[2021] UKFTT 0270 (TC)

TC08215

INCOME TAX AND CAPITAL GAINS TAX – sale of serviced building plots in grounds of Grade I listed building – sale proceeds used for restoration of listed building – whether trading or capital gain – appropriation of land from capital to trading stock – principal private residence – extent of permitted area of garden and grounds – whether land "denatured" by construction works – whether "conservation deficit" is deductible expense – whether trust impressed on sale proceeds – imputed market-value on non-arm's length disposal – s5 ITTOIA – ss 17, 161 and 222 TCGA

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/02992/V

BETWEEN

HEATHER WHYTE **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALEKSANDER

The hearing took place on 22 to 28 April 2021. Following a case management hearing on 22 July 2020, the Tribunal directed that the form of the hearing was V (video) using the Tribunal's Video Hearing service. A face-to-face hearing was not held because of the impact of the COVID pandemic. The documents to which I was referred include the skeleton arguments and notes on closing submissions of the parties, a chronology prepared by HMRC, and an amended hearing bundle of 2638 pages (including witness statements and expert reports).

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

David Southern QC and Michael Avient, counsel, instructed by JS & Co LLP, chartered certified accountants, for the Appellant

Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

INTRODUCTION

1. This appeal relates to the tax treatment of the sale of plots of land out of the Bunny Hall estate at Loughborough Road, Bunny, NG11 6QT, which were sold between 2003 and 2006.

2. Following enquiries, HMRC issued two closure notices. By these closure notices, HMRC amended Mrs Whyte's self-assessment returns for the tax years 2003/04 and 2005/06. The amendments were made on alternative bases:

(1) Adventure in the nature of a trade: that the disposals of the plots were trading transactions and the profit arising from the disposals was therefore trade income liable to income tax;

alternatively

(2) Capital gains: that the disposals of the plots gave rise to chargeable gains liable to capital gains tax and Mrs Whyte did not qualify for private residence relief because (i) of alterations to the plots prior to disposal and/or (ii) most of the plots fell outside of the "permitted area" in s222(1)(b), Taxation of Chargeable Gains Act 1992 .

3. The closure notices were upheld (but varied) on review. A corresponding penalty that had been imposed was not upheld.

4. The amounts of tax in issue in this appeal are as follows:

Tax Year	Income Tax on Trade Profits	CGT
2003/04	£736,291	£291,516.40
2005/06	£414,912	£162,564.80

5. On 29 April 2015, Mrs Whyte appealed against the closure notices on the grounds that:

(1) The disposals of the plots were not trading transactions; and

(2) The disposals of the plots were chargeable events for CGT purposes but because the plots fell within the "permitted area", she benefitted from principal private residence relief.

6. On 25 October 2018, Mrs Whyte was given permission to amend her grounds of appeal to add a further argument that the "conservation deficit" on the Hall was deductible in computing her profit or gain.

7. The appeal was heard by video, using the Tribunal's Video Hearing service.

8. At the hearing, Mrs Whyte was represented by Mr Southern and Mr Avient, and HMRC were represented by Mr Pritchard.

9. Mrs Whyte was the only witness of fact; her witness statement was taken as read as her evidence in chief. She gave oral evidence and was cross-examined.

10. Expert reports were filed on behalf of Mrs Whyte by Alexander Hugh Garratt, and on behalf of HMRC by Emma Williams. Mr Garratt's first report is dated 20 July 2016. He prepared a "Further Opinion" relating to enabling developments and conservation deficits, which is dated 9 January 2020. He prepared a "Summary Opinion" dated 13 April 2021, which is responsive to Ms Williams report. Ms William's report is dated 29 March 2021. There are

included in the bundle the two joint reports by Mr Garratt and Mr Coster (HMRC's previous expert) which are dated 7 November 2019 and 17 January 2020 (but not Mr Coster's original report), and a joint report by Mr Garratt and Ms Williams dated 19 April 2021. Both Mr Garratt and Ms Williams gave oral evidence and were cross-examined.

11. Documentary evidence in the form of an electronic bundle (the final version of the electronic bundle contained 2638 pages) was submitted, which included Mrs Whyte's witness statement and the experts' reports.

12. I was also referred to (and read) Mynors and Hewitson, *Listed Buildings and Other Heritage Assets* 5th edition (Sweet & Maxwell, 2017), Chapter 15, pp 493-538

Procedural matters

13. At a case management hearing in July 2020, I gave directions which, amongst other things, related to the hearing window and dates to avoid in order to accommodate the availability of HMRC's expert, Geoffrey Coster, who was due to retire from the Valuation Office Agency ("VOA") by the end of 2020, but who was prepared to give attend the hearing and give evidence after his retirement. In late September 2020, the Tribunal determined the hearing dates (taking account of the parties' dates to avoid). Although Mr Coster subsequently informed the VOA that he was no longer available for the hearing, due to a series of unfortunate errors HMRC's "case holder" only became aware of this on 27 January 2021, when Ms Williams notified HMRC that she had taken over Mr Coster's file. It was only on 26 February 2021 that HMRC issued formal instructions to Ms Williams to provide an expert report and appear at the hearing, and it was only on 23 March 2021 that Mrs Whyte's representatives were notified of the change in HMRC's expert.

14. On 25 March HMRC applied to the Tribunal:

(1) For permission to change their expert witness to Ms. Williams;

(2) For permission to rely on a new expert report to be produced by Ms. Williams; and

(3) For the hearing fixed for 22 to 28 April 2021 to be vacated.

In their application HMRC stated that they would not proceed with the application to vacate the hearing if Mrs Whyte considered that it was possible to proceed with the current listing dates.

15. As Mrs Whyte's representatives consented to the change in expert witness and to the hearing going ahead on the already fixed dates, I consented to HMRC's application to change their expert, and gave consequential directions for the delivery of the hearing bundle and exchange of skeleton arguments. I directed that any application as to costs in respect of the change in expert be addressed at the substantive hearing of the appeal.

16. At the commencement of the hearing, Mr Southern made an application that Mrs Whyte be treated as a vulnerable witness on account of her health. He submitted that it would be appropriate for HMRC to submit their questions to Mrs Whyte in writing, to which she could then give a written response. I warned Mr Southern that if I acceded to this application, I would inevitably have to place less weight upon Mrs Whyte's evidence than if she gave evidence orally and was cross-examined. I adjourned the hearing to allow Mr Southern to take instructions, and on the resumption of the hearing he informed me that he would not pursue the application for Mrs Whyte to respond to questions only in writing and confirmed that Mrs Whyte would give evidence orally. However, in the light of Mrs Whyte's health, I allowed regular brief adjournments during the course of her oral evidence in order to reduce the stress of the hearing so far as was possible.

17. Mrs Whyte started to give her evidence at about 12:15 on Friday 23 April and finished giving evidence at about 16:15 that same day. Mr Garratt gave his evidence on Monday 26 April, and Ms Williams gave her evidence in the morning of Tuesday 27 April 2021, with her evidence finishing just before the lunch adjournment. Immediately following the lunch adjournment, when Mr Pritchard was about to commence his closing submissions, an application was made by Mr Southern to admit a second witness statement made by Mrs Whyte. The witness statement addressed the date on which she exchanged contracts for the purchase of Bunny Hall, the dates on which she repaid the loan provided to her by Mr Whyte towards the purchase of Bunny Hall, and the involvement of Mr Whyte's businesses in relation to Clifton Hall.

18. Mr Southern submitted that it was important to admit Mrs Whyte's additional evidence, as the issues addressed in the statement were raised in the course of cross-examination, and any errors in her evidence needed to be corrected – there was an overriding duty to the Tribunal to correct mistakes. These issues went to the question of whether her actions were trading or capital in nature. Mr Southern stated that Mrs Whyte and her representatives started to prepare the statement on Friday 23 April, but the documentary evidence exhibited to the witness statement only came to hand in the morning of 27 April.

19. Mr Pritchard, on behalf of HMRC, objected to the application. He submitted that the points did not arise in the course of his cross-examination, but rather during the course of re-examination. Further, some of the points made in the witness statement were in conflict with the documentary record, and HMRC would need time to consider the implications, and might require time to undertake further research. Mr Pritchard referred me to *Ladd v Marshall* (1954) 1 WLR 1489 which addressed the circumstance in which the Court of Appeal would admit new evidence. The Court of Appeal held that new evidence must satisfy three requirements in order to be admissible, namely:

> first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible although it need not be incontrovertible.

20. I decided not to admit the new witness statement. Mr Southern could have alerted the Tribunal to the fact that an additional witness statement was being prepared at the start of the hearing on Monday. At the point when the application was made, all the witness evidence had been heard, and the evidence had closed. In the light of Mr Pritchard's submission that the new witness statement was inconsistent with the documentary evidence, if I were to admit the evidence, I would have to adjourn the hearing in order to allow HMRC time to consider the new evidence properly. As *Ladd v Marshall* dealt with the admission of new evidence on an appeal from the first-instance court, it could therefore be distinguished from the circumstances here, but nonetheless it provided helpful guidance. I considered that there was nothing in the new witness statement that could not have been obtained with reasonable diligence prior to the commencement of the hearing. Further, the new evidence would probably not have an important influence on the result of the case, and the new evidence was not "apparently credible" (in the light of Mr Pritchard's submission that it was inconsistent with the documentary evidence).

21. In addition, I was concerned that if I adjourned the case, part heard, it was likely that there would be a considerable delay before the hearing could resume. The case management hearing, at which I had given instructions for listing, had been in July 2020, and the earliest date for which it was possible to find dates that did not clash with the pre-existing commitments

of the various individuals involved was April 2021 (some nine months later). There was a very real risk if the appeal went part-heard, it could be another nine months before available dates could be found to resume the hearing.

22. The overriding objective is that the Tribunal must deal with cases fairly and justly, and I decided that it was not fair and just to admit the new witness statement at this late stage.

TAX LEGISLATION

Income Tax 2002/03

23. For the tax year 2003/04, the Income and Corporation Tax Act 1988 ("ICTA") provides that trading profits are taxable under Schedule D, Case 1:

> **Schedule D**
>
> (1) The Schedule referred to as Schedule D is as follows:
>
> SCHEDULE D
>
> Tax under this Schedule shall be charged in respect of—
>
> (a) the annual profits or gains arising or accruing—
>
> […]
>
> (ii) to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere […]
>
> (2) Tax under Schedule D shall be charged under the Cases set out in subsection (3) below, and subject to and in accordance with the provisions of the Tax Acts applicable to those Cases respectively.
>
> (3) The Cases are -
>
> Case I: tax in respect of any trade carried on in the United Kingdom […]

24. By s60 ICTA, assessment is on the current year basis:

> **Assessment on current year basis**
>
> (1) […] income tax shall be charged under Cases I and II of Schedule D on the full amount of the profits of the year of assessment.

25. By s42, Finance Act 1998, the profits of a trade (or an adventure in the nature of a trade) must be computed in accordance with generally accepted accounting practice ("GAAP"):

> **Computation of profits of trade, profession or vocation.**
>
> (1) For the purposes of Case I or II of Schedule D the profits of a trade, profession or vocation must be computed in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in computing profits for those purposes.

26. Section 832(1) ICTA, defines "trade" to include

> every trade, manufacture, adventure or concern in the nature of trade.

27. Section 37, Taxation of Chargeable Gains Act 1992 (“TCGA”) provides that the income tax charge takes precedence over any charge to CGT:

> (1) There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money’s worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts […]

Income Tax 2005/06

28. In 2005/06 the income tax provisions had been rewritten by the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). Although the governing statutes changed, the substantive underlying law (at least as regards the issues to be considered in this appeal) was not changed by the re-write.

29. Section 5 ITTOIA provides for a charge to income tax on trade profits:

> **Charge to tax on trade profits**
>
> Income tax is charged on the profits of a trade, profession or vocation.

30. The definitions in section 832(1) ICTA (at least as far as they are relevant to this appeal) were not repealed with the enactment of ITTOIA, and those definitions (including the definition of "trade") apply generally to "the Tax Acts" (which are defined to include ITTOIA). So, the definition of "trade" in s832(1) ICTA continued to apply for 2005/06, notwithstanding the enactment of ITTOIA.

31. The definition of "trade" in ICTA was repealed and replaced with the enactment of the Income Tax Act 2007 ("ITA 2007"), but that was only in respect of tax years later than the tax years that are the subject of this appeal. For completeness, the new definition in s989 ITA 2007 is

> "trade" includes any venture in the nature of trade

and in my opinion, there is no difference in the meaning of a "venture in the nature of a trade" and of "adventure in the nature of a trade" (nor should there be, given that the re-write was not intended to change the law – save for some very limited exceptions).

32. Section 7 ITTOIA states that income tax is charged on the full amount of the profits of the tax year.

> **Income charged**
>
> (1) Tax is charged under this Chapter on the full amount of the profits of the tax year.
>
> (2) For this purpose the profits of a tax year are the profits of the basis period for the tax year […]

33. Section 25 ITTOIA provides that trade profits are to be calculated in accordance with GAAP:

> **Generally accepted accounting practice**
>
> (1) The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes […]

34. As in relation to the tax year ending 2003/04, the income tax charge takes precedence over any charge to CGT (s37 TCGA).

Schedular System of Income Tax

35. With the enactment of ITTOIA, the UK's schedular system of taxing income was effectively abolished. Although profits of a trade (including profits from an adventure in the nature of a trade) were taxed under Schedule D, Case I in 2002/03, they were taxed as trade profits in 2005/06. At least as regards the circumstances of this appeal, there is no difference between these charging provisions (including the basis on which GAAP is applied), and for convenience, unless the context otherwise requires, references to trade profits include profits of a trade taxable under Schedule D, Case I (and vice versa).

Capital Gains Tax

36. The Taxation of Chargeable Gains Act 1992 ("TCGA") governed the imposition of capital gains tax in both 2002/3 and 2005/6.

37. Section 2 TCGA imposes a charge to CGT on individuals in respect of chargeable gains accruing to him or her in a tax year after deducting any allowable deductions:

> **Persons and gains chargeable to capital gains tax, and allowable losses.**
>
> (1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom.
>
> (2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—
>
> (a) any allowable losses accruing to that person in that year of assessment, and
>
> (b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1965-66).

38. Disposals between spouses are usually treated as being undertaken for a consideration that gives rise neither to a chargeable gain nor to an allowable loss under s58(1) TCGA. But this no gain/no loss rule is disapplied by s58(2) in circumstances where the asset is treated as trading stock in the hands of either the transferor or the transferee. In these circumstances ss17 and 18 apply to treat the disposal as taking place at market value.

39. Where a person acquires an asset from a "connected person", s18 TCGA provides that they are treated as not having transacted at arm's length and s17 TCGA is applied to deem the consideration to be market value:

> **17 Disposals and acquisitions treated as made at market value**
>
> (1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset (a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length, and in particular where he acquires or disposes of it by way of gift or on a transfer into settlement by a settlor or by way of distribution from a company in respect of shares in the company
>
> […]
>
> **18 Transactions between connected persons**
>
> (1) This section shall apply where a person acquires an asset and the person making the disposal is connected with him.
>
> (2) Without prejudice to the generality of section 17(1) the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by way of a bargain made at arm's length […]

40. For these purposes, s286(2) TCGA (as in force at the relevant time) provides that a person is connected to another if, amongst other things, they are spouses:

> **Connected persons: interpretation.**

(2) A person is connected with an individual if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative, of the individual or of the individual's husband or wife.

41. Where only part of an asset is sold s42 TCGA provides for an apportionment of the allowable expenditure between the part sold and the part retained:

Part disposals

(1) Where a person disposes of an interest or right in or over an asset, and generally wherever on the disposal of an asset any description of property derived from that asset remains undisposed of, the sums which under paragraphs (a) and (b) of section 38(1) are attributable to the asset shall, both for the purposes of the computation of the gain accruing on the disposal and for the purpose of applying this Part in relation to the property which remains undisposed of, be apportioned.

(2) The apportionment shall be made by reference—

(a) to the amount or value of the consideration for the disposal on the one hand (call that amount or value A), and

(b) to the market value of the property which remains undisposed of on the other hand (call that market value B), and accordingly the fraction of the said sums allowable as a deduction in the computation of the gain accruing on the disposal shall be (A)/(A+B) and the remainder shall be attributed to the property which remains undisposed of […]

(4) This section shall not be taken as requiring the apportionment of any expenditure which, on the facts, is wholly attributable to what is disposed of, or wholly attributable to what remains undisposed of …

42. Relief from CGT is given by s222 TCGA in respect of the disposal of garden or grounds of a dwelling-house, up to the "permitted area":

Relief on disposal of private residence.

(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—

(a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or

(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

(2) In this section “the permitted area” means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

(3) Where the area required for the reasonable enjoyment of the dwelling house (or of the part in question) as a residence, having regard to the size and character of the dwelling house, is larger than 0.5 of a hectare, that larger area shall be the permitted area.

(4) Where part of the land occupied with a residence is and part is not within subsection (1) above, then (up to the permitted area) that part shall be taken to be within subsection (1) above which, if the remainder were separately occupied, would be the most suitable for occupation and enjoyment with the residence […]

43. The s222 relief is commonly known as private residence relief ("PRR").

44. Section 223 TCGA limits the amount of PRR depending on how long the property has been the taxpayer's main dwelling:

> **Amount of relief**
>
> (1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 36 months of that period.
>
> (2) Where subsection (1) above does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be—
>
> (a) the length of the part or parts of the period of ownership during which the dwelling-house or the part of the dwelling-house was the
>
> (b) the length of the period of ownership.
>
> (3) For the purposes of subsections (1) and (2) above—
>
> (a) a period of absence not exceeding 3 years (or periods of absence which together did not exceed 3 years), […]
>
> shall be treated as if in that period of absence the dwelling-house or the part of the dwelling-house was the individual's only or main residence if both before and after the period there was a time when the dwelling-house was the individual's only or main residence […]

45. Sections 222 and 223 TCGA have since been amended, but the amendments are not relevant to this appeal.

46. HMRC has published guidance in its manuals about PRR. The guidance is at CG64360 which states:

> **CG64360 - Private residence relief: garden and grounds: definitions**
>
> Whether you can regard a particular piece of land as garden or grounds of a residence is a question which must be decided on the facts. The phrase "garden or grounds" is not defined in the statute and neither has its meaning been considered in case law. Therefore, the words must take their everyday meaning.
>
> A useful dictionary definition of the word garden is,
>
> "a piece of ground, usually partly grassed and adjoining a private house, used for growing flowers, fruit or vegetables, and as a place of recreation."
>
> The word "grounds" infers a larger area than "garden". A useful dictionary definition of the word grounds is,
>
> "Enclosed land surrounding or attached to a dwelling house or other building serving chiefly for ornament or recreation."
>
> Generally speaking you should accept that land surrounding a residence which is in the same ownership, is the grounds of the residence, unless it is in use for some other purpose.
>
> Land which at the date of disposal is in use for some other purpose for example agricultural land, commercial woodlands, land under development or land in use for a trade or business should not be regarded as part of the garden or grounds.
>
> The following land should not necessarily be excluded from the garden and grounds:

- Land which has traditionally been the garden and grounds of the residence but at the date of sale is unused or overgrown.
- Paddocks or orchards providing there is no significant business use.
- Land which has a building on it, see CG64200, unless that building is in use for a business or is let.

Where the land in question was acquired on a different date to the residence, it should also be accepted as garden or grounds providing it was subsequently brought into use as the garden or grounds of the residence and remains as garden or grounds at the date of disposal.

Mixed Use

To qualify for relief land does not have to be exclusively in use for recreational purposes. For example, the owner of a guest house may allow guests to use the garden. In these circumstances the garden will still qualify for relief if the other tests are satisfied.

47. HMRC's web site states that CG64360 was first published on "gov.uk" on 12 March 2016, but the manual's introduction states that the content of a page will be older than the published date (presumably having previously been available on "www.hmrc.gov.uk"). It is therefore unclear when this information was first made available to the public. However, similar guidance as to the meaning of "garden or grounds" was previously available in the Inland Revenue's Tax Bulletin 18 (August 1995) which said:

> The phrase "garden or grounds" is not defined in the statute, nor is there judicial authority. The words must carry their everyday meaning and whether a piece of land can be regarded as the garden or grounds of a residence is a question of fact.
>
> The word "garden" is taken to mean an enclosed piece of ground devoted to the cultivation of flowers, fruit or vegetables. The word "grounds" extends this and makes it more difficult to define. A useful dictionary definition of grounds is
>
> > "Enclosed land surrounding or attached to a dwelling-house or other building serving chiefly for ornament or recreation".
>
> In general, the Revenue accepts that land surrounding the residence and in the same ownership is the grounds of the residence, unless it is used for some other purpose. The Revenue would not regard land used for agriculture, commercial woodlands, trade or business as part of the garden or grounds. Also, land which has been fenced off from the residence to be sold for development is excluded. Land which has traditionally been part of the grounds of the residence but which, at the date of sale, is unused or overgrown is not excluded, nor are paddocks or orchards if there is no significant business use. Included in the definition is land which has a building on it, provided the building is not let or in use for a business, and also land which is not used exclusively for recreational purposes. For example, the owner-occupier of a guest house may allow guests to use the garden. The land would still qualify for relief providing the other conditions are satisfied.

ENABLING DEVELOPMENT AND CONSERVATION DEFICIT

48. The National Heritage List for England is maintained by the Historic Buildings and Monuments Commission for England, which also has responsibility for advising national and local government on the management and development of historic buildings. The Commission has operated under a number of different names. It used the name "English Heritage" until April 2015, when its activities were divided, and responsibility for management of the national

collection of historic places was transferred to a new charity, also called English Heritage. The Commission's retained activities were thereafter carried on under the name "Historic England". For convenience, in this decision I will refer to the Commission using the name "English Heritage", as this is the name it used at the times relevant to this appeal.

49. "Enabling development" is not a statutory term. Its origins date back to the case of *R v. Westminster City Council ex parte Monahan* [1990] 1 QB 87. *Monahan* concerned the proposed development of the Royal Opera House that included, amongst other things, the erection of office accommodation in breach of the local development plan. In dismissing the appeal, the Court of Appeal held that since financial constraints on the economic viability of desirable planning developments were unavoidable, it would be unreal and contrary to common sense to exclude them from the range of considerations which might properly be regarded as material when determining planning applications. Whilst not a term used in the judgment, "enabling development" is jargon that is now used to describe a financially beneficial development that is undesirable in planning terms, but for the fact that it will enable some other, more desirable, public benefit.

50. In June 1999, English Heritage published a booklet: "Enabling Development and the Conservation of Heritage Assets", which included a policy statement and practical guidance. The policy statement set out a presumption against the development of heritage assets unless the development met specified criteria, the most important of which was that the benefits should clearly outweigh the harms. The term "heritage assets" is used

> as shorthand for any component of our historic environment, including
>
> • scheduled monuments and other archaeological remains
>
> • historic buildings both statutorily listed or of more local significance
>
> • conservation areas
>
> • historic landscapes, including registered parks and gardens and registered battlefields.

51. The booklet was republished in June 2001, and a further edition of the booklet was published in September 2008. English Heritage's fundamental policy did not change through the various editions, but the later editions clarified and gave more detailed explanations of the policy and guidance. References in this decision to English Heritage's booklet are to the June 2001 edition, unless otherwise stated.

52. English Heritage policy statements do not have the force of law, and do not purport to have the force of law. Rather they are helpful extra-statutory guidance (see *R. (Davey) v Aylesbury Vale DC and Mentmore Towers Ltd* [2005] EWHC 359 (Admin)).

53. The policy statement's "Overview" describes an enabling development as follows:

> Enabling development is development that is contrary to established planning policy – national or local – but which is occasionally permitted because it brings public benefits that have been demonstrated clearly to outweigh the harm that would be caused. The benefits are paid for by the value added to land as a result of the granting of planning permission for its development, so enabling development can be considered a type of public subsidy. It has been proposed in support of a wide range of public benefits, from opera houses to nature conservation, but this guidance is concerned primarily with enabling development proposed to secure the future of heritage assets. Nonetheless, the principles are equally applicable to biodiversity interests, which often exist side by side on the same site.

54. The policy statement itself states that there should be a general presumption against enabling developments:

> English Heritage believes that there should be a general presumption against "enabling development" which does not meet all of the following criteria:
>
> • The enabling development will not materially detract from the archaeological, architectural, historic, landscape or biodiversity interest of the asset, or materially harm its setting
>
> • The proposal avoids detrimental fragmentation of management of the heritage asset
>
> • The enabling development will secure the long term future of the heritage asset, and where applicable, its continued use for a sympathetic purpose
>
> • The problem arises from the inherent needs of the heritage asset, rather than the circumstances of the present owner or the purchase price paid
>
> • Sufficient financial assistance is not available from any other source
>
> • It is demonstrated that the amount of enabling development is the minimum necessary to secure the future of the heritage asset, and that its form minimises disbenefits
>
> • The value or benefit of the survival or enhancement of the heritage asset outweighs the long-term cost to the community (i.e. the disbenefits) of providing the enabling development
>
> If it is decided that a scheme of enabling development meets all these criteria, English Heritage believes that planning permission should only be granted if:
>
> • The impact of the development is precisely defined at the outset, normally through the granting of full rather than outline planning permission;
>
> • The achievement of the heritage objective is securely and enforceably linked to it, bearing in mind the guidance in DOE Circular 01/97, Planning obligations;
>
> • The heritage asset is repaired to an agreed standard, or the funds to do so made available, as early as possible in the course of the enabling development, ideally at the outset and certainly before completion or occupation;
>
> • The planning authority closely monitors implementation, if necessary acting promptly to ensure a satisfactory outcome.

55. Chapter 5 of the practical guidance included within the booklet sets out the financial criteria that should be used for judging whether consent for an enabling development should be granted. The chapter is written in the context of a development carried out by a commercial developer, rather than by a prospective owner-occupier, as can be seen from the introduction to the chapter in paragraph 5.1.1:

> 5.1.1 The essence of commercial property development is to endeavour to maximise the return on investment, to compensate for the risk and time taken in carrying out a development. The purchase price paid is an important factor in this. Development sites will often be the subject of intense competition between prospective buyers, all of whom are likely to have arrived at an offer figure aware of the competition and on the basis of likely returns. If, in the event, projected future returns need to be reduced, a distinct possibility in a falling property market, the viability of a scheme may be in doubt and it might not materialise.

56. The booklet addresses the profit a commercial developer should make from a development project:

> 5.8.1 It is naturally right and proper that a developer be allowed a fair and reasonable return on his investment, to reflect the risk involved in the development project. There are many different types of developer. The developer/builder will usually require a lesser profit than the pure entrepreneur, as the builder will usually generate a profit on the cost of carrying out the actual construction, whereas an entrepreneurial developer is purely the catalyst whose vision, management and development skills need to be rewarded. In the present competitive residential development market, development companies are accepting lower profits in the hope that the finished product will sell quickly. During a recession, however, risks are obviously greater and therefore a higher percentage return is required.
>
> […]
>
> 5.8.3. Developer's profit is normally allowable on all valid development costs, including appropriate site costs (as defined above), since all involve financing costs and risk. The principal exception is cash subsidies from public sources, for example English Heritage or a regional development agency. These are deducted from total development costs before developer's profit is calculated. Whilst enabling development is itself a form of subsidy, it is normally included in development costs, because it must be funded and bears risk. […]

57. The booklet sets out the concept of a "conservation deficit" in paragraph 5.4.1:

> In financial terms, the case for enabling development normally rests on there being a conservation deficit. This is when the existing value (often taken as zero) plus the development cost exceeds the value of the heritage asset after development. Development costs obviously include not only repair, but also, if possible or appropriate, conversion to optimum viable use, and a developer's profit appropriate to the circumstances. A development appraisal in such cases produces a negative residual value. If so, enabling development (provided it meets the other criteria in the Policy Statement) may be justified, but only sufficient to cover the conservation deficit, i.e. to bring the residual value up to zero. The principal exception to this rule is historic estates whose break-up and sale would result in significant loss of heritage value. Enabling development may be justified to ensure their long term viability in revenue terms, as explained in Section 4.5. Enabling development is not justified where the financial problems arise from the lack of resources of the owner, rather than the inherent need of the heritage asset.

58. The glossary includes an entry for "conservation deficit" as follows:

> The amount by which the cost of repair (and conversion to optimum beneficial use if appropriate) of a heritage asset exceeds its market value on completion of repair and conversion, allowing for all appropriate development costs, but assuming a nil or nominal land value

59. The 2008 edition of the booklet confirms that the commercial risks associated with an enabling development must sit with the developer:

> 5.4.3 Fundamental to the concept of enabling development is that the developer takes on the commercial risk. The level of developer's profit should be set to reflect those risks, and the public benefits, particularly securing the future of the significant place, must normally be delivered at the outset. There is no mechanism for claw-back if the financial outcome is better than anticipated; similarly there can be no expectation of further enabling development if it is worse than anticipated.

> 5.4.4 Taking an incremental approach to enabling development, in which additional enabling development is sought once the scheme is under way or completed, as a means of recovering unforeseen or underestimated costs, is not an acceptable practice. Such an approach distorts the process, because it is necessary to consider the effects of the enabling development proposals in their entirety before deciding whether the benefits outweigh the harm. The developer bears the risk – there can be no 'second bite of the same cherry'. This does not, of course, apply to a strategic approach (for example to an historic estate), which is agreed at the outset and implemented in stages.

60. Where an enabling development is authorised, the booklet recommends that

> 7.1 […] legally enforceable arrangements must be put in place to ensure that the commercial element of the development cannot be carried out or used without the heritage benefits on which the scheme has been predicated materialising.

61. The recommended mechanism to ensure legal enforceability is an agreement between the developer and the local planning authority pursuant to s106, Town and Country Planning Act 1990 ("TCPA"). Section 106 TCPA gives local authorities the power to enter into agreements with landowners relating to planning obligations. At the relevant time, s106 was as follows:

> **Planning obligations**
>
> (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as "a planning obligation"), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.
>
> […]
>
> (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—
>
> (a) against the person entering into the obligation; and
>
> (b) against any person deriving title from that person.
>
> […]
>
> (5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.
>
> (6) Without prejudice to subsection (5), if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may—
>
> (a) enter the land and carry out the operations; and
>
> (b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so.
>
> […]

(11) A planning obligation shall be a local land charge.

[…]

62. A model form of an agreement under s106 is set out as an appendix to English Heritage's booklet. The model form specifies the conservation work that must be done, but it does not prevent the owner of the heritage asset from undertaking additional work.

BACKGROUND FACTS

63. It is convenient in this decision to refer to Bunny Hall - the mansion house itself - as "the Hall", the land surrounding the Hall that is (or was at the relevant times) in the ownership of Mrs Whyte as "the Grounds", the entirety of the land and buildings owned by Mrs Whyte as "the Bunny Hall Estate" or "the Estate", and the plots that were sold (and which are the subject of this appeal) as "the Plots". The scheme for constructing houses on the Plots and the sale of the Plots is referred to in this decision (unless the context otherwise requires) as "the enabling development".

64. On the basis of the evidence before me, I find that the background facts are as follows:

Bunny Hall and Estate

65. The Estate is in the village of Bunny, Nottinghamshire. Bunny is about seven miles south of Nottingham, and about seven miles north-east of Loughborough – roughly half-way between the two. It is in within the area of Rushcliffe Borough Council ("RBC"), which was and is the relevant local planning authority.

66. The name of the village has nothing to do with rabbits. Rather it means "reed island" or "island on the River Bune".

67. There are about 400,000 listed building entries in the National Heritage List for England. The entries on the list are classified into one of three grades:

(1) Grade II buildings are of special interest warranting every effort to preserve them. Over 90% of all listed buildings are in this grade;

(2) Grade II* buildings are particularly important buildings of more than special interest. 5.8% of listed buildings are Grade II*; and

(3) Grade I buildings are of exceptional interest, only 2.5% of listed buildings are Grade I.

68. The Hall is a Grade I listed historic mansion house. It has 11 bedrooms, 5 principal reception rooms, and 6 bathrooms. It was designed by Sir Thomas Parkyns and built between 1710 and 1725. The Hall was enlarged in the late 18th century, with further additions being made in the 19th century.

69. When Mrs Whyte purchased the Estate in 2001, it comprised 6.88 ha (17 acres). She unsuccessfully attempted to sell the Hall between 2007 and 2009 with around 9.71 ha (24 acres) of Grounds. At the time of the hearing, the Estate is on the market again together with a reduced area of land of 5.87 ha (14.5 acres) (but the sale particulars state that an additional 3.39 ha (8.38 acres) is available by separate negotiation). Ms Williams comments in her report that Mrs Whyte must therefore have purchased additional land between 2001 and 2007. The latest sales particulars state that the gross internal floor area of the Hall is 1991 m^2 (21,438 sq ft).

70. Included within the Grounds are walled and terraced areas of formal gardens, informal grassed and wooded areas, lawns, and fenced grass paddocks.

71. In June 2000 English Heritage prepared a brief analysis of the historic development of the Bunny Hall Estate landscape:

[…]

The second phase - late 18th to early 19th century

In the late C18 or early C19 it appears that the park was landscaped, probably in conjunction with the parish enclosure works dating from the late 1790s (Enclosure Map, 1797; OS 1820). At this time the curved north drive was inserted, entering off the west end of Keyworth Lane at the north-west corner of the site, together with the south drive which entered at the south-west corner of the site. These two drives met at an informal forecourt in front of the new entrance to the Hall on its east side. The new approaches to the Hall seemed to have been connected with the realignment of the main village road to the west of the estate (probably resulting from the enclosure works), and replaced the formal forecourt to the north side of the Hall. Before its realignment, the road lay immediately to the north of the former forecourt, continuing north from there between the present barns and possibly providing the basis of the later north drive (Enclosure map, 1797).

Also in the early C18 the Wilderness may have been reduced to its present size in conjunction with landscaping works in the park, and the south and east sides of the enclosing canal filled in, with the construction of the ha-ha dividing the remains of the Wilderness from the park. A significant feature of these works would have been the views from the Wilderness across the ha-ha to the east and south east of over the park towards Keyworth and Old Wood respectively, and from the drives and forecourt.

The third phase - mid to late 19th century

In the mid to C19 a further phase of landscaping seemed to have taken place, with the construction of the formal Italianate terrace to the south of the Hall, and possibly work within the Wilderness. The present tree cover in this area probably dates from this period or later.

The most sensitive areas of the historic landscape therefore cover the pleasure grounds, including the Wilderness, formal garden and areas adjacent to the west and north of the hall, together with the parkland immediately to the east and south east of the Hall.

72. In this decision, the area of land referred to in English Heritage's analysis as "the Wilderness", is called the "Wilderness Garden".

73. Prior to Mrs Whyte acquiring the Estate, it seems that a large part of the land and buildings that once formed part of the Estate had been sold. In particular, the range of barns and other agricultural buildings to the immediate north of the Hall had been converted into six dwellings and sold to individual purchasers. The wall of the barn nearest the Hall is within 8 metres of the walls of the Hall. Ms Williams comments in her report that it is unusual for a property of the type and character of Bunny Hall to have such close neighbours occupying properties in separate ownership.

74. The original access road was to the north of the Hall and passed the six barn conversions. Having obtained the necessary consents in October 2001, Mrs Whyte constructed a new entrance to the Estate and an access road from the south. This access road also serves the houses that were constructed on the Plots that are the subject of this appeal.

75. At the time of Mrs Whyte's purchase, the Hall was unoccupied and extremely dilapidated. Although a part of the Hall had been divided-off as an apartment and was habitable, it had not been occupied for many years.

76. As regards the Grounds, everything was overgrown, and had not been touched for decades. Weeds were up to 4ft high. The ha-ha was largely derelict and had been filled-in, but the line it followed remained visible on the ground. The line of the ha-ha formed the boundary between (a) the Hall's formal gardens and the Wilderness Garden, to its north and west, and (b) parkland (now laid to lawn), to its south and east. As part of the restoration and landscaping works, the ha-ha was restored from the formal gardens to just before the new access road. A short stretch of the ha-ha, near to the new access road, was filled-in – to allow mowing and other machinery to cross between the lawned parkland and the Wilderness Garden.

77. For completeness, a ha-ha is a boundary feature used to stop grazing animals encroaching into the cultivated areas of a garden, whilst allowing unbroken views across the garden to the parkland and countryside beyond. The construction of a ha-ha involves digging a deep dry ditch. A vertical masonry wall forms the inner side of the ditch, while the outer side is turfed and slopes upwards before levelling out. Although animals can walk down the outer slope into the bottom of the ditch, they cannot climb up the vertical masonry wall on the inner side, and the ditch is too wide for animals to jump over.

78. An avenue of lime trees forms a walk that extends north-south along the length of the Wilderness Garden. Prior to the sale of the Plots, there was a large pond at the southernmost end of the Wilderness Garden, and the lime walk took a sharp turn to the east before it reached the pond. The pond was within the areas of Plots 1 and 2 (and possibly Plot 3 – the plans included within the Bundle are not particularly clear). It was agreed that a water feature would be retained as part of the enabling development. In consequence, although the original large pond was drained and filled-in, a new small pond was dug between Plots 1 and 2. The sharp turn in the lime walk was eliminated so that the walk follows a roughly straight line along the back of Plots 3 to 6, over the new pond on footbridge, and terminates at its junction with the access road.

79. Plans of the Estate are included in Annex 2. The top of the page is orientated to the north:

(1) Figure 1 is a plan of the Estate at some time prior to its purchase by Mrs Whyte, showing the location of the Hall, the area of the Wilderness Garden, the original line of the ha-ha, the original path taken by the lime walk, and the original large pond.

(2) Figure 2 shows the location of the Plots outlined in green, with the boundary of the Estate marked in red. The new access road (shown with dotted lines) enters the Estate at its south-west corner, goes around Plots 1 to 4, and then up to the Hall. The restored ha-ha can be seen as a solid line commencing just to the east of the boundary between Plots 1 and 2, and continuing north towards the Hall. The Wilderness Garden is the area to the west of the ha-ha. The parkland area between the access road and the ha-ha is laid to lawn. There is a gate across the access road just to the east of Plot 3 (marked with a solid line across the road). The short length of dotted line from that gate to the restored ha-ha shows where the ha-ha has been filled-in to allow garden equipment to cross between the Wilderness Garden and the lawns. There is a short stub of road (not shown on this plan) which has a junction with the access road just before the gate, and then extends northwards past Plots 4 and 5, terminating at Plot 6.

(3) Figure 3 shows how the Plots were numbered, with Plot 6 closest to the Hall, and Plot 1 furthest from the Hall. The lime walk would have originally turned sharply to the east somewhere around Plot 4, but it now continues south between Plots 1 and 2 until it reaches the access road. The new pond (with a footbridge over it) is at the southern end of the walk.

(4) Figure 4 shows Ms William's alternative permitted area outlined in green, with the boundary of the Estate (other than the old access road to the north) outlined in red.

(5) Figure 5 shows Ms William's preferred permitted area outlined in green, with the boundary of the Estate (other than the old access road to the north) outlined in red.

(6) Figure 6 shows Mr Garratt's permitted area shaded in pink ,with the boundary of the Estate outlined in red. Note that the permitted area includes an irregular area of land to the south of the access road, which I refer to as the "triangle".

(7) Figure 7 shows, shaded in pink, Mr Garratt's permitted area as it would be after the sale of all of the Plots. The boundary of the Estate is outlined in red.

Mr and Mrs Whyte

80. Prior to her purchase of Bunny Hall, Mrs Whyte and her family lived at Gotham Moor Farm. Mr and Mrs Whyte first lived there as tenants, and Mrs Whyte purchased the property in 1994.

81. She was, and continues to be, married to Chek Whyte, who is a builder and property developer. Mr Whyte was an undischarged bankrupt at the time Mrs Whyte purchased Gotham Moor Farm (his bankruptcy was discharged in 1995).

82. Mrs Whyte was the sole proprietor of the unincorporated business "Matrix Design and Build", until 31 March 1994 when it was incorporated as Union Brothers Limited.

83. From 1 April 1997 until 30 June 1999, she and her husband were partners in the unincorporated business TFD Midland ("TFD"), which was a firm of builders. Mrs Whyte resigned from the partnership on 30 June 1999, and since that date TFD continued in operation under the sole proprietorship of Mr Whyte.

84. Mrs Whyte was asked about these various businesses, and her involvement in them. She described Matrix Design and Build as a small building company that her husband had been running. Union Brothers Limited were demolition contractors, mainly of industrial buildings. She confirmed that she had been a director, but she could not remember the dates. Companies House records show that she was a director of Union Brothers Limited until it was liquidated on 1 April 1998 and that its business was described as "builders and dismantlers".

85. Mrs Whyte described TFD as being a small building and repairs business, which undertook small building projects and some demolition. Mrs Whyte described her role as "purely administrative", being office-based and limited to office administration, and she could not remember any particular projects undertaken by TFD. She was asked if she would have known about projects that TFD was undertaking, and she said that she did not. In August 1998 she took time off from the business when she had her daughter. Mrs Whyte was asked about her income tax returns, which, since 1 July 1999, showed employment income from TFD 2 Limited and of TFD. The declared income from these sources has fluctuated between £29,886 (in 2002) and £40,000 (in 2008). Mrs Whyte confirmed that she was an employee of TFD at the time she purchased Bunny Hall, during the course of the restoration of the Hall and the sale of the six Plots.

86. TFD got into financial difficulties, and Mr Whyte entered into an individual voluntary arrangement ("IVA") towards the end of 2009.

87. According to HMRC's notes of a meeting on 31 July 2007 with Mr Whyte and his accountants, Mr Whyte told HMRC that Union Brothers Limited was incorporated following his discharge from an earlier bankruptcy. Union Brothers subsequently got into financial difficulties and became insolvent. Mr Whyte admitted that Union Brothers' financial records were poor, and in consequence in 1999 Mr Whyte was disqualified from being a company director for ten years.

88. Because of the risks associated with Mr Whyte's business activities, Mrs Whyte's evidence was that she and her husband have been careful to keep their respective financial affairs separate, which is why Mrs Whyte purchased both Gotham Hall Farm and Bunny Hall in her own name.

89. In 1995, an 8-acre field adjoining Gotham Moor Farm was purchased in Mrs Whyte's sole name from her neighbours, and in 1998 Mr and Mrs Whyte jointly purchased a further 5 acres including a derelict barn. The derelict barn was converted into a home by Mr Whyte's business, TFD, and renamed Sunningdale Barn.

90. Mrs Whyte's evidence during cross-examination was that Sunningdale Barn was to be a home for her parents, but that they never lived in it, as the Rectory in Plumtree had come onto the market, and her intention was that they should all move to the Rectory (including her parents). Mrs Whyte said that her mother now lives with her at Bunny Hall.

91. Mrs Whyte's evidence was that when she sold Gotham Moor Farm, Sunningdale Barn was sold with it, that she declared a capital gain on her tax return, and paid CGT on the sale. During the course of cross-examination, Mrs Whyte said that she was not aware of the profit being recategorized as trading following an HMRC enquiry – she said that she had paid capital gains tax and had not been asked to pay any more tax.

92. HMRC's records show that the disposal of Sunningdale Barn was declared on Mrs Whyte's 2001/2 tax return as having occurred in December 2001 and returned as a capital gain. HMRC's notes of a meeting on 31 July 2007 with Mr Whyte (who had written authority to represent Mrs Whyte) and his accountants, Hacker Young, state that there was a discussion at that meeting about Sunningdale Barn, and that although Mrs Whyte returned a capital gain in respect of its sale, Mr Whyte did not declare the sale on his return at all, even though he jointly owned the barn with her. At the meeting, Mr Whyte agreed with HMRC that the development of the barn gave rise to a trading profit taxable under Case I Schedule D, which would be split equally between Mr and Mrs Whyte. The consequential adjustments to Mr and Mrs Whyte's respective returns resulted in additional tax being paid by Mr Whyte (plus penalties and interest), and a refund being due to Mrs Whyte.

93. On 21 August 2009, Berryman’s wrote to Mrs Whyte in relation to Mr Whyte’s proposed IVA in order to advise Mrs Whyte on the risk of Mr Whyte’s creditors making claims against her. The letter states that it is based on Berryman’s own records and on bank statements provided by Mrs Whyte. The letter records that the sale of Sunningdale Barn was completed on 10 December 2001, that the net proceeds of sale were £346,348.50, and that Mrs Whyte transferred £345,000 to Mr Whyte on 13 December in partial repayment of the loan advanced for the purchase of the Estate. The letter also states that the sale of Gotham Moor Farm (with some adjoining land) completed on 8 February 2002, the sale consideration was £250,000 and acceptance of the buyer’s property (Parker Gardens) in part-exchange. Additional land was sold with Gotham Moor Farm for £75,000. Parker Gardens was transferred into Mr Whyte’s name. The net cash proceeds (after repayment of the mortgage) were £177,778.49, of which £105,000 was paid by Mrs Whyte to Mr Whyte on 13 February 2002 in partial repayment of the loan. Parker Gardens was sold on 9 May 2005 and the net proceeds of £221,053.43 were retained by Mr Whyte.

94. I therefore find that Sunningdale Barn was not sold with Gotham Moor Farm.

95. Mrs Whyte was asked whether she and her husband were accustomed to buying land, bettering it and then selling it, to which her answer was "no". She was asked whether she and her husband had experience of making money from the sale of land, to which her answer was also "no". She was asked whether she had experience of developing land and selling it for more than she had spent on the development. Her answer was that she had experience of developing

land at Gotham Moor Farm and had paid tax on the capital gain she had realised. She was asked whether Mr Whyte is in the business of building houses, to which her answer was "no, he wasn't building houses at that point, he was a small builder".

96. Mrs Whyte was asked whether Bunny Hall was worth more following its renovation than it cost, to which her answer was "obviously yes". She was referred to screen shots of Savills' web site, where Bunny Hall was advertised for sale, and as having been sold. Mrs Whyte's response was that the Estate was up for sale, but that it had not been sold and that she was not sure what price (if any) she would accept for it.

David Wilson Homes

97. The commercial developer, David Wilson Homes, were the owners of the Estate immediately before Mrs Whyte. In March 1999 they had an appraisal prepared to justify the granting of planning consent for the redevelopment of the Hall and its conversion into four flats, plus an enabling development of ten new houses in the Grounds.

98. It seems that David Wilson Homes were not the first business to contemplate redevelopment of the Hall and development within the Grounds. The report to RBC's Development Control Committee of 18 August 2003 (which considered Mrs Whyte's application for the enabling development) referred to previous planning applications relating to the Hall and its Grounds, including consent granted in 1989 to convert the Hall into three flats and the barns into six dwellings (although the barns were converted, no work was done to the Hall). Since then applications were made to convert the Hall into a hotel/health farm, offices, a hotel and restaurant, nine flats, and ten flats. All of these applications were withdrawn before formal decisions were reached.

99. David Wilson Homes' appraisal was updated in February 2000. Only the first page of the March 1999 appraisal was included in the documents bundle, and a copy of the February 2000 appraisal was not provided. However the report to the RBC Development Control Committee refers to an application to convert the Hall into four flats and to build ten dwellings in the Grounds. These applications are discussed in RBC's letter of 5 May 2000 to English Heritage which asks for advice about the location of the new dwellings, and considers the state of the Wilderness Garden:

> On the matter of the location of new units within the grounds I am hoping that Dr Jordan will provide me with advice on the value of the "Wilderness Garden". Although the whole of this is the subject of an Area TPO, it has become apparent that only a handful of trees are worthy of retention and many have already been felled on the grounds of safety (some substantial Beech trees have already fallen naturally). It would seem inappropriate to encourage any new development in the open countryside to retain a particular area of garden which may not be worthy of retention and which may be a better location, adjoining the village core, for at least at least a proportion of the new buildings.
>
> I feel that consideration of the structure of the hall itself and its restoration cannot be divorced from the original concept of house and garden with expansive views across the ha-ha to open countryside and obviously the views of the hall itself from that countryside. As a result your views on this particular issue would also be much appreciated.

100. RBC write to Dr Jordan at English Heritage on the same date (5 May 2000) about the importance of the Grounds (a copy of this letter was not included in the bundle, but extracts from this letter were quoted in other documents):

> The discussions currently revolve around the development of large new houses in the open countryside to the east and south east of the hall. Although we considered this open countryside to be an important part of the concept of the hall as viewed from the hall itself and from the countryside, its development has been considered to be the lesser of two evils. The alternative location for such development is part of the Wilderness Garden to the south west of the hall where existing vegetation would, to some extent, screen any new buildings and the new buildings would be close to the existing built-up village core.
>
> Until now, the existing trees within this area have been considered to be of extreme importance with the Beech and Yew dominating the skyline of the village. The whole of the Wilderness Garden is the subject of an Area TPO. However several of the Beech have fallen naturally and almost all are extremely decayed and in need felling for safety reasons. The Yew tree roots are lifting and several of the Lime trees in the original avenue have fallen with more being suspect. The Wilderness Garden is rapidly becoming a series of large open glades with still further work to be done.

101. On 23 June 2000, English Heritage wrote to RBC stating that the Grounds just fell short of being included in the Register of Historic Parks and Gardens, but their importance as a designed ornamental landscape was such that they would urge RBC to consider any plans for its future development with this in mind.

102. On 30 June 2000, English Heritage responded to RBC with their initial thoughts about the possibility of an enabling development by David Wilson Homes. They recommended that further work needed to be done to establish whether an enabling development was justified.

103. On 22 June 2001, RBC write to English Heritage saying that David Wilson Homes' planning application had been withdrawn.

Mr and Mrs Whyte's interest in buying the Bunny Hall Estate.

104. Mrs Whyte in her witness statement says that Gotham Moor Farm was set in a beautiful country location, and she had moved there as it was within the catchment area of the school to which she wanted to send her son. Although the family had spent many happy years at Gotham Moor Farm, the house did not have character or historic architecture, in which she had a keen interest.

105. In 2000, Mr Whyte's business was doing well, and Mrs Whyte says that she decided that she would like to move to a larger home. She says she was looking for a Georgian property and through Savills, the estate agent, was shown "The Rectory" in Plumtree, for which she made an offer. However the purchase of The Rectory was dependent on the sale of Gotham Moor Farm, and before she could sell Gotham Moor Farm, the Rectory was sold to someone else.

106. At around this time, Savills mentioned that David Wilson Homes were considering selling Bunny Hall, although the Estate was not (yet) formally on the market. Mr and Mrs Whyte then visited Bunny Hall. Mrs Whyte describes the Hall as being boarded-up and in a dreadful condition, and they needed torches to look inside the building. The roof was leaking, floors had collapsed, there was no electricity and no heating, and the building was covered with mould, and she could see evidence of dry rot. She says that she later discovered that Bunny Hall was on English Heritage's "at risk" register.

107. In her witness statement Mrs Whyte says:

> 16. […] the property had retained many of its original features like fireplaces and I could see what a magnificent family home it could be. I fell in love with

> it and decided to buy it. I must admit this was not a rational but an emotional decision.
>
> 17. I understood that it would take a considerable amount of time to renovate and also at significant cost. I considered that it was going to be a "labour of love" which would satisfy my interest and passion in architecture but also be a beautiful home for my family to live in.

108. She said that did not know how she would finance the restoration work. She and her family would have to live in a small part of the Hall whilst the rest of the Hall would be slowly renovated as her finances allowed.

109. In her witness statement, Mrs Whyte says that as her knowledge was limited, she asked her husband to investigate the feasibility of her taking on the restoration of a Grade I listed building. Apparently it was during the course of Mr Whyte's discussions with RBC that the possibility of an enabling development first came to his attention and that RBC had also told Mr Whyte that David Wilson Homes had applied for consent to convert the Hall into four flats and build ten houses in the Grounds. Mrs Whyte's witness statement refers to English Heritage's letter of 29 June 2001 (see below) which warns that Mr Whyte should not assume that permission for an enabling development would be granted, but in her witness statement, she says that she would have gone ahead with the purchase of the Hall even if RBC and English Heritage had not consented to an enabling development. She confirmed this in the course of cross-examination, even though she had said that she did not know how the refurbishment work would have been financed.

110. There are inconsistencies between Mrs Whyte's witness statement and the documentary evidence on the one hand, and her oral evidence on the other. During the course of her oral evidence, she said that she and Mr Whyte had no knowledge of David Wilson Home's discussions with RBC and English Heritage about an enabling development until after she had bought the Hall, whereas in her witness statement, she says that RBC told Mr Whyte about David Wilson Home's application when they first raised the possibility of an enabling development with him:

> 20. During his discussions with RBC it was suggested to him by one of the people in the planning department that one of the potential ways of funding the renovations was to consider the possibility of obtaining planning permission within the grounds under strict requirements of Enabling Developments. It was my understanding that he also told my husband that a previous planning application for 10 dwelling houses and conversion of the hall into 4 flats had been submitted by David Wilson Homes, but it had not been accepted.

111. I note also that Mr Whyte's letter to RBC of 25 May 2001 refers to David Wilson Home's proposal to build 10 homes in the Grounds and convert the Hall into four units, and a letter from English Heritage to Mr Whyte of 29 June 2001 refers to a previous proposal to convert the Hall into four units.

112. Mrs Whyte says that she asked her husband to deal with the detailed negotiations and other discussions relating to the Hall renovations and the enabling development. Indeed, it is striking how the documentary evidence shows that it is Mr Whyte who drives forward the restoration of the Hall and the discussions and negotiations relating to the enabling development, virtually to the exclusion of Mrs Whyte – notwithstanding that Mrs Whyte in her evidence said that the restoration of the Hall was a "labour of love", and that she has an interest and passion for architecture. Whilst Mrs Whyte is a party to some of the contracts, it is clear from the correspondence that it was Mr Whyte who has been responsible for their negotiation. It is Mr Whyte who deals with, and corresponds with, the various professionals, RBC and

English Heritage. It is Mr Whyte's firm, TFD, that is the main contractor for the renovation of the Hall and the construction of the houses on the six Plots, and it is Mr Whyte's firm that buys five of the six Plots. Mrs Whyte was cross-examined about her involvement with the professional team responsible for the renovation work, and her evidence was that she had no direct contact with them at any time. Her oral evidence was that prior to her purchase of the Estate she did not even discuss either the renovation of the Hall, nor the enabling development, with her husband. However, her husband had discussed the renovation work and the enabling development with her – but only after she had purchased the Estate. Her evidence was that she was not aware, for example, of the discussions that the architects (whom Mr Whyte had instructed on her behalf) had with RBC in March 2001 about the recreation of the Wilderness Garden and the development plan for new houses in the Grounds, and she was not aware of the invoices rendered by the architects to TFD for the work they did in respect of Bunny Hall prior to her purchase.

113. On the basis of the correspondence, I find that Henry Mein Partnership ("HMP") (a firm of architects) were instructed by Mr Whyte, on behalf of Mrs Whyte, and they met RBC. On 7 March 2001, HMP wrote to RBC enclosing "thoughts on a development plan to create six Plots and recreate the wilderness woodland" at the Bunny Hall Estate and asking for their comments and those of English Heritage. On the same day HMP wrote to Mr Whyte enclosing a copy of "our revised sketch 5218/SK2", which had been sent to RBC. I note that HMP (in their letter of 13 April 2010) state that at no time did they meet, correspond, or have any dealings with Mrs Whyte – at all times their only contact was Mr Whyte. It seems that HMP ceased to be instructed at some point, as some of the later plans for the Plots have "Roger Harrison Architects" stamped on them, and Mrs Whyte in the course of her evidence refers to a "Mr Burtenshaw" as being the architect (and it is Mr Burtenshaw of ADA Architects whose name appears as Mrs Whyte's agent on the 21 November 2011 application for listed building consent for the works to the Hall, and on the 21 May 2002 application for planning permission for the enabling development).

114. Mrs Whyte's evidence was that she was not aware that the architects (or indeed any other professionals) had been instructed prior to her purchasing Bunny Hall, and when she was taken to any correspondence in the bundle between her husband on the one hand and professional advisors, RBC or English Heritage on the other, she denied ever having seen it. However, I find that HMP were instructed on her behalf prior to her purchase of Bunny Hall. The TFD work ledgers show fees payable to "Mein" (which I find is a reference to HMP) under the heading "Architect" on 29 June 2001 for £3309, which amount was wholly allocated in the ledgers to the infrastructure works on the new houses – in other words, the enabling development. In addition, English Heritage's letter of 29 June 2001 is marked "cc Mr B Mills, Henry Mein Ptnrship". Although not included in the bundle, there are references in schedules and correspondence to letters from HMP to Mr Whyte and to RBC dated 7 March 2001 about a plan to create six plots, and to another letter dated 17 April 2001 about the funding of essential repairs to the Hall by the generation of additional plots within the Grounds. I therefore find that HMP were instructed to undertake architectural work in relation to the enabling development prior to Mrs Whyte's purchase of the Estate.

115. On 28 March 2001, GG&P (UK) Limited ("GG&P"), a firm of quantity surveyors, wrote to Mr Whyte with a fee proposal headed "Bunny Hall" relating to a site visit and provision of copies of a "bound document for grant submission purposes".

116. Mr Barker, of Knight Frank, the estate agents, met Mr Whyte on 23 May 2001, when he was instructed to provide an indication of the likely value of Bunny Hall once it has been refurbished and renovated to a standard ready to fit out. Mrs Whyte in cross-examination says that Knight Frank were instructed to give an indication about values in connection with her

consideration of applying for a grant for the renovation works – but the letter Mr Barker writes in accordance with those instructions is not consistent with it being used for a grant application – the drafting of the letter is consistent with the provision of valuations for the purposes of determining the amount of the conservation deficit and the number of plots that would need to be sold to meet that deficit – which is the use to which it was actually put. In his letter to Mr Whyte of 24 May 2001, Mr Barker says that he did not have time to read GG&P's report, but has assumed that the property will have been:

> Re-roofed and insulated, windows will have been repaired or replaced, and full plastering will have been undertaken. In addition to this, I have assumed that central heating will have been fitted and electrical works undertaken. In short the property will be left in a condition that required decoration and the fitting of kitchens and bathrooms, carpets and curtains.

The letter goes on to consider comparable properties (Clifton Hall and Smalley Hall) and concludes that Bunny Hall could be worth between £800,000 and £900,000 once fully renovated. The letter goes on to discuss the likely amounts that could be realised for the sale of building plots:

> Regarding the additional land, I would suggest that it would be appropriate to offer plots of around ¼ of an acre, on the basis that planning consent is forthcoming. On this basis, the plot values would be in the region of £150,000 per plot. This is on the basis that the type of scheme is in keeping with the surrounding area.

Mrs Whyte during cross-examination said that she was not aware that Mr Whyte had discussed the possibility of selling plots with Knight Frank.

117. On 25 May 2001, Mr Whyte writes to RBC (the letter is dated 2000 – but this is clearly a typographical error) as follows:

> Further to our recent telephone conversation with regards to Bunny Hall please find enclosed an inspection report from GPP and Knight Frank. As you will see these are quite specific in the refurbishment and the sale after completion. As I have always said if there is the value of the hall left I will absorb this as it will be my personal residence as when David Wilson Homes application they needed profit, this is why their scheme needed to be so intense i.e. 10 - ½ acre plots in the paddocks and the conversion of the hall into 4 units.
>
> At the moment I have been offered Clifton Hall as the people who have bought it are finding it hard to split into units, as when it was for tender I was in second place. Where as before I was buying Clifton Hall and its grounds I can now buy just Clifton Hall without the grounds but very little land/garden only where we need at least 5 acre for paddock area.
>
> Whilst I am serious about Bunny Hall I cannot justify paying Wilsons £500,00[0] and. spending 1.6 million refurbishment - total cost say 2.1 million as this will have a negative value of 1.1 million. I would say that if Chek Whyte does not do this project then this building will go into total disrepair. Whilst it is one of the most Historical buildings in Nottingham you now have the chance to totally rubbish this property by releasing a few plots in the grounds for enabling development. Cost plans as follows:-
>
> | | |
> |---|---|
> | Purchase price | £500,000 |
> | Refurbishment | £1.6 million |
> | Road Costs | £100,000 |

TOTAL	£2,200,000
Deficit	£1,200,000
8 plots ¼ acre	£150,000
5 ½ acre plots	£250,000

> As you will see from the above a certain amount of plots are required. As we are not house builders we would sell the individual plots. I have now until the end of the month, being June the 1st to make a decision whether to buy Clifton Hall or Bunny Hall. Whilst I am not forcing you into a decision I do not want to miss Clifton Hall for second time. All I want is in principle that you will approve the enabling developments to proceed and we have agreed all the requirements to an enabling grant i.e. Section 106 Agreement
>
> I am sure that English Heritage will say that the Hall is worth nothing, that is why working with me as a single use of Bunny Hall we are not putting all it gives in to claim back as by Chek Whyte doing this project I am investing 1 million of my own personal money. As I say again if we are not to proceed then please let me know by return and I would say that this building is only heading for more disrepair.

118. Mrs Whyte was cross examined about Mr Whyte's letter, and she said that she was not aware of this letter. She was asked why Mr Whyte had written "I cannot justify paying Wilsons £500,000", to which her answer was that Mr Whyte did not pay Wilsons £500,000 – "I did pay Wilsons £500,000 without an enabling development". She was asked about the cost plan in the letter, and the fact that the sale price and acreage for the building plots corresponded to the sale price and acreage set out in Knight Frank's letter. Mrs Whyte's response was that this was "speculation" and "not accurate", and in any event she had "not seen the letter before". She also said that she could not recall ever having had a conversation about selling plots with her husband, nor was she aware that Mr Whyte had asked for approval in principle for an enabling development. She said that the possibility of an enabling development was first discussed after she had purchased Bunny Hall – and that there had been no discussions about enabling developments prior to purchase.

119. Clifton Hall is mentioned both in Mr Whyte's letter to RBC as a property he was considering buying as an alternative to Bunny Hall and Clifton Hall is also mentioned by Knight Frank as a comparable property for valuation purposes. And Mr Whyte does buy Clifton Hall later – but as a commercial development project (he restores the mansion and builds a number of new houses in its grounds).

120. Mrs Whyte's evidence was that she had not considered buying Clifton Hall and was not aware of the property at the time (although she acknowledges that she became aware of Clifton Hall later – possibly around 2008). She was also aware that Mr Whyte was responsible for the renovation of Clifton Hall, although this occurred many years later. She was asked about the development work Mr Whyte undertook at Clifton Hall, to which her response was that "you are asking the wrong person". She was asked to confirm whether Clifton Hall had 17 bedrooms, and her answer was that she knew it had been divided into two wings when sold, but she did not know how many bedrooms it had. She was referred to plans submitted to Nottingham City Council relating to the construction of houses in the grounds of Clifton Hall, but she said that she had no knowledge about those houses.

121. RBC replied to Mr Whyte on 7 June 2001:

> I understand that you intend to complete the purchase of the Hall very shortly and are hoping for confirmation that 8 plots of .25 acre or 5 plots of .5 acre would be acceptable to the Borough as Enabling Development and I feel a

written response from the Borough's viewpoint is essential regardless of any eventual comments from English. Heritage.

Without further discussions with English Heritage it is not possible to give any such assurance although I have no objection in principle. I would further comment that even if the Schedule of Works is found to be acceptable then both English Heritage and the Borough Council will be taking the view that the price you pay for the Hall must not be entered into the equation.

Assuming your figures are found to be acceptable then they will undoubtedly be considered for enabling development as follows:

Refurbishment Costs	£1,600,000
Road Costs	£100,000
TOTAL	£1,700,000
Value of hall once refurbished	£1,000,000
Shortfall	£700,000

From the figures you have provided this shortfall would appear, on the face of it, to be acceptable as proof of a need for enabling development to this value. However, English Heritage will insist that you are also able to show that you have tried to obtain grants for some, or all, of this shortfall. If any such grant is available then enabling development will not be needed at all It is worth noting, of course, that the less development there is in the grounds, then the greater will be the value of the Hall.

If you are determined to include the purchase price in the figures then no grant aiding body will be willing to assist as it would be regarded as aiding speculative development from a public purse. Additionally, no enabling development would be acceptable, as the requisite conditions for enabling development) laid down by English Heritage, will not have been met

I strongly recommend that you review the figures with a view to excluding any purchase price paid for the Hall and that you look fairly speedily to applying for grant aid to assist in any shortfall. I would be happy to assist you in applying for Grant Aid and advising on the various bodies to approach.

The above comments are given in good faith and cannot be taken as any guarantee that a planning approval would be forthcoming for any development in the grounds of Bunny Hall.

122. Mrs Whyte was cross-examined about this letter. She said that she was not aware of the letter and was not aware that RBC had said that they had no objection in principle to an enabling development, nor was she aware that RBC had indicated consent in principle to an enabling development to realise a shortfall of £700,000 (assuming the figure were accepted). In any event, she said that English Heritage "would need to see if you had applied for grants". She was asked whether Mr Whyte was asking RBC about enabling developments on her behalf, to which Mrs Whyte's reply was that he "was just asking questions".

123. On 22 June 2001, David Wilson Homes withdraw their application to erect ten new homes in the Grounds.

124. On 29 June 2001, English Heritage wrote to Mr Whyte about the possibility of consent being granted for an enabling development and the possibility of consent being granted for the construction of new access, a swimming pool and garaging for six cars. As regards the likelihood of consent being granted in respect of "new service buildings", the letter says:

> In trying to find potential locations for any new service buildings the setting of the listed buildings (both the Grade I listed Hall and the Grade Il listed barns) is paramount and the landscape features form an important part of the setting of the hall visually and historically.
>
> The most sensitive parts of the grounds are the open views across the former parkland to the east and south-east of the hall, and the pleasure grounds including the remains of the Wilderness (to the south and west of the site), formal garden (to the south-east of the hall) and areas to the west and north of the hall.
>
> Any proposals, whether for enabling· development or new service buildings, which are located in the open land to the east and south-east would have a detrimental effect on the setting of the hall. Development in these areas would be highly visible from the main garden front of the hall and would radically change the open character of views to and from the hall.
>
> To the north, west and south-west of the hall the historic landscape, with planting (such as the lime avenue, Wilderness and other mature trees) and 'structural' features such as the former ponds and the ha ha, survives well and any proposals in these areas need consider both the setting of the hall and the impact on the gardens designed to complement the hall.
>
> To the north-east of the hall little survives of the historic landscape and the area is currently poor quality hard surface. This area relates visually to the former stables and barns of the hall, now converted to housing and in separate ownership.

Following the purchase of the Bunny Hall Estate by Mrs Whyte

125. The contract for the purchase of the Estate was not included in the Bundle. Mrs Whyte's evidence was that the contract was exchanged in early 2001, but it was a long-drawn-out process before she completed. During the course of submissions, Mr Southern mentioned that contracts were exchanged on 20 June 2001 and there was only a short period between exchange and completion (so perhaps Mrs Whyte's recollection relates to when David Wilson Homes accepted a "subject to contract" offer). In any event, at some point, the contract is exchanged for the purchase of the Bunny Hall Estate and a deposit of £50,000 is paid. Exchange must have taken place between the date Mr Whyte writes to RBC (25 May) stating that he was considering buying Clifton Hall, and completion on 16 July – probably in June or early July 2001. Mrs Whyte has yet to sell Gotham Moor Farm, and does not have sufficient free cash to meet the deposit. The deposit is therefore paid out of drawings made by Mr Whyte from TFD (£25,000 drawn on 5 March 2001, and £25,000 drawn on 5 April 2001), which Mr Whyte lends to Mrs Whyte on an interest-free and undocumented basis. Mrs Whyte's evidence was that the loan agreement was verbal and was intended to be very “temporary”. Her oral evidence was that the loan was repaid in 2003, when she sold Gotham Moor Farm.

126. On 16 July 2001, Mrs Whyte completes the purchase of the Bunny Hall Estate. The purchase price is £500,000. The entries at HM Land Registry show her recorded as the registered proprietor of the freehold with title absolute on 30 July 2001. Berryman’s letter of 21 August 2009 (relating to Mr Whyte’s IVA) states that the total funding required (including costs, stamp duty and land registry fees) was £517,655.50, which was paid to them from a bank account in the name of TFD Midland. Mrs Whyte's evidence was that this represented an interest-free undocumented loan (just like the one made to meet the deposit) and it was always understood between herself and her husband that she would repay him.

127. On 27 September 2001, a planning application was made to RBC for a new access and driveway to the Hall and to the proposed building plots. The application form is signed by Mrs

Whyte, and she gives her address on the form as "TFD (Midlands) Ltd, Bunny Hall, Bunny, Notts". Under the heading "brief particulars of the proposed development including the purpose(s) for which the land and/or buildings are to be used", the form says, "the construction of a new access and driveway to Bunny Hall inc access to proposed plots for [illegible] dwellings". Mrs Whyte when cross-examined says that the application does not mention the enabling development, but in my view, and I find that, the reference to the plots can only have been to the proposed plots for the enabling development. I am supported in this view by correspondence from BDO (her then accountants) to HMRC dated 26 June 2012 which states that the new access road was built in two sections, and the first section solely accessed the Plots. The second section (from the Plots to the Hall) was not constructed until some time later (and in the interim, access to the Hall was via the original road to the north of the Hall past the barn conversions).

128. Mrs Whyte was asked whether she intended to sell the plots, to which her answer was "It would have been a possibility". She was also asked why her address was given as TFD (Midlands) Ltd, to which she said that she did not know.

129. In October 2001, Mr Ince of Hacker Young telephones English Heritage. The note of that call (which is quoted in correspondence between HMRC and BDO) states "Stuart Ince of Hacker Young who appears to be acting for Mr Whyte at Bunny Hall. They had come across the idea of enabling development from Mr Whyte and wanted to find out what it was".

130. GG&P write to English Heritage on 10 October 2001, providing an update on the progress of the restoration of the Hall. The letter includes the following paragraphs:

> 7. With reference to page 2 item 4 of your letter the Employer for the work is Mrs Whyte and the work are being earned out by Mr Whyte's company TFD. This information has previously been passed on to English Heritage but if you have any queries please contact us.
>
> 8. As you are aware the works are to be carried out by TFD with work packages carried out by specialist sub-contractors. The team working on the project are Geoff Haynes Construction Director, David Jones - Contracts Manager and Don Tolby - Site Agent.

131. GG&P write again to English Heritage on 31 October 2001, following a site meeting that day to confirm various points.

(1) As regards the terms of the building contracts, the letter states:

> 2. Contract and certification
>
> 1t was agreed that the contract for the works would be between Mrs Whyte and TFD. The contract will be JCT cost plus form of contract. The architect will issue monthly payment certificates which will also confirm the quality of the work. Details of all costings will be available to Ian Forester of English Heritage for inspection.

(2) The letter discusses the enabling development

> 3. Enabling development
>
> a) The cost of the access road up to the development is to be included in the enabling works
>
> b) Planning permission is to be submitted for the dwellings on the development.

Mrs Whyte, when asked about the reference to planning permission, said that she was obviously thinking about submitting a planning application. But she rejected the suggestion

that GG&P must therefore have been working on the development plots and the enabling development since at least October 2001, as "GG&P were solely working on the Hall". She was also asked whether there was a pressing need to get the planning permission as soon as possible, to which she answered "no".

132. As regards the contract and certification, it appears that no written contract was ever put in place between Mrs Whyte and her husband's business and no architect's certificates were ever issued, as there are no references to any such contract or certificates in the bundle.

133. An application for listed building consent for alterations to the Hall is made to RBC on 21 November 2001.

134. There is correspondence between Mr Whyte and GG&P in November 2001 about the cost plan. On 22 November 2001, GG&P fax Mr Whyte a copy of the latest draft of the cost plan that they propose to send to English Heritage – but which needs to be updated for various detailed items. GG&P's final cost plan is dated November 2001. The introduction states that "The initial costs have been based on the owner procuring the works himself with the use of a main contractor." The overall summary of costs is as follows:

Construction costs based on Owner carrying out the works himself without any added profit or overheads		£1,662,000
Provision of access road and services to potential new properties on site		£147,000
	Sub-total	£1,809,000
Allowance for overheads and profit assuming work was carried out by a main contractor say	5%	£90,000
	Sub-total	£1,899,000
Professional fees	10%	£190,000
	Sub-total	£2,089,000
VAT liability. Still being investigated but likely to be 100%		£366,000
Potential total cost		**£2,455,000**
Less		
Value of property		£1,000,000
Assuming planning permission granted for 9 plots		
Sale of plots say	£1,000,000	
Tax on sale 40%	£400,000	£600,000
Short fall		**£855,000**
The above figures exclude purchase cost of building and interest charges		

Mrs Whyte's evidence was that the cost plan was "obviously about Bunny Hall". She was also asked about the reference to the VAT liability, and she said that she was unaware that the VAT liability was being investigated. She also said that the references to planning permission for nine plots was speculation, GG&P were not used for planning advice, and that she had not seen this letter at the time. As regards the tax on sales at 40% (viz, income tax rather than capital gains tax), she "didn't read this letter at the time" as it had been "sent to my husband". She was

asked whether Mr Whyte had discussed the value of the plots with her, or the tax treatment, to which her reply was that "20 years have elapsed, and I can't remember".

135. Mrs Whyte completes the sale of Sunningdale Barn on 10 December 2001 and completes the sale of Gotham Moor Farm on 8 February 2002. The sale of Gotham Moor Farm is on the basis of a "part-exchange", and the buyers transfer their property at Parker Gardens, Stapleford, to Mrs Whyte, and make a balancing payment to her of £250,000. It appears (from correspondence between Mrs Whyte and Berryman relating to Mr Whyte's IVA proposal dated 21 August 2009) that the Parker Gardens property was transferred to Mr Whyte (presumably at Mrs Whyte's direction) and that he sold it on 9 May 2002 with the sale proceeds being retained by him.

136. Prior to David Wilson Homes acquiring the Estate, part of the Hall had been adapted into a flat that had been occupied by an elderly lady (although the Hall had been vacant for some time by the time Mrs Whyte acquired it). Renovation works were done to this flat to make it habitable, and Mrs Whyte and her family moved into this flat on 2 March 2002.

137. There is a site meeting at Bunny Hall in March 2002 attended by English Heritage and GG&P. Following the meeting, English Heritage send an email to GG&P requesting various documents and other information so that they can consider an application made for a grant. In addition, the information is required so that they can assess the conservation deficit. One of the questions asked relates to VAT on the refurbishment works:

> 3. Confirmation from his [Mr Whyte's] accountant of the ability or otherwise of the owner to recover VAT charged on the works. The original application mentions that the VAT liability was being investigated.

A copy of this email is faxed by GG&P to Mr Whyte at TFD. Mrs Whyte was asked whether she had seen this letter at the time, to which her answer was "no", but that it must have been about the grant for which she was applying. She confirmed that she was the "owner" to which the email referred. But she could not recall anyone asking her about VAT. She said that she "dealt with the invoices my husband sent to me". She was asked if she could recall discussions about the VAT charged, to which her answer was "Possibly, it was 20 years ago". She was asked if the grant was made, to which her reply was "I can't remember".

138. On 21 May 2002, an application is made for planning permission for the "residential development of 9 dwellings forming enabling works towards costs of renovations to Bunny Hall listed building". Mrs Whyte was asked why permission was sought for nine dwellings, to which she said she did not know "I left it to Mr Burtenshaw, the architect".

139. On 28 June 2002, Rothera Dowson, solicitors to the BD Edwards Trust, wrote to Berryman Shacklock (whom I believe were the predecessors to Berryman), referring to meetings had "with your client Mr Whyte and his agent, Mr Roger Jones of TFD, regarding the proposed development by Mr Whyte of land at Bunny Hall". Part of the Grounds are subject to a restrictive covenant in favour of the BD Edwards Trust, and a release was required from the restrictive covenant to allow the construction of houses to go ahead on the part of the Grounds subject to the restrictive covenant. It was agreed that £25,000 would be paid to the trustees for each of the Plots that was subject to the covenant, and as there are a maximum of four Plots on the covenanted land, the maximum payment will be £100,000. The letter goes on to state that the "proposed developable land once planning permission has been obtained is to be sold by Mr Whyte and that he will not himself be carrying out the development."

140. English Heritage write to RBD on 1 July 2002 (the letter is copied to Mr Whyte, amongst others), about the proposed enabling development, stating that they consider the current scheme is over-intensive:

> […] we have fundamental concerns over the proposal in its current form. From my knowledge of the site, I do not believe that nine substantial 5-bedroomed houses can be accommodated on the site without a significant detrimental impact on the setting of the Grade I listed building and the character of the conservation area.
>
> […]
>
> […] the proposed development is over-intensive and would have a substantial impact on the character of the wooded area. The houses are large in scale and sited very close to one another. This may well have an impact on the value which could be achieved. With the access road running on the Hall side of the houses and the number of trees which would be removed there would be clear views over the new development from the Hall and its gardens to the front.

The letter notes that "a significant amount of repair work has now been completed", and in consequence the actual costs incurred can be incorporated into the appraisal. The letter asks about the ability of the owner to recover VAT, as this is a substantial sum, which would have a significant effect on the calculations for the development. Mrs Whyte was asked whether she had seen this letter at the time, to which her answer was "no", and that she could not remember that English Heritage had concerns about nine houses. As regards the questions about VAT, Mrs Whyte said that she would have sent any questions about tax to her accountants, Hacker Young. Mrs Whyte was referred to the reference in English Heritage's letter to the significant renovation work done by July 2002. Her response was that "When I bought the Hall, I spent all the money I had on renovation. I spent a significant amount to make the area in which we were living comfortable."

141. On 30 August 2002, GG&P write to English Heritage with Mr Whyte's comments on their 1 July letter (thus confirming that the 1 July letter had been received and read by Mr Whyte). In the letter, GG&P say in response to English Heritage's comments about the views from the Hall, that:

> We understand that the nine units are being completely screened by trees and the units cannot be seen from the hall.

Mrs Whyte said that she had not seen this letter at the time. She was asked about the units being screened by trees and replied that this was a reference to the Wilderness Garden, and the trees were already there. Her evidence was that some of the trees in the Wilderness Garden were subject to tree preservation orders ("TPOs"), and the trees subject to TPOs were retained. In fact, the documentary evidence shows that the whole of the Wilderness Garden was subject to an area TPO, and not all of the trees subject to a TPO were retained. RBC's two letters to English Heritage of 5 May 2000 both refer to the whole of the Wilderness Garden being protected by TPOs (although RBC say that only a handful remain worthy of retention) and letters by the Nottinghamshire Wildlife Trust to RBC (objecting to the enabling development application) remind RBC that the applicant (Mrs Whyte) had felled trees protected by TPOs without having previously obtained RBC's consent.

142. Mrs Whyte said that it was English Heritage and RBC that chose the location for the building plots (namely that they be located in the Wilderness Garden), and not her. They had complete control over the location and decided where they should be. She could not remember having had a discussion with English Heritage about the siting of the Plots, and she could not remember whether she had the discussions with English Heritage, or whether it was her husband.

143. On 14 August 2002, RBC grant planning permission for the new access and driveway.

144. On 23 April 2003, English Heritage write to RBC, welcoming the reduction in the number of proposed units from nine to six. The letter noted that independent advice had been commissioned by English Heritage and RBC from Chestertons, whose interim report of 13 November 2002 had recommended that there was a case for an enabling development of five units. However, this did not recognise the VAT liability, tax, and the need to release restrictive covenants. The letter refers to a meeting between Mr Whyte, RBC and English Heritage that was held just before Christmas 2002, when it was decided that six units were justified. The letter continues to consider the detailed design of the new houses, the landscaping of the Grounds, and the terms of any agreement under s106 TCPA. The letter states that it is copied to Mr & Mrs Whyte.

145. Mrs Whyte said in cross-examination that she did not recall having seen this letter, notwithstanding that it had been copied to her and Mr Whyte. Nor was she aware that RBC had originally contemplated granting consent for five plots, but that this was later extended to six plots, although she said that English Heritage would have written to her to confirm the approval of six plots.

Sale of the Plots

146. Mrs Whyte's evidence in cross-examination was that the decision to sell plots of land within the Grounds as an enabling development was made at some point prior to December 2003 when the planning permission was granted (she could not remember exactly when). The six Plots are sited at the southern end of the Wilderness Garden, within the area of land originally bounded by the ha-ha.

147. I find that Mr Whyte would have been aware of the interim report of Chestertons dated 13 November 2002 recommending an enabling development of five units in the southern part of the Wilderness Garden. I find that at the meeting Mr Whyte had with English Heritage and RBC “just before Christmas” in 2002, he reached agreement with RBC and English Heritage that they would support an enabling development of six houses at the southern end of the Wilderness Garden. Both the Chestertons’ report and the meeting are discussed in English Heritage’s letter of 23 April 2003. On 8 May 2003, a revised layout plan with six houses is filed with RBC.

148. The revised layout is considered by RBC's development control committee on 18 August 2003. The report by the RBC's development officer to the committee recommends that permission be granted for six new houses subject to various conditions (including an agreement under s106 TCPA). The report states that the restoration of the Hall will cost £1.83 million, and the resultant value will be £1.25 million, with a shortfall of £587,200.

149. Included in the bundle were copies of correspondence received by RBC commenting on Mrs Whyte’s application for planning permission. This includes two letters dated 23 July 2002 and 16 May 2003 from the Nottinghamshire Wildlife Trust objecting to the application. The letters note that trees subject to TPOs have been felled without the consent of RBC.

150. The report states that "considerable work has already been carried out [to restore the Hall], but [Mrs Whyte] is unable to finance completion of all the works necessary". It goes on to refer to the previous grant of consent for the new access and confirms that the new access has been formed. Mrs Whyte explained that at the time of the committee meeting, the only work that had been done was to make the Hall "liveable". Mrs Whyte was questioned about this, as the report goes on to say that "repairs of the Hall is well advanced", her response was that she could not recall the stage at which the repairs would have reached in May 2003 – but the structure of the building would have been secured, and the money would have been spent on securing the structure, dealing with collapsed beams, no electricity supply, and no roof.

151. In her witness statement, Mrs Whyte says that the grant of consent to an enabling development allowed the renovation work to the Hall to proceed in "one go", far more quickly than she had originally planned. Although, she says, this seemed ideal at the time, she regrets that she went ahead with the enabling development, given all the trouble it has caused her, and that she now has six large houses at the bottom of her garden.

152. On 11 September 2003, TFD write to Mrs Whyte about the purchase of the Plots

> Further to our discussion with Chek, we confirm the agreement to purchase 5 serviced plots at the following prices:
>
> | | |
> |---|---|
> | Plots 1 to 3 | £668,900 |
> | Plot 4 | £215,000 |
> | Plot 5 | £250,000 |
>
> As discussed this is based on the Chesterton's valuation and assessment of the costs of the infrastructure as detailed:-
>
> | | |
> |---|---|
> | Professional design fees and Local Authority costs | £97,500 |
> | Site clearance | £110,800 |
> | Road, drainage and landscaping | £375,600 |
> | Statutory services | £50,000 |
>
> We confirm that details of payment timings etc. are to be arranged and agreed.

Mrs Whyte was asked what was meant by "serviced plots" in this letter, and she confirmed that it meant that all the utility services were in place, but that she did not know what it would entail to make the Plots "serviced". She also said that she was not aware of any third-party valuations for the Plots.

153. There is very little (if any) evidence as to why Mr Whyte wanted to buy serviced plots – rather than just the bare land. This point was not addressed in Mrs Whyte's witness statement, nor in her oral evidence. Mr Southern's skeleton says the following about the arrangements agreed between Mr and Mrs Whyte regarding the sale of the Plots:

> 73. While there was no binding contract between Mrs Whyte and Mr Whyte, the agreement between them, as part of the overall restoration project agreed by the LPA and English Heritage, was:
>
> (i) Mrs Whyte would sell prepared building plots at agreed prices [Docs/36/381]. This was because the bank would not lend money to TDF Midlands, required to pay for the on-going costs, on the security of unprepared plots.
>
> (ii) The costs of preparing the sites for sale would form part of the agreed renovation costs.
>
> (iii) TFD Midlands would record separately costs attributable to the Hall specifically and costs attributable to the setting of the residence and the site preparation.
>
> (iv) No plots could be sold until the stipulated Phase of the restoration had been completed.
>
> (v) Prior to sale of the plots no payment would be required for renovation work performed up to that date in cash or in kind.
>
> (vi) On sale the costs already incurred in respect of the Phase of restoration would be credited against the purchase price of the plot.

154. The statement in 73(i) of Mr Southern's skeleton does not make sense – as TFD undertook the construction work to clear the site and service the Plots, and Mrs Whyte's

payment for that construction work was largely (or in the case of Plot 5 wholly) set-off against the price Mr Whyte paid for the Plots. So, the actual cash required by Mr Whyte to purchase the Plots was not large. This submission is also not supported by any evidence.

155. I find that Mr Whyte must have had sufficient resources available to meet the construction costs for clearing and "servicing" the Plots, without the need to borrow on the security of "serviced" plots.

156. As an expert Tribunal well versed in property development, I am aware that banks will lend on the security of unprepared plots – or perhaps to put it another way, I do not understand why a bank would not lend money to Mr Whyte on the security of an "unserviced" Plot but would on a "serviced" Plot – it seems to me likely that there is more to the story than just the Plots being "unprepared". There is no evidence before me to support Mr Southern's contention that Mr Whyte was not able to obtain a bank loan to finance the acquisition of bare Plots – not even a statement to this effect in Mrs Whyte's witness statement, let alone any documentary evidence.

157. But more fundamentally, I do not understand why Mr Whyte would need to borrow at all to acquire the Plots, as he could offset the purchase price against the amounts owed to him by Mrs Whyte for the restoration work to the Hall (other than perhaps £100,000 in aggregate that needed to be paid to release Plots 1 to 4 from the restrictive covenants).

158. Mrs Whyte was referred to RBC's development officer's report for the August committee meeting, which stated that the "shortfall" was £578,200, and was asked to compare this with the amounts to be realised from selling the serviced plots, which exceeded the amount of the shortfall. Mrs Whyte said that she did not discuss the prices for which the Plots were sold with RBC and was not aware of anyone else discussing these prices with RBC.

159. On 1 October 2003, Berryman Shacklock wrote to Mrs Whyte enclosing a final draft of the agreement under s106 TCPA ("the s106 Agreement"), which they confirmed was substantially in the form discussed and agreed with Mr Whyte (other than that arrangements for landscaping of the grounds must be approved by RBC before construction on the Plots can commence). They also confirm that the planning consent will be issued on execution of the s106 Agreement.

160. On 3 December 2003, the following all occur:

(1) Planning permission for the development of the 6 houses in the Grounds is granted by RBC, subject to conditions, including the s106 Agreement

(2) The s106 Agreement is executed

(3) Mrs Whyte sells Plots 1 to 3 to her husband (trading as TFD) for £668,900. There appears to be no contract for the sale of these Plots, and only TP1 transfers are executed.

(4) The deed of release from the restrictive covenant is executed in respect of all four plots subject to the covenant, not just the three plots that are sold.

161. Extracts from the s106 Agreement are annexed to this decision.

162. Berryman Shacklock wrote to Mrs Whyte on 3 December to confirm that the deed of release (of the restrictive covenant) and the sale of Plots 1 to 3 to Mr Whyte have completed, and enclose a cheque for £66,695.37, being the amount shown as owing to Mrs Whyte on the completion statement. The completion statement was as follows:

	Receipts	Outgoings
Sale Proceeds	£668,900.00	

Owed to Chek Whyte		£500,000.00
Deed of Release of Covenant Costs		£100,000.00
Stamp Duty on Deed of Release		£1000.00
Berryman Shacklock's fees and disbursements as per attached invoice		£1,204.63
TOTAL	£668,900.00	£602,204.63
TOTAL DUE TO YOU	**£66,695.37**	

Mrs Whyte was asked whether the amount owed to Mr Whyte related to the loan that he had made to her to fund the purchase of the Estate, and Mrs Whyte's response was that it might have been for the work done for the restoration of the Hall.

163. Mrs Whyte was also asked about the payment of £100,000 for the release of the restrictive covenants, given that the amount that was agreed for the release was £25,000 per Plot. Mrs Whyte was also referred to a letter from BDO to HMRC which stated that only two of the Plots had to be released from the covenants. Mrs Whyte's response was that she could not remember how the amount for the release was decided, nor how many Plots were covered by the restrictions. A copy of the deed of release is included in the bundle, and the deed releases Plots 1 to 4 from the restrictions. It appears therefore that (i) BDO's letter was wrong; and (ii) Mrs Whyte obtained the release on 3 December 2003 in respect of all the four Plots subject to the restriction, rather than obtaining a separate release each time a Plot was sold.

164. Mrs Whyte was questioned about TFD's work ledgers, which show the costs incurred in respect of the work done at the Estate and allocate the costs to either the Hall or the Plots ("housing infrastructure") or apportion those costs between the two on a percentage basis.

165. Mrs Whyte's evidence was that she had not previously seen these ledgers. When asked how big a business TFD was at the time, Mrs Whyte's reply was that she could not remember.

166. Mrs Whyte was asked about one of the line items in the ledgers in respect of "bricklayers", and she said that she had "no idea" what that related to. She was asked whether it might relate to work undertaken on the Plots, to which her reply was that the Plots were sold as serviced Plots, and she did not know why a bricklayer would be working on them.

167. Also included in the bundle is a spreadsheet prepared by HMRC which extracts line items from TFD's worksheets relating to "housing infrastructure" that were dated before 3 December 2003 (being the date of grant of planning permission for the enabling development). The expense types in the spreadsheet include groundworks, haulage, engineer, landscaping, plant hire, plant fuel, plant repair, and lost plant. The accuracy of this spreadsheet has not been challenged. The dates of the items range from 29 January 2001 to 28 November 2003. The date range for "groundworks" items is 31 July 2001 to 21 November 2001, and the date range for "landscaping" items is from 20 September 2001 to 1 October 2003. There are 16 entries for groundworks that predate 8 May 2003 (the date on which the revised plan for six houses is filed with RBC). There are also entries relating to haulage, landscaping, plant hire and plant fuel that predate 8 May 2003. Costs recorded in the spreadsheet in relation to the enabling works up until 3 December 2003 amount to £26,265.37, of which approximately £24,000 (roughly 90%) appear to have been incurred prior to 8 May 2003.

168. I find that it would have been clear from at least the date of Chestertons' interim report of 13 November 2002 that the enabling development would be located in the southern part of the Wilderness Garden. The reduction from nine to six houses was agreed in principle with

RBC and English Heritage before Christmas 2002, and the precise boundaries of the Plots were identified by 8 May 2003 (when the revised plans were submitted). Although work on individual plots may not have started before the plot boundaries were identified in May 2003, preparatory work would have needed to take place to clear the area of trees and vegetation, to drain and fill-in the pond, and to construct the access road. All of this work could be undertaken once it was clear that approval for an enabling development was likely to be given, even though the precise boundaries of the Plots had not been identified. I infer that the work identified in HMRC's spreadsheets that occurred prior to May 2003 must have related to these matters.

169. RBC inspected the work on the Plots at various times, probably for the purposes of the building regulations. The first inspection takes place on 19 January 2004 (not long after the sale of Plots 1 to 3), and extracts from the notes of the inspectors are as follows:

> **Plot Details: Plot 1**
>
> Date: 19.01.2004 Inspection Type: COMM Time: 0.6
>
> Work in progress and the first plot excavated to a level across the plot on 2m into stony clay. The intention is to excavate trenches from this level. The whole site contained a mix of mature trees both broad leaved and conifers. Assuming a medium water table I told the builder a minimum 2m excavation is required.
>
> Date: 05.02.2004 Inspection Type: EXC Time: 0.5
>
> Exc below reduced level approx. 1.80m across the plot. I.30m into shaley red clay – foundation waterlogged – to have clayboard to the top 400mm.
>
> Date: 09.02.2004 Inspection Type: EXC Time: 0.5
>
> Excavation approx. 50% complete A/D 1.3m below the reduced level – trenches flooded.
>
> Date: 10.02.2004 Inspection Type: EXC Time: 0.5
>
> Plot 1 95% complete but cave ins causing problems. Plot 2 with wall trenches lined with plastic sheet and concreting about to commence.
>
> **Plot Details: Plot 2**
>
> Date: 05.02.2004 Inspection Type: COMM Time: 0.4
>
> DPM/insulation and two layers mesh reinforcement in place.
>
> **Plot Details: Plot 3**
>
> Date: 20.02.2004 Inspection Type: COMM Time: 0.5
>
> DPM/insulation 2 no. layers mesh reinforcement in place.
>
> Date: 25.02.2004 Inspection Type: EXC Time: 0.5

Exc in progress and 2 no. trenches (1 no R/H side 1 No part rear) complete a/d 2.1m and 1.5m respectively into firm grey clay.

Date: 26.02.2004 Inspection Type: EXC Time: 0.5

Exc almost complete depths as above – claymaster being fixed into the perimeter trenches together with PVC lining.

Plot Details: Plot 4

Date: 20.02.2004 Inspection Type: COMM Time:0.5

50% of the excavations complete and dug to a depth of 1.5m from reduced level. The builders are also providing clay boarding and polythene sheeting within the excavations.

Date: 20.02.2004 Inspection Type: EXC Time: 0.5

Exc now complete, the exc nearest the mature trees are to a depth of 1.80m from reduced level - in red clay.

Date: 17.03.2004 Inspection Type: OSC Time: 0.4

Insulation and 2 no. layers mesh reinforcement in place all appears satisfactory.

Plot Details: Plot 5

Date: 20.02.2004 Inspection Type: COMM Time 0.5

[blank]

Date: 23.09.2004 Inspection Type: FOL Time:

Works in progress

Date: 23.09.2004 Inspection Type: FOL Time: 0.1

Works in progress

Date: 21.02.2005 Inspection Type: EXC Time 0.5

1.2m deep stepping down to (eventually 1.5m) all in red clay.

Date: 23.02.2005 Inspection Type: EXC Time: 0.4

Exc 90% complete and satisfactory.

Date: 23.05.2005 Inspection Type: FOL Time:

Works still in progress

Plot Details: Plot 6

Date: 20.02.2004 Inspection Type: COMM Time:

[blank]

Date: 23.09.2004 Inspection Type: FOL Time: 0.1

Works in progress

Date: 07.04.2005 Inspection Type: FOL Time:

Works still in progress

Date: 01.12.2005 Inspection Type: COM Time: 0.4

Setting out in progress – asked bldr. For excavated depths of 1.5m across the rear of the property.

Date: 02.12.2005 Inspection Type: EXC Time: 0.5

Exc approx. 50% complete A/D 1.5m into grey/green clay proposal is to concrete this section before exc further.

Date: 08.12.2005 Inspection Type: EXC Time: 0.5

Exc complete all as before

Date: 11.01.2006 Inspection Type: DPC Time: 0.5

Five courses blue brick dpc to the inner leaf only at insp. Floor slab to be suspended off the perimeter and internal walls.

Date: 18.01.2006 Inspection Type: OSC Time: 0.6

Suspended concrete floor prepared with 2 layers mesh reinforcement in place dpm on top of insulation and short FW branch drains laid to clear the slab.

Date: 01.11.2012 Inspection Type: FIN Time: 1.5

House complete and has been occupied since 2007. Lifted inspection chamber lids and flushed toilets – drains appear to work OK. All appears satisfactory – issue completion certificate.

170. Mrs Whyte was asked about these inspection notes, but she said that she had not seen them before. She was not able to answer any of the questions she was asked about the notes. She said that she never inspected the Plots and had never visited them whilst the building work was going on. Mrs Whyte was asked whether the area in which the Plots were sited was part of the garden of the Hall. Her response was that prior to December 2003 (when the first of the

Plots was sold), she used the garden area. She was asked whether she had used the area occupied by the Plots, to which her response was that she did not understand the question.

171. Mr Garratt comments in his report on the inspection notes as follows:

> Referring to the Building Inspector's notes and my table on page 11 (above), it will be noted that no works had been undertaken at plots 1, 2 and 3 at the date of disposal. Plot 4 was noted [on 17/03/2004] as having mesh in place. This means the excavation works were done and the site was being prepared for pouring the concrete floor-slab. Plot 5 was noted [on 23/02/2005] as having excavations 90% complete, i.e. the ground preparations were not finished. Plot 6 was noted [on 18/01/2006] as being ready for its concrete floor – the mesh was in place, there was a damp-proof membrane over the insulation and short sections of foul water drain had been installed ready to be encased in the concrete floorslab.
>
> […]
>
> […] there is no question that development commenced at plots 1, 2 and 3 after acquisition by TFD, so the depth of excavations has no relevance to that land while it was within the permitted area of the Hall. The Building Inspector's notes relating to plots 4, 5 and 6 reveal that the maximum depth of excavation prior to the relevant disposal was 1.8 metres below an undisclosed reduced level (plot 4, 20th February 2004). This excavation was noted as being complete and the nearest excavation to the mature trees, so it is likely to have been an excavation for a perimeter drain rather than for the under-build of house 4.

172. I do not consider that Mr Garratt is correct in his comments on Plots 1, 2 and 3, as there was no inspection at, or prior to, the date of disposal, so the notes of RBC's inspectors make no reference to the state of Plots 1 to 3 at the date they are sold. The first inspection takes place a short time after the disposal of those Plots to Mr Whyte. I make findings in relation to the state of the Plots at their date of sale below.

173. Mr Garratt is inconsistent in his report about the excavations on Plot 4. In his earlier paragraph he states that by 17 March 2003, excavation work had been done, and the site was being prepared for the pouring of the concrete floor slab (I infer that the reference in the inspection report to two layers of mesh reinforcement is to the layers of steel reinforcing mesh that will be incorporated in a reinforced concrete floor slab). But in his later paragraph he states that the excavations undertaken at Plot 4 were for perimeter drains, and not for any under-build. I find that it would not be possible to pour a reinforced concrete floor-slab without having previously excavated foundations underneath the proposed floor slab. I reach this finding as the reports for Plot 6 refer to the floor slab being suspended, and I infer and find that the construction methods used for each of the houses on the six plots would have been similar, so it is likely, and I find, that the floor slab in the other Plots would also have been suspended, and therefore there would have been excavations beneath the floor slabs for all the houses. So, the excavations referred to in the 20 February report as having been completed must, I find, have included excavations underneath the footprint of the house.

174. The sale of the remaining three Plots takes place on the following dates for the following prices:

12 March 2004	Plot 4	£215,000
8 November 2005	Plot 5	£250,000
16 March 2006	Plot 6	£100,000

175. As with Plots 1 to 3, there were no contracts for the sale of Plots 4 and 5 to Mr Whyte, the only documentation was the TP1 transfer form (in the case of Plot 4, only an unsigned copy of the TP1 is provided).

176. No reason is given why Plot 4 was not sold at the same time as Plots 1 to 3, the s106 Agreement permits construction on all four of these Plots to commence as soon as the planning consent was granted.

177. The completion statement for Plot 4 states that Berryman Shacklock credited £105,146.65 to Mrs Whyte, and the balance of the price was settled between Mr Whyte and Mrs Whyte. Mrs Whyte said the balance was set-off against the cost of work done by TFD to the Hall. She could not remember what happened to the balance. Berryman's letter of 21 August 2009 dealing with Mr Whyte's IVA proposal confirms that the balance of £107,450 was set off against amounts owed by Mrs Whyte to Mr Whyte (although it does not say what the amounts owed related to, but it seems likely that they related to the restoration of the Hall).

178. No completion statements for the sale of Plot 5 and Plot 6 are included in the bundles. However the TP1 transfer for Plot 5 showing the price is included in the bundles. Berryman's letter of 21 August 2009 dealing with the IVA proposal states that no cash payment was made by Mr Whyte to Mrs Whyte on the transfer of Plot 5. As regards Plot 6, the sale price is stated as £98,912 in a letter from Hacker Young to HMRC of 14 November 2007, but as £100,000 in Berryman's letter of 21 August 2009 to Mrs Whyte (although the net proceeds were £98,912.64 after expenses). I consider it highly unlikely that Mrs Whyte would have agreed a price of £98,912.64 with Mr Bailey – as an expert Tribunal, I am aware that this is just not the way the residential property market works. And as Berryman Shacklock represented Mrs Whyte on the sale of the Plots, it is likely that when they wrote to her about Mr Whyte's IVA, they would have had access to their files on Plot 6, and so their statement about the sale price is highly likely to be reliable. I find that the sale price was £100,000, but that Mrs Whyte incurred legal and other costs, so that the net proceeds remitted to her by Berryman Shacklock were £98,912.64.

179. Mrs Whyte was asked why Plot 5 was sold (Nov 2005) so long after the Plot had been "serviced" (Feb/March 2005). Mrs Whyte's reply was that she did not know. It could have been because she could only sell Plot 5 after a further phase of renovation work on the Hall had been completed – but she could not remember.

180. Unlike Plots 1 to 5, Plot 6 was sold to a Mr Bailey. Neither the contract for this sale nor the TP1 is included in the bundle. No completion statement is provided. Mrs Whyte's evidence is that Mr Bailey approached Mrs Whyte shortly after she purchased the Estate and offered to buy Plot 6 for £100,000. Her evidence was that she had not advertised the sale of the plots, and his offer was unsolicited, and came out of the blue. When questioned, Mrs Whyte said that she had no idea of how Mr Bailey approached her, and that "he must have known I was the owner", and that he "must have heard about the enabling development going ahead". When it was pointed out that her evidence was that the sale price had been agreed with him before the planning application for the enabling development had been made, Mrs Whyte said that he must have heard about it from someone. She said that £100,000 appeared to her to be the market value of the Plot at the time (this was before the "true" market values had become known), and she agreed in principle to sell it to him at that price – and the price reflected the fact that Mr Bailey had to pay for part of the construction costs of the access road. Although it took several years before she was able to complete the sale, she considered that she should honour their original verbal agreement, notwithstanding that the value of the Plot had increased in the intervening time. Mrs Whyte said that she did not know Mr Bailey prior to his unsolicited approach, and she stated that Mr Bailey was not a business contact of her husband. She was

asked how much Mr Bailey contributed towards the cost of the access road, but she could not remember, but the price of the road was "considerable". She was asked whether construction work had started on Plot 6 at the time it was sold, but Mrs Whyte could not remember. She was asked whether she had sold Mr Bailey a serviced Plot, or just the bare land, and she could not remember. She was asked to look at the RBC inspection reports for Plot 6 and asked whether the reports indicated that building work had commenced prior to the sale, to which her response was that she could not comment on something she did not understand. It was put to her that Plot 6 was not sold at an open market price to Mr Bailey, which Mrs Whyte denied.

181. On 31 January 2006 Mrs Whyte sold additional land adjacent to Plot 1 for £90,000. As with Plot 6, no completion statement or TP1 is included in the bundle, but the sale price is stated to be £90,000 in a letter from Hacker Young to HMRC. Mrs Whyte said that the additional land was sold to the purchasers of the house on Plot 1 to add to their garden, and therefore did not require planning consent.

182. Berryman's letter of 21 August 2009 about Mr Whyte's proposed IVA states that no payment was made to Mr Whyte out of the sale proceeds of Plot 6. The letter does not mention the sale of the land adjacent to Plot 1, and I therefore find that the net sale proceeds from this sale were retained by Mrs Whyte, as were the net proceeds from the sale of Plot 6.

183. On 30 June 2006, TFD wrote to Mrs Whyte as follows:

> Houses, and works to Bunny Hall
>
> We enclose our invoice No. 1220 for the work carried out to Bunny hall and the infrastructure costs to the houses together with the build ups etc as discussed.
>
> We confirm that the costs for the infrastructure are less than originally anticipated and are therefore presumably acceptable.
>
> We look forward to agreeing payment terms.

The invoice enclosed is dated 30/06/2006 and is for £1,480,345.60 plus £78,294.78 VAT (total £1,550,838.38). The invoice narrative reads "to refurbishment and new works as requested to Bunny Hall". Mrs Whyte confirmed that she had seen this invoice before. She said that it related solely to the renovation work on the Hall and had nothing to do with the work to create the serviced Plots. Mrs Whyte was asked when she paid Mr Whyte for the work to create the serviced Plots, and she said she could not remember. She said that she had paid for some of the work included in the invoice previously, and that amount had to be taken off the invoice total to determine the amount that she paid. But she could not remember how much she had previously paid. Mrs Whyte was asked whether the invoice included the work to create the access road, to which she answered that she did not know.

184. However, I note that the ex-VAT amount on the invoice corresponds to the total on TFD's work ledgers (inclusive of the 5% profit margin shown as a separate line item on the ledgers) – and TFD's work ledgers include both work on the Hall and the "housing infrastructure" work to create the Plots. The work ledgers include line items for tarmac of approx. £45,000, which I find must have related to the access road, and this is consistent with TFD's letter of 11 September 2003 which refers to "road" as one of the elements of the costs of the infrastructure required for servicing the Plots. And I find that the reference to "houses" in the heading of the letter and to "infrastructure costs to the houses" can only have been to the works on the Plots. I find that the invoice included the costs incurred in relation to servicing the Plots.

185. According to HMRC's notes of a meeting held on 6 December 2005 with Mr Whyte, his accountants (Hacker Young) and HMRC, having bought the plots TDF Midlands continued to work on the site, completing the construction of the houses.

Subsequently

186. In her witness statement, Mrs Whyte said that after having lived in Bunny Hall for five years, an opportunity arose to buy another period property, Stanford Hall. Stanford Hall is not far from Bunny Hall (about 5 mile south of Bunny Hall), and Mrs Whyte said that she had admired its parkland setting whenever she passed it. She purchased Stanford Hall on 7 March 2007 for £1.5m, which was funded by a mortgage from Yorkshire Bank secured over the Stanford Hall. Stanford Hall is set in 360 acres of protected parkland, and she considered that would make a perfect location for her family home, and she would be able to indulge her interest in keeping animals. Her son was a student at an agricultural college, and he would be able to run the estate there when he had completed his course. Her husband was able to buy land adjacent to Stanford Hall from which to run his business. Mrs Whyte and her family moved into Stanford Hall and occupied it as their main residence.

187. Notes of a meeting on 22 October 2013 at the Hall that Mr and Mrs Whyte had with Mr Coster of the VOA (attended also by Mr Whyte's accountant from BDO) tell a slightly different story, as does the letter of 21 August 2009 from Berryman's about Mr Whyte's IVA proposal. The VOA's notes of the meeting state:

> I asked how the sale went when the property was marketed in 2007-2009. They said the original Savill's asking price was very high and intended to make a statement, unfortunately the market then collapsed with the financial services crash. They did have the property under offer in late 2010 for £2.9 million when it was fully refurbished (although Mrs Whyte pointed out one never finishes a house of this nature and there was always further repairs to be done). At the time the bank had control of the property it was sold subject to contract with an exchange date but at the last moment the prospective purchaser pulled out as he couldn't raise the deposit.
>
> They then moved out and leased the property to this purchaser for 6/9 months but he was unable to proceed. They had moved out to Stanford Hall and then moved back in when the deal fell through. Prior to that they had another offer of £2.5 million in April 2010 at which point the property wasn't completely finished.

The Berryman's letter states:

> The total purchase price paid for Stanford Hall was £6,250,000.
>
> Although the original purchase contract was entered into by Chek [Mr Whyte] alone, your plan was that the hall and the majority of the grounds would be owned by you and used as a private residence for you, Chek and your family once Bunny Hall had been sold. Chek would purchase Oak Court, Cedar Mews, the Lido, the walled garden area and land upon which future development might be allowed, dependent upon the outcome of an application for planning permission.
>
> The King Sturge valuation report indicated a value of £4,500.000 for the hall and grounds and £1,750,000 for Oak Court etc. However, after taking tax planning advice you and Chek agreed that you would pay £1,500,000 for the hall and grounds and he would pay £4,750,000 for Oak Court etc. This split took into account (a) the hope value attributable to the planning application and (b) the substantial expenditure that would be required to bring Stanford Hall (a listed building) up to standard, which would be a condition of a section

> 106 agreement to be entered into as a condition of the grant of planning permission and, therefore, the realisation of the hope value.
>
> Your purchase of the hall was financed by a home loan from Yorkshire Bank Home Loans Limited of £1,500,000 secured by a first legal charge over Stanford Hall.
>
> Chek's purchase was financed, in part, by facilities from Clydesdale Bank of £2,375,000, secured by a first legal charge over Oak Court etc and a second legal charge over Stanford Hall. The balance of the funding for Chek's purchase came out of a Yorkshire Bank overdraft facility on your account and secured on Bunny Hall. The total facility was £2,900,000. Out of this, a joint account overdraft facility of £700,000, secured on Bunny Hall, was repaid, a retention of £200.000 was made to cover one year's interest and the balance of £2,000,000 was drawn down and used to fund the balance of the purchase price for Chek's purchase.

188. I happen to be aware that Yorkshire Bank is a trading name used by Clydesdale Bank PLC.

189. HMRC's Statement of Case says the following about Mrs Whyte's purchase of Stanford Hall:

> On 7 March 2007, whilst living at Bunny Hall, the appellant and her husband jointly purchased Stanford Hall Estate and obtained planning permission in 2009 for a retirement home and spa on part of the site to fund the restoration of the Hall. Stanford Hall Estate was sold in September 2011.

190. Companies House records show that Mrs Whyte was a director of a company called Stanford Hall Retirement Village Limited until it was dissolved in October 2010.

191. Included in the Bundle are particulars for the sale of Bunny Hall (together with its grounds of 9.5 ha (24 acres)) in 2007, and a copy of an article in the Nottingham Evening Post dated 7 March 2007 about the sale of Bunny Hall by Mr Whyte for £4.7m. As can be seen from the October 2013 meeting notes, Mrs Whyte did not sell Bunny Hall in 2009, but instead rented it.

192. Planning consent to build a garage to the north-west of the Hall was granted in October 2001 (and was included in the consent for the new access road). In 2012 Mrs Whyte obtained planning consent to convert the garage into a detached house, called "The Warren". There have been various (apparently unsuccessful) attempts to sell The Warren, and it appears not to have been sold as at the date of the hearing.

193. After Mrs Whyte and her family had moved into Stanford Hall, her evidence was that an offer was made on behalf of the Duke of Westminster to buy Stanford Hall (and the associated estate) for conversion into the new national military rehabilitation centre. She says that given the amount offered and the proposed use, Mrs Whyte decided to accept the offer. Stanford Hall was sold in September 2011, and her evidence was that she and her family then moved back into Bunny Hall.

194. Included within the bundles are sale particulars prepared by Savills for the Bunny Hall Estate, which, as of the date of the hearing, is being marketed for sale. As marketed by Savills, the Hall is described as set within 5.87 ha (14.5 acres), but the particulars state that an additional 3.4 ha (8.38 acres) is available by separate negotiation. The Warren does not appear to be included in the land being offered for sale.

HMRC Enquiry

Mrs Whyte's 2003/2004 tax return

195. On 19 May 2006 Mrs Whyte filed her self-assessment tax return for 2003/2004, reporting the sale of Plots 1 to 4 as qualifying for PRR from capital gains tax. On 23 June 2006 HMRC commenced an enquiry into the return. On 26 April 2007 HMRC issued a closure notice making the following adjustments to her return relating to the disposal of Plots 1 to 4:

(1) Additional trading profits of £736,291 liable to income tax and Class 4 NIC of £302,759; or

(2) In the alternative capital gains of £728,791 liable to capital gains tax of £291,516.

196. On 15 May 2007 Mrs Whyte appealed against the closure notice.

Mrs Whyte's 2005/2006 tax return

197. On 19 January 2007 Mrs Whyte filed her self-assessment tax return for 2005/2006, reporting the sale of Plots 5 and 6 as qualifying for PRR from capital gains tax. On 1 October 2007 HMRC commenced an enquiry into the return. On 29 May 2009 HMRC issued a closure notice making the following adjustments to her return relating to the disposal of Plots 5 and 6:

(1) Additional trading profits of £414,912 liable to income tax and Class 4 NIC of £180,161; or

(2) In the alternative capital gains of £406,412 liable to capital gains tax of £162,564.

198. On 17 June 2009 Mrs Whyte appealed against the closure notice.

Review

199. On 28 September 2010 HMRC wrote to Mrs Whyte's accountants, offering a review of the assessments for 2003/2004 and 2005/2006. The review commenced 10 months later on 26 July 2011.

200. The review was completed on 30 March 2015. The review

(1) cancelled the penalty determinations; and

(2) reduced the amounts of the preferred and alternative assessments:

Tax year	Original		As reviewed	
	Trading	Capital gain	Trading	Capital gain
2003/04	£736,291	£728,791	£376,747	£360,679
2005/06	£414,917	£406,120	£227,480	£353,974

201. Mrs Whyte appealed against the review decision on 29 April 2015, and the appeal was referred to ADR. An ADR meeting was held on 4 May 2017, but the parties were not able to reach an agreed settlement.

202. In 2017, Mrs Whyte applied to amend her grounds of appeal, and have the issue of whether the conservation deficit was a deductible expense heard as a preliminary issue. Permission to amend her grounds of appeal was given, but the Tribunal refused permission for a preliminary hearing (and that refusal was upheld on appeal).

EXPERT EVIDENCE

203. Expert evidence was given by Mr Garratt on behalf of Mrs Whyte, and by Ms Williams on behalf of HMRC.

204. Mr Garratt is a senior surveyor at Smith & Garratt, a firm of surveyors based in Ladykirk, Scotland (near Berwick-upon-Tweed). Mr Garratt has a first degree in law, he is a Fellow of the Royal Institution of Chartered Surveyors ("RICS"), an RICS registered valuer of real property, an RICS certified Historic Building Professional, and a Fellow of the Central Association of Agricultural Valuers. He qualified as a rural practice surveyor in the mid-1980s, spent 20 years as the resident agent or factor on rural estates, and has been in private practice for about 15 years. Smith & Garratt is a small firm specialising in planning and development, historic buildings and heritage work, and private client services.

205. Mr Garratt visited the Estate on 12 July 2016 and took a number of photographs. These photographs, together with other photographs provided by Mrs Whyte, were included in his report.

206. A significant part of Mr Garratt's report and his evidence related to matters of tax policy, his views on the deficiencies in the application of UK tax law to conservation projects and enabling developments, and how it ought to be amended.

207. Ms Williams is a technical advisor working in the Chief Valuer Group at the Valuation Office Agency ("VOA") based at their Wrexham office. She graduated in 2001 with a first degree in business law, qualified as a Member of the RICS in 2011 and as a Fellow of the Association of Agricultural Valuers in 2016. She gained a Postgraduate Diploma in Surveying from the College of Estate Management in 2009. She is a member of the RICS Registered Valuer scheme. She joined the VOA in 2003, and her current responsibilities include the provision of technical advice nationwide on Inheritance Tax and Capital Gains Tax land valuation cases. In a previous role (2017-2010) she was a complex caseworker lead on the VOA's National Taxation Team.

208. Because of the COVID-19 pandemic, Ms Williams was not able to visit the Estate or any of the comparable properties that she and Mr Garratt had put forward. She makes the following statement in her report about the evidence she has used:

> 3.14. I have not had an opportunity to inspect the property due to the pandemic and the tight timescales involved in producing this report. In order to obtain a full understanding of the property characteristics, the garden and grounds and the immediate locality I have used a number of resources. I have reviewed my colleague's inspection notes, studied plans and sales particulars of the subject property and viewed google street view images of the property boundaries in addition to satellite images. I have also taken a virtual tour of Bunny Hall which was available on Savills website, and I have watched a 2009 YouTube promotional video of the property which included drone footage of the surrounding land. The video was produced by FHP living. My VOA colleagues have previously inspected the property on three occasions in order to arrive at their opinions and provide advice to HMRC.
>
> 3.15. RICS Practise Alert supplement dated November 2020 and entitled 'impact of Covid 19 on valuation' states that 'in absence of an inspection a valuer may have enough information to proceed with assignment, subject to one or more reasonable assumptions'. My valuation advice given later in this report is therefore a desk-based valuation based on restricted information and investigations and the relevant assumptions are stated.

209. Ms Williams is an employee of the VOA, which is an executive agency of HMRC. I am aware that the VOA operates as a distinct agency within HMRC, so that the management and operations of the VOA are distinct and separate from the tax assessment and collection functions of HMRC. Although not cited to me, I note the decisions of the Upper Tribunal in *Forager Limited v. Natural England* [2017] UKUT 0148 (AAC), and in *Natural England v*

Warren [2019] UKUT 300 (AAC) which addressed (amongst other things) the weight to be placed on expert evidence where the expert is an employee of the party on whose behalf she or he is giving evidence. The Upper Tribunal said the following in *Warren*:

> [103] The first error is that the First-tier Tribunal incorrectly said at paragraph 43 that none of Natural England's witnesses had the status of an expert witness because they were employed by Natural England. In *Forager* the Upper Tribunal rejected a similar submission, saying that it "confuse[d] the concepts of "independent" and "expert". As long as the fact that a witness is employed by one of the parties is disclosed, it is open to the First-tier Tribunal to take into account that kind of lack of independence of witnesses in deciding what weight to give to their expertise." That approach is fully supported by the Court of Appeal in *R (Factortame Ltd) v Secretary of State for Transport (No. 8)* [2002] EWCA Civ 932, [2003] QB 381 at [69]-[70].

210. During her cross-examination by Mr Southern, Ms Williams was asked whether the statements in her report about the "denaturing" of the Plots were consistent with her duty of impartiality. Her response was that she set out the factual matters and gave her impartial view based on the facts presented to her. Mr Southern did not pursue this line of questioning, nor did he make any submissions that Ms Williams' evidence was compromised by any lack of independence on her part.

211. Nothing came to my attention during the hearing or from reviewing the documentary evidence, which would suggest that Ms William's evidence was compromised, or should be given less weight, by any lack of independence on her part.

Comparable properties

212. Both Mr Garratt and Ms Williams refer to comparable properties in relation to their opinion as to the size and location of the permitted area for the Hall. As each expert also comments not only on the comparable properties included in their own reports, but also on the comparables in the other expert's report, it is convenient to list both sets of comparables before turning to the evidence of each of the experts.

Mr Garratt's comparables

213. Mr Garratt refers in his report to "designation" under s31 Inheritance Tax Act 1984 ("IHTA"). Section 31 gives the Treasury discretion to designate buildings and associated land of outstanding historic or architectural interest, and an area of land which is essential for the protection of that building's character and amenities. A transfer of value of designated property is not subject to IHT, subject to certain conditions being met. In Mr Garratt's opinion there are sufficient similarities between the intended effects of conditional exemption for IHT for designated assets and permitted area for s222 TCGA that the IHT exemptions can provide useful comparables. In his opinion, they offer persuasive guidance for defining the extent and location of the land associated or linked with a special building, which is helpful in defining the permitted area in this case.

214. In his report, Mr Garratt states that "comparables are not difficult to find because it is not uncommon for buildings similar to Bunny Hall to be conditionally exempt from Inheritance Tax and conditionally exempt properties are listed, region by region, on HMRC's web-site." In the body of his report Mr Garratt states that he lists fifteen comparable properties in an appendix, ten of which were conditionally exempt from IHT and five were gifts to the Nation. However, the appendix only includes fourteen properties. His report included maps of the properties (other than for Coughton Court, Paxton House, and Thirlstand Castle, where a photograph was provided) and a brief description.

215. The fourteen properties and the descriptions provided by Mr Garratt are as follows:

1	Castern Hall, Staffordshire	Conditional exemption	An early C18 manor house located within the Peak District National Park
2	Cottesbooke Hall, Northamptonshire	Conditional exemption	A Queen Anne House dating from 1702 set in formal gardens with 300-year-old cedars, double herbaceous borders, pools and lily ponds
3	Leadenham House, Lincolnshire	Conditional exemption	A late C18 house in a park setting
4	Papplewick Hall, Nottinghamshire	Conditional exemption	Stone built house completed 1787 set in a park with woodland garden laid out in C18
5	Tissington Hall, Derbyshire	Conditional exemption	A Jacobean manor house with a 10-acre [4.04 ha] garden and arboretum
6	Iscoyd Park, Shropshire	Conditional exemption	An C18 red brick house in a park
7	Kinnersley Castle, Herefordshire	Conditional exemption	Remodelled Elizabethan manor house
8	Langstone Court, Herefordshire	Conditional exemption	C17/C18 house with older parts and courtyard. Located amidst park and gardens.
9	Whitmore Hall, Staffordshire	Conditional exemption	Carrollian manor house. Lime avenue, landscaped gardens, Elizabethan stable block.
10	Weston Park, Staffordshire	Conditional exemption and gifted to Nation	Weston Park and approximately 405 ha (1000 acres) of land
11	Coughton Court, Warwickshire	Gifted to Nation	Built between 1530 and 1550. 25 acres [10.1 ha] of gardens, two churches and a lake.
12	Seaton Deval, Northumberland	Gifted to Nation in lieu of tax	The remains of an early C18 house and garden, partially restored in the 1950/60s
13	Paxton House, Berwickshire	Placed into charitable trust	C18 Palladian house in 80 acres [32.3 ha] of gardens, woodland and riverside walks
14	Thirlestand Castle, Berwickshire	Placed into charitable trust	Keep (1590) extended with symmetrical towers and further wings. 40 acres [16.1 ha] of gardens and grounds, woodland walk.

216. As Mr Garratt primarily uses imperial measurements in his report, I have had to convert these into hectares, which are the units of land area used in the legislation.

Ms Williams' comparables

217. Ms Williams says the following about comparable properties in her report:

> 11.1. Houses of the size and age of Bunny Hall are not common and sales evidence from the immediate locality is limited. Many substantial historic houses of this type have been lost to demolition and the surviving properties are often now associated with reduced areas of land and associated properties.

> 11.2. I must consider the minimum acreage required for the reasonable enjoyment of a dwelling-house of the size and character of Bunny Hall.

218. She provides details of three "large historic houses" in the East Midlands that she considers are comparable. Included in her report are the agents' sale particulars for each of the properties, and in the case of Clifton Hall, she also includes plans provided in connection with a planning application for what appears to be an enabling development of the construction of new houses in the grounds and the division of the property into two units.

(1) Clifton Hall, Holgate, Clifton, Nottingham, NG11 8NT

Clifton Hall is a substantial Grade 1 listed Georgian mansion house, having "evolved" from an earlier mediaeval house. It was in educational use until 2002. In 2005 it was restored and returned to use as a single private house, and it was sold for £3.6m in November 2006. 14 new houses (now known as Clifton Hall Drive) were built in the grounds of Clifton Hall (this part of its grounds – approximately 3.74 ha (9.25 acres) – was not sold with the property in 2006). The house was subsequently split into two wings which were sold separately. Included with Ms Williams report were copies of the agent's sales particulars for Clifton Hall after restoration, but prior to the split into two units, and also for the two units following the split. As the sale particulars did not include plans of the grounds, she also included copies of two plans submitted to Nottingham City Council: the first is dated October 2001 and possibly relates to an application for consent to return of the property to private use. The second is dated March 2004 and possibly relates to the construction of the new houses in the grounds and the split of Clifton Hall into two units. This latter plan shows that a large part of the grounds is vested in a management company as a communal garden for the owners of the new houses.

Clifton is a suburb of Nottingham. Clifton Hall is about 5 miles from the centre of Nottingham and about 5 miles northwest of Bunny Hall.

Prior to its division into two units, Clifton Hall was on three floors with 8 reception rooms, 2 kitchens, 17 bedrooms, 10 bathrooms. Its gross internal area was 2523 m^2 (27,156 sq ft) and it was offered for sale with grounds of about 1 hectare (2.5 acres).

Following its division into two units, the North Wing has 7 bedrooms and 0.264 ha (0.652 acre) of gardens and grounds. The South Wing has 10 bedrooms and 0.73 ha (1.809 acres) of gardens and grounds.

There is a connection between Mr and Mrs Whyte and Clifton Hall. As described above, Mr Whyte told RBC in his letter of 25 May 2000 that he was considering purchasing Clifton Hall instead of Bunny Hall. Mr Whyte subsequently purchased Clifton Hall for commercial development, was responsible for the restoration work to Clifton Hall itself and for the construction of the new houses in the grounds. This can be seen from Mr Garratt's report (in which he says that Mr Whyte purchased Clifton Hall and restored it as a single dwelling after Mrs Whyte had bought Bunny Hall), and there are references to Mr Whyte having bought Clifton Hall as a development project in HMRC's review decision letter of 30 March 2015, and the notes of a meeting with the VOA on 22 October 2013.

(2) Walton Hall, Walton-on-Trent, Derbyshire DE12 8LZ

Walton Hall is a Grade II* listed Georgian house located on the edge of a village, four miles south of Burton-on-Trent. Ms Williams' report states that the property required

comprehensive renovation. A copy of the agent's sales particulars prepared in June 2011 were included with Ms Williams' report. Ms Williams states in her report that the VOA records indicate that the property was sold on 31 May 2017 for £1,150,000. The house was built in about 1729 using brick and slate. It is on three floors with 4 reception rooms, 5 main bedrooms, and 7 rooms on the top floor. The gross internal area is 1095 m^2 (11,787 sq ft). Attached to one side of Walton Hall is a terrace of two two-bedroom cottages. These were included in the sale as were a range of outbuildings. The total area of the garden and grounds is 3.05 ha (7.5 acres).

(3) Normanton Manor, Old Melton Road, Normanton-on-the-Wolds, Nottinghamshire

Normanton Manor is a Grade II listed house. The core was constructed in 1914, with a large modern extension. At the time of the hearing, it was on the market with an asking price of £5,500,000. It is on three floors, and has 5 reception rooms, 7 bedrooms and 5 bathrooms. There is a garage in the grounds, with staff accommodation above. The house has a gross internal of 1252 m^2 (13,486 sq ft) (main house). The modern extension includes a swimming pool, gym, and a basement cinema. The total area of garden and grounds is 1.2 hectares (3 acres).

There are a number of other properties close to Normanton Manor, but none as close as the converted barns are to Bunny Hall. Normanton Manor is in a conservation area in a village about 6 miles south-east of Nottingham and is under 4 miles from Bunny Hall.

219. Ms Williams states in her report that there are other examples of large houses selling with small acreages throughout the UK such as: Chapel Cleeve Manor in Somerset sold in June 2014 with 2.83 ha (7 acres) of land, Invereil House, East Lothian, Scotland sold with 1.61 ha (4 acres) of land. However, she prefers the evidence of the more local properties as being the most reliable.

Mr Garratt's evidence

Enabling development and conservation deficit

220. Mr Garratt commented on enabling developments generally, and the meaning of a "conservation deficit".

221. Mr Garratt considered that the definition of conservation deficit was the excess of costs incurred in renovating a property over the increase in the property's market value as a result of those renovations. In other words, it was the amount spent for which there was no economic benefit to the owner or developer.

222. In his report Mr Garratt comments that:

> Having separated the major liability, enabling development cannot be used to make development profits; all that is permitted is the minimum of enabling development that is necessary to meet the "conservation deficit" and that may not harm the heritage values of the place or its setting.

When he was cross-examined about this statement, Mr Garratt said that there was nothing in English Heritage's guidance to distinguish between an enabling development undertaken by a commercial developer or privately – and that enabling developments were generally a commercial enterprise. He was asked to explain what he meant by "having separated the major liabilities". Mr Garratt's explanation was that an enabling development is permitted where the funds raised from the development are used for that liability. It was important that the liability to restore the heritage asset was not separated and the developer then "disappeared into the hills" with the profits from the enabling development.

223. In his view RBC miscalculated the conservation deficit arising in the case of the Hall as being £587,200, as reported to RBC's development control committee on 18 August 2003. Mr Garratt agrees that a conservation deficit – justifying an enabling development – existed, but in his view the amount of the deficit was much greater than the amount determined by RBC, as RBC calculated that the deficit would be funded by a grant, whereas it would in fact be funded by an enabling development. He referred to section 4.3.6 of the 2008 edition of English Heritage's booklet on enabling developments, which sets out two different model calculations for conservation deficits the first method being used where the deficit is to be covered by a grant, and the second where it is to be covered by an enabling development:

> 4.3.6 Enabling development should always be seen as a subsidy of last resort, since it is an inefficient means of funding a conservation deficit, often requiring enabling development with a value of three or four times the conservation deficit of the historic asset to break even. The simplified example, based on residential enabling development, illustrates the point.

Conservation deficit met by cash subsidy	**£**
Market value of historic building at the outset	10,000
Repair costs (inc fees)	150,000
Conversion to optimum beneficial use (inc fees)	100,000
Financing and other costs	10,000
TOTAL COSTS	**270,000**
Market value of place on completion	170,000
Conservation deficit (difference)	100,000
Grant to owner	**100,000**
BALANCE	0

Conservation deficit met by enabling development	
Acquisition costs	10,000
Repair costs (inc fees)	150,000
Conservation to optimum beneficial use (inc fees)	100,000
Build costs enabling development (inc fees)	175,000
Sales, legal costs etc	15,000
Financing costs	20,000
Developer's profit	70,000
TOTAL COST	**540,500**
Less Market value of historic building on completion	170,000
Market value of enabling development	**370,500**
BALANCE	0

224. In Mr Garratt's opinion, RBC mixed the method used when the deficit is covered by a grant with the method used where the deficit is to be covered by an enabling development. His report states the following:

> The correct method would probably have arrived at a conservation deficit three or four times larger than the incorrect method, i.e. £1.73m to £2.31m. The correct method takes account of the acquisition cost […].
>
> The conservation programme at Bunny Hall was costed at £1.83m in 2003 and was completed prior to the sale of plot 6 on 16th March 2006. The enabling development raised £1,323,900 between December 2003 and March 2006. In addition, Mrs Whyte had to pay £100,000 to BD Edwards Settlement for release of a covenant; she had to fund the construction of a new access - possibly to the enabling development and onwards to the Hall, and at least from the enabling development to the Hall (no information has been provided to say which); she had to fund any cost-inflation; she had to fund the cashflow of the conservation programme; and she had to pay the costs associated with each disposal of land used for enabling development. Clearly the enabling development did not raise enough money to cover the conservation programme and, net of all costs, it must have fallen considerably short - perhaps only covering half the expenditure required to carry out the whole scheme. Mrs Whyte cannot be said to have obtained any personal benefit from the enabling development ... she was worse off as a result of undertaking the scheme.

225. In Mr Garratt's opinion the conservation deficit was around £1.32m, after taking into account all costs, such as the release of the restrictive covenants and the construction of the access road. Selling six plots at £150,000 each was never going to be enough to fund the deficit. It was not possible for Mrs Whyte to have made a surplus from the enabling development. In Mr Garratt's opinion, Mr Whyte undercharged for the works done to the Hall, and could not have made a profit. He probably also paid more than market value for the Plots.

226. Mr Pritchard asked Mr Garratt why his calculation of the conservation deficit used the amounts actually raised from the sale of the Plots against the 2003 estimated costs of the restoration. He was referred to TFD's invoice for its work of £1.55m. Mr Garratt's response was that there was no way of knowing whether this invoice represented the totality of the costs incurred by Mrs Whyte, as there might be other invoices. But he confirmed that he had not asked for up-to-date costs when preparing his report. He was asked why, therefore, he had used actual sale prices. His reply was that "this is what you are looking for".

227. Mr Garratt attention was drawn to the line item "Developer's profit" in English Heritage's model calculation for an enabling development. He was asked whether his earlier statement was correct that an enabling development could not be used to make a developer's profit, to which his answer was that "it can be used". He was asked whether Mrs Whyte would be permitted to make a percentage profit from the enabling development. Mr Garratt's answer was that RBC and English Heritage could have taken this into account in their consideration of whether to grant consent – and in the case of commercial developers they did.

228. Mr Garratt's sets out in his Summary Opinion three losses that Mrs Whyte has suffered as a result of the enabling development:

> Both Mr Coster and Ms Williams believe Mrs Whyte obtained a benefit from the operation of the conservation deficit at Bunny Hall, or at least suffered no loss. But she lost land ... and losing land is a loss. The land she lost was from the garden or grounds at Bunny Hall; I believe the loss unacceptably compromised Mrs Whyte's reasonable enjoyment of Bunny Hall as a residence but, even if I am wrong, severance of the enabling development and the arrival of six new houses in the park diminished the value of her retained property ... and that was her second loss. The district valuers say Mrs Whyte benefitted - by the amount of the premium endowed upon the land she lost,

> arising out of the grant of planning permission for enabling development - because that premium paid for repairs to her residence. The permission was, however, granted wholly and exclusively for the purposes of contributing a kind of public subsidy towards funding repairs to a nationally important heritage asset, i.e., the premium was endowed by the local authority in accordance with Government policy for the public benefit, not for Mrs Whyte's private benefit. It is important to remember that, having decided to cede land for an enabling development and to accept the diminution in value to her retained property, Mrs Whyte had no further choices. She had no choice about how to spend the proceeds; the risk that the proceeds would not cover the cost of the conservation works was hers alone; and she was committed come-hell-or-high-water, under penalty of losing her home, if she failed to complete those works. As stated at the top of page 10 of my further opinion of January 2020, in retrospect we know the proceeds from selling the enabling development did not cover the cost of the conservation works; and on top of those costs Mrs Whyte was obliged to meet substantial other costs in order to deliver the scheme and repair Bunny Hall. Mrs Whyte had no choice but to pay the difference ... and that was her third loss.

229. Mr Garratt was cross examined about this section of the report:

(a) He agreed that although Mrs Whyte "lost land" through the sale of the Plots, she "gained" the sale price of the Plots

(b) He agreed that the purpose of the enabling development was to deliver that gain in order to fund the restoration to the Hall

(c) He agreed that the Plots were sited to minimise their impact on the Hall (however in his view the enabling development damaged the Hall through "severance and injurious affection"), the development enabled Mrs Whyte to fund the renovations to the Hall (which was dilapidated when she acquired it), and as a result she was able to create a nice home in which to live and obtained a private benefit of a renovated home.

230. Mr Garratt was asked whether the second loss that he identified (diminution in the value of the retained Estate) was in fact a "loss", as the Estate was now on the market at a higher price as a result of the renovation works, and that Mrs Whyte would realise a gain, and not a loss. Mr Garratt's response was that the value of the Estate was diminished as a result of the existence of the houses constructed on the Plots within the former Grounds. He said also that Mrs Whyte "achieved her ambition and saved a heritage asset".

231. Mr Garratt was asked about the conservation deficit in the context of the fact that the Estate was currently being marketed for sale. His evidence was there was a difference in tax treatment between a commercial developer and an individual, as a commercial developer can offset renovation costs against the sale proceeds for tax purposes, whereas an individual cannot. For a commercial developer, the conservation deficit "would come out in the wash", and in his view there should not be a difference in the tax treatment between a commercial developer and a private person.

232. Mr Garratt was asked about the amount of the conservation deficit if the appreciation in the value of the heritage asset was greater than that used in the calculation of the conservation deficit, or if the costs of the renovation were lower. Mr Garratt's response was that the amount of the conservation deficit would not change, even though the financial outcome to the developer or owner would have improved. He was asked if there was a mechanism for clawing-back the excess, to which his answer was "no". English Heritage were more concerned with what would happen if costs increased, or the realised value decreased – they wanted the

conservation works to be done, irrespective of the financial outcome. In other words, English Heritage's concern was that the developer or owner must take the risk of increased loss – but as a consequence, the developer or owner would benefit from the possibility of increased profit.

233. He was asked about whether Mrs Whyte was under a legal obligation to use the funds realised by the enabling development on the restoration of the Hall. Mr Garratt's answer was that this was the intention and could be seen in recital (G) of the s106 Agreement. He was then asked if more funds were raised from the enabling development than were anticipated in the calculation of the enabling development, whether these needed to be spent on the renovation of the Hall. His answer was that this situation would not arise – rather the s106 Agreement was concerned with Mrs Whyte delivering the conservation programme included in its terms, whatever the cost. It was open to her to use any source of funds to finance the conservation programme, but the most likely source of funds was the enabling development.

234. Mr Garratt was asked about the phasing of the enabling development, and the statement in his report that the release of plots for sale was linked to progress with the remedial works to the Hall. He confirmed that Mrs Whyte was prevented by the s106 Agreement from selling Plots 5 and 6 until the relevant phase had been undertaken. His attention was then drawn to the provisions of clause 3 of the s106 Agreement, which restricted the erection of a dwelling, rather than preventing the sale of a Plot.

235. Mr Garratt confirmed that a commercial developer was allowed to take a profit from the development project as a whole – which would include the enabling development as one of its components. He commented that although a commercial developer could be allowed to generate a commercial profit, that was not relevant as regards the Hall.

236. Mr Garratt was asked to review TDF's letter of 11 September 2003, which set out the prices that TDF would pay for each of the Plots, and he agreed that these were greater than the amounts included in RBC's calculation of the conservation deficit. He agreed that the sale prices of Plots 1 to 5 were (on their own) "more than enough" to cover the conservation deficit.

237. Mr Garratt was asked whether the payment for the release of the restrictive covenant on four Plots represented costs incurred in the restoration of the Hall. His answer was that the payment was not part of the restoration costs – rather it was paid to enable the enabling development to take place.

238. Mr Garratt confirmed that the amount raised by an enabling development was not intended to cover all the costs of the restoration of the heritage asset.

239. In the course of re-examination, Mr Garratt was referred to the calculations of Mrs Whyte's profit or gain prepared by BDO (her former accountants) and submitted to HMRC on 23 December 2010. BDO prepared two sets of calculations, one on the basis that Mrs Whyte was liable to income tax on trade profits, the other that she was liable to capital gains tax. For each set, two computations were prepared. The first on the basis that the quantum of the conservation deficit was not deductible ("with no deficit" or “not offsetting”) in calculating her profit, and the second on the basis that the conservation deficit was deductible (“with deficit” or "offsetting"). In Mr Garratt's opinion, he would "ignore the conservation deficit, but include all costs of restoration and the enabling development" in computing the taxable profit or gain. He "didn't see why the conservation deficit would appear in the accounts". Mr Southern said that HMRC were concerned that the conservation deficit was not a "real figure", and Mr Garratt's answer was "I think they are right".

Permitted area

240. In considering the "permitted area" for s222 TCGA, Mr Garratt quoted in his report the provisions as originally enacted, and without taking account of amendments in force for the

relevant tax years. In cross examination, Mr Garratt said that he was unaware of the amendments.

241. The report also quoted from articles published in the Inland Revenue's Tax Bulletin in issues 2 (February 1992) and 18 (August 1995). Tax Bulletin 2 includes the following as regards the identification of the permitted area:

> The questions to be answered in such cases are:
>
> - is the land at the date of sale "garden or grounds"?
>
> - what is the size and character of the dwelling house at the date of sale?
>
> - what is the corresponding size of the permitted area?
>
> - where should the permitted area be located?
>
> - how should disposal proceeds and acquisition costs be apportioned between the exempt and non-exempt areas?
>
> The first question is relevant because if the land is not "garden or grounds" at the date of sale it cannot qualify for relief. In general, land is treated as "garden or grounds" if it is enclosed land serving chiefly for ornament or recreation, surrounding or attached to a dwelling house or other building. Land used for agriculture, for commercial woodlands, or letting, for example, will not qualify. If the land does qualify as "garden or grounds" the second question becomes material. Section 101(3) CGTA 1979 allows a permitted area in excess of half a hectare if required by the size and character of the dwelling house. The permitted area must include the site of the dwelling house (Section 101(2)) and must be located on the land most suitable for occupation with the residence (Section 101(4)).
>
> […]
>
> In considering these questions [questions 3 and 4 above] the District Valuer has to decide what is required by the size and character of the dwelling house. This is considered to be an objective test. To be required the land must be needed by each and every occupant of the dwelling house, not just by a particular occupant who has special needs. Although there is not direct judicial guidance, the view taken is that the corresponding legislative context makes the compulsory purchase case of In *Re Newhill Compulsory Purchase Order 1937, Payne's Application* [1938] 2 All E R 163 useful guidance on the meaning of this word. Du Parcq J said at page 167C:
>
> > "'Required', I think, in this Section does not mean merely that the occupiers of the house would like to have it, or that they would miss it if they lost it, or that anyone proposing to buy the house would think less of the house without it than he would if it was preserved to it. 'Required' means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury would be done to the property owner."
>
> The District Valuer's opinion will be based on a comparison of the size of garden and grounds held with other houses in the locality which are of a comparable size and character to the subject house.

242. In order to determine whether the Plots form part of the garden and grounds of the Hall, within the permitted area, at the time of their disposal, Mr Garratt's report stated that he first needed to answer the following five questions

> • Firstly, s.222(3) charges Commissioners with the duty of defining the permitted area. If the permitted area is influenced by factors such as

occupation and enjoyment, to what extent can an occupier change its boundaries? The answer appears to be that disposing of part of the permitted area removes that part from the residence to which it previously belonged, whereas abandonment of gardening practices merely changes a part of the permitted area from garden to 'ground'. Ground is defined in the Tax Bulletins as, "*Enclosed land surrounding or attached to a dwelling-house or other building serving chiefly for ornament or recreation*" and remains within the permitted area. It therefore appears that an owner may vary his permitted area by altering the enclosure – either reducing or increasing the amount of ground surrounding or attached to his dwelling-house – so long as the revised area is in the same ownership as the residence and is used chiefly for ornament or recreation … which is a question of fact. Changing the permitted area might or might not involve disposals or acquisitions of land. For example, an owner who builds a house in his garden and lets it reduces the permitted area of his residence without selling any land. Logically, where land is acquired an occupier has to amalgamate the new part and use it for his own occupation and enjoyment with his residence as its garden or grounds before the permitted area could be said to have been enlarged.

• Secondly, what is the relevance of the word 'required' in the phrase 'required for the reasonable enjoyment of the dwelling-house as a residence'? In *Re Newhill*, a case demanding examination of compulsory purchase legislation, Du Parcq J said, "*'Required', I think, in this Section does not mean merely that the occupiers of the house would like to have it, or that they would miss it if they lost it, or that anyone proposing to buy the house would think less of the house without it than he would if it was preserved to it. 'Required' means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury would be done to the property owner.*" The word 'required' was found to mean "*more than desirable*" in *Sharkey*. But these authorities reviewed the word 'required' in isolation; neither of them involved examination of the phrase 'required for the reasonable enjoyment of the dwelling-house as a residence' or concerned permitted areas. In the words of Tax Bulletin 2, "*The District Valuer will advise the Inspector on the size and location of the permitted area … In considering these questions the District Valuer has to decide what is required by the size and character of the dwelling house. This is considered to be an objective test. To be required the land must be needed by each and every occupant of the dwelling house, not just by a particular occupant who has special needs.*" The exact question arose in *Longson*. The test of whether land attached to a private dwelling in excess of a half hectare was required for the reasonable enjoyment of the property was found to be an objective one; the individual circumstances and requirements of the taxpayer did not affect the assessment. In that case, although the residence included stabling, land used for the horses stabled there was not to be included because the keeping of horses was not an essential part of the use of the house as a residence. It appears, therefore, that the phrase exists to exclude from permitted areas those lands that any particular occupier uses incidentally with his dwelling-house.

• Thirdly, is the existence of restrictive covenants relevant? A covenant preventing development within the garden or grounds of a dwelling-house contributes to maintaining the area to which it applies undeveloped and suitable for use as garden or ground. If the land to which the covenant applies is land which the owner has for occupation and enjoyment with the residence and is not, for example, otherwise enclosed – which is a question of fact – it is difficult to see how the existence of a covenant would do anything other than affirm the affected land's suitability for inclusion in the permitted area.

> The guidance in Tax Bulletin 18 states, "*... enjoyment means possession without contested claims from third parties.*" For so long as the land subject to the covenant remains undeveloped there can be no third party claims to it, the owner can enjoy it … and the covenant is, therefore, not relevant to defining the permitted area.
>
> So the permitted area must be in the same ownership as the dwelling-house at the relevant date, and must be used by the owner for his own occupation and enjoyment with his residence as its garden or 'grounds' – which are enclosed lands surrounding or attached to the dwelling-house serving chiefly for ornament or recreation. Its extent is the area required for the reasonable enjoyment of the dwelling-house as a residence, having regard to the size and character of that dwelling-house. Where the taxpayer owns a greater area of adjoining land the permitted area is the part most suitable.
>
> • Fourthly, the second question raised in Tax Bulletin 2 (*what is the size and character of the dwelling house at the date of sale?*) requires the Inspector to define the residence and any other buildings that form part of the residence and which therefore contribute to its size and character … as opposed to any that merely stand in the permitted area and do not count as part of the residence … or indeed any that do not belong to either category. This, again, is a question of fact. At the time of selling the plots the residence included the Hall and structures such as the service cottage/garages behind (which were either built or being built), the fountain and garden walls – including a recently constructed brick garden wall to the north-east of the Hall. I am not aware of any disagreement on this point.
>
> • Fifthly and finally, the third question raised in Tax Bulletin 2 (*what is the corresponding size of the permitted area?*) requires that, "*The District Valuer's opinion will be based on a comparison of the size of garden and grounds held with other houses in the locality which are of a comparable size and character to the subject house*". Comparables are not difficult to find because it is not uncommon for buildings similar to Bunny Hall to be conditionally exempt from Inheritance Tax … and conditionally exempt properties are listed, region by region, on HMRC's web-site. According to HMRC's memorandum 'Capital Taxation and the National Heritage', '*designation'* is available for six categories of property, including: *(c) any building for the preservation of which special steps should in [our] opinion be taken by reason of its outstanding historic or architectural interest; and (d) any area of land which in [our] opinion of is essential for the protection of the character and amenities of such a building as is mentioned in paragraph (c) above*.

243. The reference in HMRC's memorandum "Capital Taxation and the National Heritage" to "designation" (quoted by Mr Garratt under his fifth bullet), is designation under s31 Inheritance Tax Act 1984 ("IHTA"). Section 31 gives the Treasury discretion to designate buildings and associated land (as described in the Tax Bulletin article) of outstanding historic or architectural interest, and an area of land which is essential for the protection of that building's character and amenities. A transfer of value of designated property is not subject to IHT, subject to certain conditions being met. In Mr Garratt's opinion there are sufficient similarities between the intended effects of conditional exemption for IHT and permitted area for s222 TCGA that the IHT exemptions can provide useful comparables. In his opinion, they offer persuasive guidance for defining the extent and location of the land associated or linked with a special building, which is helpful in defining the permitted area in this case. He considered that there were "co-extensive principles for the determining the extent" of the land required in both cases.

244. Mr Garratt then went on to:

(1) provide his view of what constituted the permitted immediately prior to the first disposal in December 2003; and

(2) show which of Plots 1 to 6 were within that area.

Mr Garratt took the opportunity to give his opinion on the Hall's permitted area following the sale of the Plots.

245. Mr Garratt's report states that the "tone" of these fifteen comparables shows that the area of land that HMRC considers essential for the protection of the character and amenities of the building is quite large – up to 405 ha (1000 acres) in the case of Weston Park.

246. He says that the comparables all have two things in common as regards the land allowed to be included with the house. The first is that the boundaries follow features in the ground (natural or man-made). The second is that it is, or includes, an enclosed area surrounding or attached to the house serving chiefly for ornamentation or recreation. In the case of twelve of the comparables, the area of conditionally exempt land is considerably larger than the permitted area. Only in three of the comparables (Castern Hall, Papplewick Hall, and Kinnersley Castle) do the boundaries of the conditionally exempt land match the boundaries of the permitted area. He draws the following conclusions from this analysis:

> Whilst the area of land which in [HMRC's] opinion is essential for the protection of the character and amenities of such a building is not the same as its permitted area, these comparables show that (i) the area essential for the protection of the character and amenities of such a building is never less than the permitted area; and (ii) the boundaries of the areas relieved against capital taxation invariably follow natural or man-made features of enclosure. The permitted area for each of the twelve more extensive comparables must, therefore, be the part which, if the remainder were separately occupied, would be the most suitable for occupation and enjoyment with the residence. This leads me to conclude that the permitted area is, in each case and including at Bunny Hall, the area which:
>
> • at the relevant date, is in the same ownership as the dwelling-house;
>
> • is used by the owner for his own occupation and enjoyment with his residence as its garden or grounds;
>
> • includes enclosed lands surrounding or attached to the dwelling-house serving chiefly for ornament or recreation;
>
> • is the area required for the reasonable enjoyment of the dwelling-house as a residence, having regard to the size and character of that dwelling-house; and, where the ownership is more extensive,
>
> • is the part most suitable.
>
> The first three are questions of fact; the fourth is established per *Sharkey*; and the fifth requires judgement case by case … but in doing so the presence of restrictive covenants is ignored and regard must be had to natural and man-made features of enclosure existing on the ground. It will be noted that (i) there is no requirement to minimise the permitted area ("In general, the Revenue accepts that land surrounding the residence and in the same ownership is the grounds of the residence, unless it is used for some other purpose"[see Tax Bulletin issue 18]); and (ii) it is not necessary to define it by attributing a physical size and then attempting to set-out the attribution on the ground.

247. Annexed to this decision are plans showing Mr Garratt's opinion of the extent of the permitted area of the Hall on 1 December 2003 (before the sale of any of the Plots), and on 12

July 2016 (after the sale of all Plots), and I have attached these plans showing Mr Garratt's permitted area in Annex 2 at figures 6 and 7, but corrected them to show the boundary of the Estate as at the dates the Plots were sold. The permitted area is shaded in pink, and the Estate boundary is outlined in red. At the earlier date, all of the Plots were, in his opinion, within the permitted area. Mr Garratt states that the permitted area after the sale of the Plots is larger than the permitted area before the sale for the following reason:

> It will be observed from the plans on pages 17[1] and 18[2] that Mrs Whyte has responded to the disposal of part of the Hall's permitted area by adjusting her enclosure to substitute the loss with a new area. The 16th July 2016 permitted area is, in fact, larger than the 1st December 2003 permitted area. This is her prerogative. The area she chooses for her own occupation and enjoyment with her residence as its garden or grounds, including enclosed lands surrounding or attached to the dwelling-house serving chiefly for ornament or recreation, is a question of fact. If that area is larger than is appropriate having regard to the size and character of her dwelling-house only the most suitable part will qualify as the permitted area in any future disposal.

248. The permitted area in Mr Garratt's first plan is bounded by the line of the old ha-ha – which enclosed the formal gardens adjacent to the Hall, and the Wilderness Garden (in which the Plots were sited). The new access road extends across the southern tip of the land bounded by the ha-ha – cutting-off a small area of land (the "triangle") that was within the old ha-ha. Mr Garratt included this triangle within his permitted area, as in his opinion the access road had not been built at the time the Plots were sold. So, at the dates of disposal, it was his opinion that this triangle had not been cut-off from the remainder of the permitted area by the access road.

249. Mr Garratt considered that each of the Plots formed part of the garden and grounds of the Hall at the time they were sold. In his report he gave the following explanation for his opinion:

> Nothing in the documents provided to me indicates that a formal contract existed for the transfer of plots at Bunny Hall. In addition, there is nothing to suggest that a fence was erected, that TFD had rights to occupy exclusively or otherwise – or that any regulations for occupation were in place. The facts appear to be on all fours with *Dickinson* in this regard. Any works undertaken by TFD were, therefore, at TFD's risk and did not part-perform an agreement or change the character of the land from garden or grounds.
>
> Referring to the Building Inspector's notes and my table on page 11 (above), it will be noted that no works had been undertaken at plots 1, 2 and 3 at the date of disposal. Plot 4 was noted as having mesh in place. This means the excavation works were done and the site was being prepared for pouring the concrete floor-slab. Plot 5 was noted as having excavations 90% complete, i.e. the ground preparations were not finished. Plot 6 was noted as being ready for its concrete floor – the mesh was in place, there was a damp-proof membrane over the insulation and short sections of foul water drain had been installed ready to be encased in the concrete floorslab.
>
> Following *Dickinson* it is clear that plots 4, 5 and 6 retained their character as garden or grounds within the meaning of s.222(1)(b) until exchange of contracts on 22nd March 2004, 8th November 2005 and 16th March 2006 respectively. In any case, had something occurred to prevent the disposal of plot 4, plot 5 or plot 6 at the relevant times the works could have been tidied away and the land reinstated to its previous condition. The key point is the one

[1] Annex 2 – Figure 6
[2] Annex 2 – Figure 7

> from Tax Bulletin 18 stating, "… enjoyment means possession without contested claims from third parties." In *Dickinson* the Tribunal considered that a failure by the council to give an undertaking in respect of St Johns Road might have prevented completion. In the present case hazards included death of the parties, divorce, total destruction of the Hall, and the possibility that Mrs Whyte could win the National Lottery and thereby obtain the means to undertake the necessary works without resorting to enabling development. The changes on the ground were both transient and conditional. It cannot be suggested that plots 4, 5 and 6 had ceased to be garden or grounds in the presence of a risk that they could yet revert.

250. Mr Garratt was cross-examined about his reasons for his opinion on the extent of the permitted area of the Hall and its location.

251. Mr Garratt was referred to s222(3) and (4). Mr Garratt's response was that some houses will require a permitted area greater than the 0.5 ha specified in s222 TCGA. He disagreed with Mr Pritchard that in order to determine the location of the permitted area, you first had to determine its size. In his opinion, the size and location will depend on the house and the "features on the ground". There was not, in his opinion, a mathematical relationship between the size of the house (in, say, m^2) and the size of the permitted area. Rather both the size and location had to be determined by reference to the evidence of comparables. The first step was to look at the dwelling and consider if it needed garden and grounds in excess of 0.5 ha. Then you turned to the evidence of comparables, and the evidence from the comparables determined the size and location of the permitted area. There was no formula that could be applied.

252. Mr Garratt criticised Ms Williams' report on the grounds that Ms Williams sought to minimise the size of the permitted area. In his opinion, for the purpose of s222 it was necessary to identify the appropriate permitted area, not the minimum permitted area. He considered that her error was a possible consequence of the stepped approach described in her report, where the process followed by the VOA requires that a "a specific size of permitted area to accompany a house of a certain size and character."

253. Mr Garratt was asked why he had not provided the size of the permitted area in his report. His response was that he was asked (and provided) a plan showing his opinion as to the permitted area for the Hall. This was determined by reference to the features on the ground in the Estate, and what he described as the "means of enclosure". This "helped me to identify the permitted area, and I can then measure it." He considered that the ha-ha provided the means of enclosure, and that the line of the ha-ha formed the boundary of the permitted area. I asked Mr Garratt about the reasons why he included the Wilderness Garden and excluded the lawned parkland to its east in his version of the permitted area. In answering my questions, Mr Garratt placed great emphasis on the need for the grounds and garden to be enclosed: "enclosure is important". As regards the Plots, he agreed that it was possible for Mrs Whyte to fence herself out of the Plots – but this would require more than just a temporary fence, and she must have lost control of the land. I asked him why the permitted area expanded into the lawned parkland area to the east of the ha-ha after the sale of the Plots. His response was because at that point Mrs Whyte was using it – although it was more "grounds" than "garden".

254. Mr Garratt was asked why his plan of the permitted area extended over land not owned by Mrs Whyte. His reply was that some of this land was not owned by Mrs Whyte today. But he agreed that the permitted area could not extend to land that was never owned by Mrs Whyte. His attention was then drawn to the triangle of land, which was included within his view of the permitted area. Mr Garratt was informed that Mrs Whyte's evidence was that she did not own the "football field" (which included the triangle of "pink" land south of the access road), to

which Mr Garratt's response was that it was “not all that relevant”, and that his plan was incorrect to that extent.

255. Mr Garratt was asked about the new access road. His initial response was that it had not been built at the time the Plots were sold. He was then referred to the planning officer's report of 18 August 2003 to RBC's Development Control Committee (which states that the new access to the Estate had been formed), and Mr Garratt acknowledged that the new access road had been completed by the time the Plots were sold. Mr Garratt was asked whether this was significant as regards the permitted area, to which his response was that it was. This was because he assumed that the road had a fence along its length at the time the plots were sold, as it was fenced at the time he inspected the Estate. He regarded the Tax Bulletin articles as a useful guide to determining the permitted area and referred to the sentence that defined "grounds" as being "enclosed land […]". The fence alongside the road enclosed the permitted area.

256. Mr Garratt was asked what constituted "garden or grounds" for the purposes of s222, and he said that the Tax Bulletin articles provided a useful guide. He was asked whether land that had been fenced off was excluded from garden or grounds, to which his answer was that the Plots were not fenced off. But more generally, whether land formed part of garden or grounds would depend upon whether the land had been "denatured or fenced-off". Land, he said, could change its status (as garden or grounds) as a result of change of use (for example, use for agriculture), but the land could be changed back. He referred to the example in his Summary Opinion of the construction of Fidler's Castle in Surrey, where Mr Fidler erected a mock Tudor castle without having obtained planning consent, and hid the castle behind straw bales, in the expectation that he would become immune from enforcement action after four years. In fact enforcement action was taken (and upheld by the courts) and the castle was removed. This demonstrates, in Mr Garratt's opinion, that "if a castle can be removed to leave the land exactly as it was before, then any works preparatory to building houses near Bunny Hall could have been reversed ... right up to the point when Mrs Whyte ceded control of the land for enabling development."

257. But, Mr Garratt said that what might cause garden or grounds to be denatured to the extent that the land ceased to be part of the garden or grounds would depend on its purpose – and gave the example of a country house which had the ruin of an old castle keep in its grounds, and in that case the old keep would continue to form part of the garden or grounds of the house.

258. Mr Garratt agreed that it was possible for an owner to fence him (or her)-self out of his garden or grounds, because the grounds had to be "enclosed". But the fence would need to be substantial. He was asked whether a wire stretched between poles was a fence for these purposes, to which his response was "hardly". What constituted a fence for these purposes would depend on it use and the nature of the enclosed area of garden or grounds. Mr Garratt was asked whether developing land for the purpose of constructing a new home could denature land so that it ceased to be garden or grounds, and Mr Garratt agreed that it could. He was referred to the case of *Dickinson v Revenue and Customs Commissions* [2013] UKFTT 653 (TC) and agreed that loss of control of the land in question by the owner could cause it to cease to be garden or grounds – to form part of a house's garden or grounds, the land in question had to be free of third-party rights.

259. Mr Garratt was asked to look at the notes of the building inspectors' inspection of the Plots. As the Plots were sold as "serviced plots" he was asked whether the Plots had to be prepared, to which he replied "yes". He was asked whether utility services had to be provided to the plots, to which he replied "yes".

260. In his report he says that:

> […] there is no question that development commenced at plots 1, 2 and 3 after acquisition by TFD

He was asked whether, at the time they were sold, Plots 1 to 3 had been prepared and the utilities provided. His answer was that it "doesn't appear so", rather Mrs Whyte "sold unserviced plots, and paid the buyer for the cost of servicing". In his view, no work had commenced on Plots 1 to 3 at the time they were sold. As regards Plot 6, he was asked whether he knew what was meant by the note "Five courses blue brick dpc to the inner leaf only at insp"? His response was that certainly some construction and preparation works were in progress.

261. Mr Garratt was asked about the statement in his report that "any works undertaken by TFD were […] at TFD's risk", and whether he had been instructed by Mrs Whyte that this was the case. His answer was that he had not been so instructed, but he had deduced that this must have been the case from his reading of *Dickinson*.

262. Mr Garratt was asked why the lawned parkland area to the east of the ha-ha became, in his opinion, part of the permitted area following the sale of the Plots. His answer was that the area had become enclosed, with a rail fence running along the access drive, and the grassed area was now mown, and used by Mrs Whyte and her family as the garden and grounds of the Hall. He was then asked if that area had been fenced in 2003, whether it would have formed part of the garden and grounds of the Hall at the time the Plots were sold. Mr Garratt said that he was not sure, s222 required the permitted area to be the part of the garden and grounds that was most suitable, and in 2003 it was rough grassland. Mr Garratt was challenged about whether the fact that land was overgrown would take it outside the garden and grounds of a home – but his answer was that the area had to be the "most suitable", and at the time of the first disposal it was not, but it became the most suitable area subsequently, But Mr Garratt acknowledged that he had not inspected the Estate at the time the Plots were sold.

263. Mr Garratt considered the triangular area to the south of the access road as being more suitable, as it was enclosed with the rest of the Wilderness Garden by the ha-ha. But he acknowledged that when he inspected the Estate, the area south of the access road looked rough.

264. Mr Garratt was asked whether a road could form the boundary of garden or grounds, and he answered that the area of land had to be an enclosed area, so it had to be fenced in some way. As regards the ha-ha, he confirmed that he had no specific instruction about the state of the ha-ha at the time the Plots were sold, but he had seen photographs that showed that the ha-ha was "mostly derelict" and was degraded. By this he meant that you could make out the line of the ha-ha in the ground, but that what remained of the ha-ha would not have stopped livestock crossing it.

265. Mr Garratt was asked why he considered the size of the permitted area prior to the disposal of Plots 1 to 3, and then after the final disposal of Plot 6. Why did he not consider the permitted area at the point of each disposal? Mr Garratt said that he considered the disposal of all of the Plots together, as there was one scheme for the enabling development, one s106 Agreement, one scheme of conservation works for the Hall, and one planning permission. There was therefore, in his opinion, one disposal for the purposes of ascertaining the permitted area.

266. Mr Garratt was asked about how a number of factors might have an impact on the permitted area. He was asked whether an owner of a property that was overlooked would have a different expectation as to his garden or grounds as compared with a property that was not overlooked. Mr Garratt's response was that the Hall and its Grounds were not overlooked –

rather the Hall (with its tower) overlooked its neighbours. But he did consider that having close neighbours was a relevant factor. He considered that the dilapidated state of the Hall did not have relevance to the issue of garden and grounds – rather it was necessary to consider the size and character of the property and comparables, the issue of whether the Hall had electricity had nothing to do with it. He was asked whether the absence of a roof had an impact on the Hall's character. Mr Garratt said that this was a "weird question", as if a property had no roof, it was not someone's residence. The absence of a roof in the past was not a relevant factor.

267. Mr Garratt was cross-examined about the comparables considered by Ms Williams and himself. He confirmed that comparable properties were helpful in determining the extent of garden or grounds (in excess of 0.5 ha) required for a home. He said that in considering comparables, consideration needed to be given to the size and character of the property, whether the property was located in an urban or countryside setting, and (to a more limited extent) whether the property was a period property or a new build. But in his reports he says that he:

> believes that useful comparable evidence comprises large residences on large plots ... so large that some analysis can be made of the part most suitable for occupation and enjoyment with the dwelling as a residence. Dwellings so shorn of land that they no longer have what might be considered to be their permitted areas are not comparable with Bunny Hall. Using such dwellings as comparables will result in ever reducing permitted areas, which is not the intention behind s.222.

268. Clifton Hall was included in Ms Williams' list of comparable properties. In his report, Mr Garratt makes the following comment about the choice of Clifton Hall as a comparable by Mr Coster (Ms Williams' predecessor as HMRC's expert):

> Clifton Hall would only be relevant to a case concerning the permitted area belonging to part of a mansion house following subdivision and development of the former grounds … prior to which it stood at 9.25 acres. It appears to be included in Mr Coster's report for the purposes of highlighting Mrs Whyte's husband's trade – notwithstanding that he bought Clifton Hall, and restored it as a single dwelling, ***after*** his wife bought Bunny Hall.

269. Mr Garratt acknowledged that the October 2008 sale particulars (pre-dating the division of the building into two) described Clifton Hall as having 17 bedrooms and set in 2.5 acres of garden and grounds. He was asked whether the proximity of other buildings close to the house was relevant to how much land was required for garden or grounds. His response was that it was not really relevant, but he gave as an example Apsley House in central London (the former home of the Duke of Wellington on Hyde Park Corner) which was a large house but with a smaller garden compared with the garden of an equivalent house in the Yorkshire countryside. But in Mr Garratt's opinion, the more important factor relating to Clifton Hall was that it had been "chopped into two". In his opinion, large houses needed large plots and Clifton Hall required larger grounds for its "reasonable enjoyment" as a 17-bedroom residence.

270. Mr Garratt was asked to consider Normanton Manor. Mr Garratt described the house as being a small house with a huge extension (including an indoor swimming pool). In his view, the permitted area of the house could reasonably be expanded if the owner purchased additional adjoining land. It was, in his opinion, an example of a large house on a small plot.

271. Mr Garratt considered that the most compelling comparable was that of Clipsham Hall (a comparable selected by Mr Coster, but not by Ms Williams), of which he said in his reports:

> Mr Coster believes that the permitted area at Clipsham Hall (actually listed Grade II*), being more rural and undisturbed, extends to 9.0 acres and is

> contained by its ha-ha wall. I agree with this but cannot see why he then seeks to exclude land within the ha-ha from the permitted area at Bunny Hall.

272. Mr Garratt was then taken to the list of comparables included in his report. He was asked why he chose these properties. Mr Garratt confirmed that the test for designation for IHT purposes was "not quite the same" as the test for the purposes of PRR, being "character and amenity". He was asked for the extent and the boundaries of the comparables, and he said that these were shown on the maps included with his report.

273. Weston Park is a property with 1000 acres of land. Mr Garrett was asked whether any of this land was agricultural, and he said it probably was. He was asked the extent of Weston Park's permitted area for s222 TCGA purposes and said that he would have to do the same analysis as he did for Bunny Hall. He would need to consider the kinds of man-made features that make up the boundaries within Weston Park's estate. The permitted area for s222 purposes would be an enclosed area of garden or grounds, with a perimeter of boundary features that are man-made.

Ms Williams' evidence

Enabling development and conservation deficit

274. Ms Williams said that she was in substantial agreement with Mr Garratt about the planning and heritage policy behind the concept of enabling developments and conservation deficits. They both agree that the first step in justifying the need for an enabling development is to identify the existence of a conservation deficit – and they both agree that Mrs Whyte demonstrated that a conservation deficit existed at the time she purchased the Estate.

275. Ms Williams was not instructed to advise on the quantum of the conservation deficit that arose in respect of the restoration of the Hall. But she notes that at the time planning permission was sought and obtained for the enabling development in the Grounds, the relevant English Heritage guidance was the 2001 edition of their booklet, as the 2008 edition had not been published.

276. As regards the calculation of the conservation deficit, she states the following in her report:

> 15.5. Paragraph 5.4 of the 2001 publication defines the conservation deficit as follows: “In financial terms, the case for enabling development normally rests on there being a conservation deficit. This is when the existing value (often taken as zero) plus the development cost exceeds the value of the heritage asset after development.” Paragraph 5.3 of the 2001 publication states that a development appraisal will usually be carried out in order to ascertain whether enabling development is necessary. The development appraisal should include the Market Value of the completed development and set out deductible costs in order to arrive at a residual figure. If the existing value of the heritage asset together with the repair and other costs such as developers profit exceeds the completed development value thereby resulting in a negative value, there may be a case for justifying an enabling development.
>
> 15.6. Paragraph 5.5 of the 2001 version details how to calculate the market value of a completed scheme, a residential scheme being normally arrived at using the comparison method of valuation. Para 5.6.2 requires the existing value be the fair open market value.
>
> 15.7. Whilst there is no specific reference in this guidance to the date at which these valuations are to be made it would be expected that the valuation inputs are the date the development appraisal and planning justification calculations were calculated in order to give a reflection of the enabling development that was justified as at that date. For example, an appraisal using historic or future

> projected Gross Development Values and build costs may not provide an accurate result. Sensitivity analysis may be carried out in order to demonstrate how changes to the appraisal inputs can affect the appraisal results. For more complex developments future cash flows may be taken into consideration.
>
> 15.8. This creates a difficulty for the taxpayer's approach given that the market value of Bunny Hall will have changed over the period from 3 December 2003 to 16 March 2006 (the range of disposal dates for enabling development plots). This change will have been caused by the physical changes in the immediate locality, changes in market values over that period, and the increase in value due to the restoration of Bunny Hall.

277. Ms Williams notes that there is a discrepancy between the "shortfall" reported to RBC's development control committee of £578,200, and the amounts set out in recital E of the s106 Agreement – the s106 Agreement appears to quantify the matter based on the cost of repairs, whereas the development control committee quantify the matter by reference to market values. She notes also that the report to the development control committee does not give any allowance for the then market value of the Hall (as required by the 2001 English Heritage guidance), but she considers that this may have been on the basis that its market value was zero. But this is then at odds with the calculation of the conservation deficit as calculated in the Appellant's skeleton argument. In any event, Ms Williams had not had sight of any of the professional valuations used for the purposes of calculating the conservation deficit and she said that she could not therefore comment on its quantum.

278. She also disagreed with Mr Garratt's opinion that Mrs Whyte suffered losses from undertaking the enabling development. Whilst Mrs Whyte did sell some land, in her opinion the sale provided her with funds to pay a significant part of the restoration costs of the Hall, and as a result the Hall was significantly improved and more valuable compared with its state when she bought it.

279. Ms Williams reaches the following conclusion on the deductibility of the conservation deficit in computing profit or gains for tax purposes:

> 17.1. The conservation deficit argument is not a representation I have considered previously. It seems to me a concept used to justify enabling development by evidencing a shortfall between the market value of a renovated historic property and the costs of the restoration and repairs required. It does not necessarily follow that the applicant would then make an actual loss. The enabling development is surely there to prevent that occurring. The step following identification of a conservation deficit would be to prepare a development appraisal showing what type or the extent of development is required to finance that deficit. Factors such as a developer's profit are allowable inputs within the development appraisal as evidenced on page 84 of Appendix 22. The guidance states that the profit element is intended to give the investor a fair and reasonable return. It is therefore in my view incorrect to say that the proceeds from the enabling development are solely to cover the conservation deficit. That is of course the overarching aim, but as a result there is an allowed reward and return for any investor. Furthermore, in this particular case an additional building plot was allowed to cover additional costs such as VAT, taxation and costs relating to releasing a covenant.
>
> 17.2. The conservation deficit of £578,200 was never actually crystallised as a loss suffered by the taxpayer. The taxpayer remains in residence at the hall and the fact that an enabling development was allowed prevented such a loss occurring.

> 17.3. Therefore, in my opinion there is no evidence of a conservation deficit related loss actually having been suffered by the taxpayer. No evidence has been provided of any physical loss in actual monetary terms when assessed on a market value basis. Therefore, in valuation terms, I consider there is no real merit in the conservation deficit argument.

280. Mr Southern suggested to Ms Williams that an enabling development could never give rise to a profit or gain, as the yield from an enabling development could never come close to the expenditure incurred on the conservation of the property. Ms Williams said that she could not comment on this, as she "would need a quantity surveyor on board". She also could not comment on Mr Garratt's opinion that RBC had miscalculated the conservation deficit, as she had not considered the calculations, and did not have sufficient information to be able to comment.

Permitted area

281. In her report, Ms Williams sets out the process the VOA adopts when it advises on permitted areas:

> 8.1. […] When advising HMRC upon the matter, the VOA breaks the process down into five basic steps. Responsibility for determining each step is allocated either to HMRC or the VOA depending upon the amount of property expertise required.
>
> 8.2. It is important to follow the steps in order to avoid the confusion and / or an incorrect premature conclusion being arrived at. The steps are as follows:
>
> **Step 1:**
>
> Determine the entity of the "dwelling house", i.e. which buildings qualify for relief under Section 222(1)(a). This is for HMRC to decide, with assistance as required from the VOA.
>
> **Step 2:**
>
> Determine the extent of the "garden or grounds", i.e. which land occupied with the dwelling house can be described as garden or grounds. This is for HMRC to decide, with assistance as required from the VOA.
>
> **Step 3:**
>
> Determine the size of the permitted area, i.e. if the "garden or grounds" are in excess of 0.5 of a hectare, how much of that land is "required" for the reasonable enjoyment of the dwelling house as a residence.
>
> **Step 4:**
>
> Determine the location of the permitted area, i.e. which part of the "garden or grounds" would be the most suitable for occupation and enjoyment with the residence.
>
> **Step 5:**
>
> Apportion the proceeds of the disposal and acquisition cost between the part of the property qualifying for relief and the remainder.
>
> 8.3. Steps 3, 4 and 5 involve a knowledge of the residential property market. Therefore, these steps are considered by the VOA rather than by HMRC. The VOA also provide any necessary valuation apportionments if relief is only available on part of the property disposed.

282. Ms Williams supported HMRC's submission that the Plots had lost their character as "garden or grounds" because they were building plots at the time of their disposal, and therefore could not be enjoyed with the Hall as its garden or grounds.

283. Ms Williams comments in her report on the building cost information included in TFD's work ledgers and on the notes prepared by RBC's building inspectors:

> 9.3. The Building Control Inspector's reports are prepared for statutory purposes, to enable the Council to meet their duty to ensure building work complies with building regulations under the powers of the Building Act 1984.
>
> 9.4. Therefore, they provide a reliable record of the status of the subject land prepared for statutory purposes whilst having no connection with this taxation matter.
>
> 9.5. The taxpayer has not disputed the accuracy of the Building Inspector's reports nor have they provided any evidence for the land being in a different physical condition from that stated in the report themselves.
>
> 9.6. A copy of the Building Control Inspector's reports is provided at Appendix 25. The key dates and details for each plot are as follows:
>
> > 9.6.1. The Building Control Inspector's reports in respect of Plots 1 to 3 were prepared after the dates of their disposal by the taxpayer on 03 December 2003. This was also the date planning permission was granted. In the interests of completeness, I have detailed the earliest entries detailed for plots 1 to 3 within the reports. In respect of Plot 1, the reports show that by 19 January 2004 Plot 1 had been excavated to a level of 2 meters. By 5th February 2004, Plot 2 had damp proof membrane and reinforced mesh installed. By 5 February 2004 Plot 3 had an entry in the report which stated 'F/W Water tested satisfactory'. This presumably related to the foul water drainage installed. These inspections occurred after these plots were sold on 03 December 2003. Therefore, the Building Control Inspector's reports cannot be taken as definitive evidence of their condition at the time of disposal.
> >
> > 9.6.2. Plot 4 was sold on 22 March 2004. The first entry in the Inspector's report for plot 4 is dated 20 February 2004. Inspections recorded that day stated foundation excavations to a depth of 1.8m below reduced level had taken place. A further inspection was made on 17 March 2004. It appears to relate to the construction of a floor slab. Thus, preparatory and ground works had been undertaken on Plot 4 before it was sold on 22 March 2004.
> >
> > 9.6.3. Plot 5 was sold on 8 November 2005. The first entry in the Inspector's report for plot 5 is dated 20 February 2004 and described only as a commencement inspection, no further details are provided. Subsequent inspections were made on 23 September 2004, and 21 and 23 February 2005. These refer to works in progress and excavations to a depth of 1.5m. Thus, significant works had commenced to plot 5 before it was sold some months prior to sale.
> >
> > 9.6.4. Plot 6 was sold on 16 March 2006. The first entry in the Inspector's report for plot 6 is dated 20 February 2004. This was a commencement inspection; no further detail is given. Seven subsequent inspections were made prior to the sale of plot 6. The inspection on 11 January 2006 refers to the construction of 5 courses of brickwork to the internal house wall. The inspection on 18 January 2006 refers to the construction of a suspended reinforced concrete floor slab with drains laid. The inspection report shows that significant construction works had taken place prior to the date of disposal.

> 9.7. Evidence provided to HMRC by the taxpayer in support of a claim for allowable expenditure against tax, show expenditure attributed to the building plots before the first date of planning permission / disposal on 3 December 2003. These include works of physical alteration, such as ground works and machinery expenses. The ground works entries comprise 17 entries between 31 July 2001 and 21 November 2003, where part of the cost was attributed to the building plots. It appears probable that construction work on plots 1 to 3 had been undertaken prior to the dates of disposal.
>
> 9.8. The building control inspector's reports evidences that the clay soil type required substantial excavations in order to construct the dwelling foundations. Seasonal changes can affect clay soils causing them to swell in winter and shrink in summer. Therefore, there are minimum excavation depths depending on the type of clay in the locality and the type of building foundation system used.
>
> 9.9. The Inspector's reports show that the site conditions required foundation excavations across the site were to a minimum depth of 1.2 metres. For many of the plots excavations went deeper than 1.2 metres. For example, plot one required excavations to a minimum of 2 metres into stony soil whilst plot 3 was excavated to 2.1 metres in parts according to the building control inspector's reports (Appendix 20).
>
> 9.10. HMRC do not accept that substantial excavations for permanent dwelling house foundations can be regarded as a temporary work. To reinstate the land as usable garden or grounds would require filling in substantial excavations, and the removal or burying of substantial concrete and brick structures as well as the removal of any drainage works undertaken. The disturbed land would then need to be reinstated as garden or grounds. HMRC's Capital Gains Tax Manual CG64360 refers to a dictionary definition of garden as 'a piece of ground usually partially grassed, and adjoining a private house, used for growing flowers, fruit of vegetables, and as a place of recreation'. Grounds are stated to be larger than a garden but are further described as 'enclosed land surrounding or attached to a dwelling house or other building served chiefly for ornament of recreation'. The physical characteristics of the building plots described above do not appear to fall within these definitions of garden or grounds.
>
> 9.11. The disposals of plots 1-5 are understood to be to connected parties and were not 'arm's length' transactions. The VOA has not been provided with any information concerning the installation of boundaries between the sold plots and the taxpayer's retained land. The creation of a physical boundary marking would usually be expected following a sale of land. The erection of safety fencing may also have been required during construction works. However, I have no clear information on this aspect to be able to comment further and I cannot comment on whether safety boundaries or fenced boundaries were in place as at the date of disposals.

284. Ms Williams' report includes two plans showing the extent of the permitted area for the Hall. One plan is on the basis that I accept HMRC's submission that the Plots have been "denatured" and could not form part of the Hall's Garden and grounds when sold. The other plan assumes that I decide that the Plots were not denatured and could form part of the Hall's garden or grounds. These two plans are included in Annex 2 at figures 5 and 4 but corrected to show the boundary of the Estate as at the dates the Plots were sold. The permitted area is outlined in green.

285. Ms Williams describes the Hall as a substantial property, and in the light of its size and character, she agrees with Mr Garratt that such a substantial property requires a greater permitted area than 0.5 ha.

286. In her report Ms Williams notes the proximity of the "Bunny Hall Barns" to the north of the Hall, the closest of which is 8m from the Hall. She considers that many potential buyers of properties like the Hall may place a great deal of importance on factors such as privacy, exclusivity and security. She notes that when Savills appraised the Hall in February 2000 (as part of David Wilson Homes application for permission for an enabling development), they considered that the Hall had nominal value as a single residence, and David Wilson Homes' development appraisal concluded that redevelopment of the Hall as a single dwelling was not viable. She notes that English Heritage in their letter of 1 July 2002 comment that a higher gross development value might be obtained by converting the Hall into four units rather than a single-family home. She concludes by saying:

> 10.8 I consider that the loss of privacy and size of the hall together with the extent and cost of works to bring the property into repair would be relevant factors to consider when assessing the size of the permitted area required for the reasonable enjoyment of the property.

287. In terms of comparable evidence, Ms Williams says the following:

(1) The fact that Clifton Hall was offered for sale in November 2006 with formal grounds of about 1 ha shows that grounds of about 1 ha were in practice sufficient for the reasonable enjoyment of a very substantial (2523 m^2) property.

(2) She finds the area of gardens and grounds associated with Clifton Hall and Normanton Manor particularly persuasive given both these properties proximity to Bunny Hall. In respect of Clifton Hall the fact that planning permission existed for the development of 14 houses at the date of its sale in 2005 means that the purchasers of the property would have been aware of the eventual loss of privacy. Normanton Manor also has neighbouring properties in separate ownership within close proximity. However, neither of these properties have other houses in third-party ownership as close as 8 meters or so from their windows as is the case with the Hall.

(3) Although the three comparables she puts forward were offered to the market after the dates of disposal of the Plots, this did not affect the weight she attaches to them in terms of evidence. The amount of land required to be occupied as garden or grounds for the reasonable enjoyment of such residences has not, in her opinion, changed in the interim period.

(4) There are other examples of large houses selling with small acreages throughout the UK, such as Chapel Cleeve Manor in Somerset (sold in June 2014 with 2.83 hectares (7 acres) of land) and Invereil House, East Lothian, Scotland (sold with 1.61 hectares (4 acres) of land). However, she prefers the more local evidence available as being the most reliable.

(5) She notes that there are many other large historic houses that were sold with more land than the comparables she uses. However, the sales that have taken place provide evidence that such properties of the size and character of Hall can be sold with relatively modestly sized gardens and grounds.

288. Based on the evidence of her comparables, she concludes that the permitted area of garden and grounds for the purposes of s222 TCGA is between 1 ha and 3 ha (4.94 and 7.41 acres).

289. She states the following in her report about locating the permitted area within the Grounds:

> 12.2. In identifying the 'most suitable' garden or grounds, consideration should be given to existing features such as the lie of the land, mature trees etc. but the location of the permitted area need not be inhibited by the position of existing paths, gates, fences etc. A new layout of the notional grounds may be envisaged. It does not necessarily follow that the part of the garden/grounds which have actually been sold cannot prior to sale form part of the 'required' or 'most suitable' area since commercial motives or financial necessity might well have outweighed the resulting loss in enjoyment of the residence.
>
> 12.3. In choosing the most suitable garden or grounds, no undue concern should be given to odd parcels of land falling outside the permitted area that may appear to become land locked or unusable. This is not important as the test solely has regard to the enjoyment of the residence itself and does not relate to financial or other considerations.
>
> 12.4. Assuming the building plots do not form part of the garden and grounds and are to be excluded, I consider the most suitable area of land to be included in the permitted area to be as outlined green in Appendix 11[3]. This area totals 2.43 hectares (4.94 acres).
>
> 12.5. The reasons I have allocated this land as the most suitable is that it includes the wooded boundary that is sandwiched between the A60 highway and the properties adjacent fronting onto the highway including the Rancliffe Arms public house. This wooded area affords Bunny Hall a degree of privacy to the east. In respect of the northern boundary, I have taken a pragmatic approach and not included the old driveway in the permitted area calculation. I have included all of the other land to the north of the hall including the formal gardens accessed from the indoor swimming pool. I have also included the areas comprising the tennis court, the pavilion and the formal and informal gardens to the south of the hall. I have also included the garaging as it existed at the dates of disposal. I have excluded the areas which now comprise of stables and paddocks to the west. I consider this to be most suitable garden and grounds excluding the building plots.
>
> 12.6. If the building plot areas do form part of the garden and grounds, I consider that the most suitable area of land to be included in the permitted area to be as outlined in green in Appendix 7[4]. The permitted area would be slightly larger at 2.83 hectares (7.14 acres). It should be noted that two and a half building plots would then fall to be within the permitted area.
>
> 12.7. The reasoning for my identification of the ‘alternative basis’ permitted area is in part influenced by the historic plan showing the football field and adjacent woodland boundary as shown on Appendix 10. My colleague, Mr Coster, noted that when he visited the property, ‘the taxpayer stated local villages historically used a gate in the boundary wall and paths within the gardens and grounds, to gain access to the football ground’. The plan at 10 shows a woodland walk through the woods terminating at this area. The separation of the wooded area from the open field area would appear to have been a natural boundary. In addition, the 1991 plan showed that any new access road would be constructed on this football field land area in order to facilitate development. This area of land was therefore treated differently to

[3] Annex 2 – Figure 5
[4] Annex 2 – Figure 4

> the land on the first conveyance plan which included the Hall and formal gardens.

290. During cross-examination, Ms Williams was asked about the area to the north of the Hall included within her plans of the permitted area, given that this included agricultural buildings (such as the piggery, milking house and stables), and could not comprise amenity land. Ms Williams response was that she had reviewed the documents, and the evidence was that the piggery had been demolished, and was ruins, so was not excluded from being the curtilage of the permitted area. She was asked whether it was unusual to have agricultural buildings so close to a house, and her reply was that these agricultural buildings did not exist in 2001. She acknowledged however that the stables did exist. She was then asked whether there was any privacy to lose, but her response was that in 2001, at the time of purchase, there were just neighbours in close proximity.

291. She was asked whether there could be any overlooking of the Hall by the neighbours, rather the Hall (with its tower) overlooks them. Her response was that there was potentially a degree of overlooking. She used digital mapping tools to measure the distance between the Hall and the closest barn conversion, which was 8m. There were neighbours in close proximity – these were Grade II listed barns converted into residential use.

292. She agreed with Mr Southern that Mrs Whyte had achieved something remarkable in restoring the Hall – Ms Williams said that it was a fantastic restoration and improvement.

293. Ms Williams was asked why she excluded the Plots from her permitted area. Ms Williams replied that she was instructed that building plots could not form part of the garden and grounds for the purposes of s222. But she added that she had also included a plan showing the extent of the permitted area if the Tribunal held that the Plots could form garden and grounds.

294. Ms Williams was then questioned about the Plots. She said that her professional opinion was that the Plots were development sites at the time of their sale and could not be garden or grounds. As they could not be garden or grounds, they could not form part of the permitted area.

295. Ms Williams was referred to Mr Garratt's report, where he said that there was no evidence that the Plots had been "fenced off". Ms Williams replied that she disagreed, she would have expected the Plots to be fenced because of health and safety requirements.

296. She was asked about the phasing of the restoration of the Hall and the sale of the Plots. Her comment was that irrespective of the timing requirements for the restoration works on the Hall, the timing of the sale of the Plots was within the control of the seller (subject to the relevant phase of restoration having been completed).

297. She was asked what evidence there was of ground preparation in relation to Plots 1 to 3 prior to their sale. Ms Williams referred to the cost information included in the work ledgers provided by TFD which show that work had been undertaken in relation to the enabling development prior to the sale of Plots 1 to 3. Although the notes of the building inspectors were made after the sale of the Plots, their inspections had been very close after the sale.

298. As regards Plot 4, Mr Southern commented that this Plot (and Plot 5) could be filled in. Ms Williams said in relation to Plot 4 that more than trenches had been dug. Ms Williams was asked about the decision of the Tribunal in *Dickinson* which referred to structures being "permanent or regarded as permanent". Her response was that any building work is potentially reversable – houses can be demolished, and any works of construction can be undone. The question was whether the intention was that the structure was to be permanent.

299. Ms Williams was then referred to the section in her report where she said that she needed to determine the minimum amount for the permitted area. She said that in the light of the decision of the court in *Longson v Baker* "minimum" was not a good word and "required or necessary" would have been better. She agreed that the test for permitted area was an objective test that applied to all occupants of the building.

300. Ms Williams was asked about the comparables that she included in her report.

301. As regards Clifton Hall, Ms Williams disagreed with Mr Southern that because of the expansion of Nottingham, it was now in an urban setting. She agreed that there were differences between the setting of Bunny Hall and of Clifton Hall, and although Clifton Hall was not in an urban setting, it was not at the edge of a village, and Bunny Hall was in a more rural location. She was asked whether she agreed that Clifton Hall had been shorn of land and used to occupy a larger area and that Clifton village used to be a considerable distance from Clifton Hall. Ms Williams replied that she did not know. She agreed that Clifton Hall was considerably larger than Bunny Hall – Bunny Hall's area was 1500 m^2, and Clifton Hall's area was 2500 m^2. She also agreed that it had been divided into two in 2006, but before 2006 it had been one property, that the now communal garden to the south of the property was included with that single property, and there were no other properties in close proximity. In considering her comparables, she placed greater weight on Clifton Hall prior to its division. Mr Southern suggested to her that after 2006 Clifton Hall had been shorn of all land, and was open on all sides, so that nowhere was private. Ms Williams replied that when sold in 2006 it would have had smaller garden and grounds on all sides. She had included the sale particulars after the division to show what was reasonable at the time. It was perhaps small, but it was still within the basket of comparable evidence.

302. Mr Southern suggested that most purchasers of larger properties would want sufficient garden and grounds to be able to go outside and have a cup of coffee without being overlooked. Ms Williams' response was that she did not dispute that this might be desirable, but it is not the test of what is required. It was put to her that Clifton Hall would fail this test, and she said that she did not know. She was asked whether Clifton Hall was a useful comparator, and her response was that as it was arranged in 2006, it was a useful comparator, although there were differences with Bunny Hall, it did show what a large 17-bedroom property required in 2006.

303. As regards Walton Hall, Mr Southern submitted that it was half the size of Bunny Hall. Ms Williams agreed that it was smaller, but it was a Grade II* listed detached property. Mr Southern put it to her that Walton Hall was not detached, as there were two cottages attached to one side – Ms Williams agreed, but she said that the cottages were included in the same title and were sold with Walton Hall with vacant possession. She agreed that there are differences between Walton Hall and Bunny Hall.

304. Mr Southern asked her about the extent of the permitted area for Walton Hall, and in particular whether it was bounded by the ha-ha to the south-west of Walton Hall as marked on the plan in the sale particulars. Ms Williams said that she had not considered the ha-ha and had not seen it. But, for CGT purposes, she would not have agreed that all 7 acres of grounds at Walton Hall was within the permitted area. She would exclude the woodland to the north of the access drive, as the house did not require that area for the use of the property.

305. As regards Normanton Manor, Ms Williams agreed that it was located in a village and was surrounded by other houses. She agreed that it was not identical to Bunny Hall, but that it was a useful comparator as there were other properties reasonably nearby to it. She disagreed with the suggestion by Mr Southern that it showed that you could "get by" with less, rather it evidenced what is reasonably required. The use of comparables in case law is to evidence what area of land is reasonably required by a house. Mr Southern put it to her that Normanton Manor

showed that someone will buy a house with that amount of land. Ms Williams disagreed. She said that there were no properties which were the same as Bunny Hall, but what she could find (and what she was required to find) were properties which were comparable. She agreed that Bunny Hall was different to Normanton Manor, it was smaller than Bunny Hall and was Grade II listed. Mr Southern commented on the large modern extension to the side, and Ms Williams said that there is a case for showing that the extension is different. She was asked whether Normanton Manor was a large house in a plot that was too small. Her response was that there was no evidence to indicate that, rather it was a large house on the land on which it sits.

306. Ms Williams was asked what about the features of Clifton Hall and Normanton Manor that made them comparable to Bunny Hall. Her reply was that they had character and privacy. Mr Southern challenged whether either had privacy, to which her response was that she could not get an exact match. And when challenged that none of her suggested comparables were helpful, her response was that they were the best evidence available to her. Mr Southern suggested that her difficulty in finding comparables was because Bunny Hall is unique, and Ms Williams accepted that it is unique, which is why she chose as comparables properties with similar characteristics.

307. Ms Williams was asked whether the boundary of the permitted area should follow the natural and historic features of the garden or grounds. Ms Williams disagreed, the requirement of the legislation was that the permitted area should be the most suitable part of the garden or grounds. Once you have determined what size the permitted area should be, you then have to determine the most suitable location.

308. Ms Williams confirmed that in her opinion, the access road was outside the permitted area. When I questioned her about this, she said that she would not object to the access road being included within the permitted area.

309. She was asked why her "alternative" permitted area terminated in a straight line at the southern boundary. She said that the southern boundary corresponded to the end of the ha-ha. She acknowledged that historically the ha-ha used to carry on, but it was not there at the time of the disposals. Although she had not inspected the Estate, she was persuaded by the evidence as to the extent of the ha-ha (which included photographs, the redevelopment plans, and notes of meetings). The southern boundary also coincided with the gates installed by Mrs Whyte across the access road that prevented access to the Grounds from the houses on the Plots.

310. Ms Williams was challenged that her opinion had an inadequate evidential basis, and that her conclusions were based on second and third hand evidence that was not before the Tribunal. She did not agree. She had regard to the meeting notes included in the hearing bundle, and she had also read Mr Garratt's report and reviewed the photographs and other material included in the hearing bundle (she apologised that the meeting notes were not included as an appendix to her report, but they were included in the bundle – during re-examination, Ms Williams was taken to the notes of the meeting Mr Coster had in October 2013 included in the bundle, and confirmed that these were the meeting notes that she had reviewed, and which referred to the extent of the ha-ha). Mr Southern criticised her for not having followed the golden rule of "always inspect the hereditament". Ms Williams stated that Mr Garratt's inspection was in 2016, and that no one appears to have seen the Estate prior to the development of the Plots. English Heritage had recommended that a topological survey of features be carried out, but this had not been disclosed, and it would have been useful to have seen it.

311. Mr Southern asked why her suggested southern boundary cut through the lime walk and the Wilderness Garden. Ms Williams replied that the boundary did not exclude the lime walk as it existed prior the enabling development. The lime walk was relocated as part of the enabling development, but she accepted that part of the Wilderness Garden was excluded from

her view of the permitted area. She was also asked why her boundary did not conform to natural or historic features. Her reply was that her boundary included within it the lime walk as it existed prior to the enabling development. She also referred to RBC's report that trees within the Wilderness Garden had decayed. During re-examination, she referred to the historic plans of the Grounds included in the bundle and the features that showed the original path of the lime walk and where it originally took a sharp turn to the east (before the former pond), how this lined up with the features shown on her plans, and how the southern boundary of her preferred permitted area included the whole of the original lime walk.

312. Mr Southern asked Ms Williams why she disagreed with Mr Garratt's opinion of the permitted area. She said that first, part of Mr Garratt's permitted area included land outside the ownership of Mrs Whyte (the triangle of land within the historic ha-ha but below the new access road). Secondly, in her opinion the southern area of the Wilderness Garden was of limited value to the Hall when compared with (for example) the lawned parkland area. Her disagreement with Mr Garratt was more about the location of the permitted area rather than its size. The comparables suggested that the size of the permitted area should be between 1 ha and 3 ha (but less than 3 ha). She considered that the lawns to the south of the formal gardens and to the west of the access road were more suitable than the southern end of the Wilderness Garden – as the owner of the Hall would want control of that area.

EVIDENCE

Generally

313. This appeal relates to matters that occurred some twenty years ago. It is not surprising that given the elapse of time, memories fade and individuals will find it difficult to recall with precision things that happened. For this reason, I find that of the evidence before me as to factual matters, the documentary evidence is the most reliable.

314. That said, two matters stand out when considering the factual evidence. The first is that Mr Whyte was not called to give evidence, and the second is the gaps in the documentary record.

315. Mr Whyte was not called to give evidence, even though he was responsible for dealing with RBC, English Heritage, and the professional team responsible for the renovations to the Hall and the enabling development. In addition, it was his business, TFD, that was responsible for the renovation work and the construction of the new homes on the Plots, and it is Mr Whyte who is the buyer of Plots 1 to 5. I find it striking, for example, that HMP, although instructed by Mrs Whyte, report that they had no contact with her of any kind – but only dealt with Mr Whyte. It was Mr Whyte that provided Mrs Whyte with a loan to finance the purchase of the Estate (although the loan was, according to her, repaid from the sale proceeds of Gotham Moor Farm). Mr Whyte also extends credit to Mrs Whyte in respect of the restoration works undertaken to the Hall and in respect of the costs incurred in "servicing" the Plots. The restoration and construction costs are not invoiced until 30 June 2006, although Mrs Whyte says that she had previously made some payments towards this final bill and Berryman's letter to Mrs Whyte about Mr Whyte's IVA proposal states that as at 21 August 2009 £406,095.45 remains owing to Mr Whyte in respect of the renovation work. And I note also that it is Mr Whyte who leads in any discussions or negotiations with HMRC and the VOA, and Mrs Whyte provides him with authority to act on his behalf.

316. There was no suggestion that Mr Whyte was in any way estranged from Mrs Whyte, or that he was incapacitated from giving evidence. That he has not given evidence in these circumstances is striking, and I infer that important evidence is being withheld. I draw inferences from his absence as a witness.

317. The documentary evidence is incomplete, and it is obvious that important documents are missing. Whilst I appreciate that documents relating to matters occurring twenty years ago may not have been retained or could go missing for entirely innocent and understandable reasons, HMRC opened their enquiries within the time limits of the enquiry windows – and so it would have been clear in 2006 (when the first enquiry was opened) that all relevant documents would need to be kept. Given that many documents have been kept, it is unclear why other documents have not. And given that some of these documents relate to the sale of land, it would be usual for copies (or originals) of the relevant documents to be retained in the archives of the relevant legal advisors. So I do not understand why there are no documents of any kind included in the bundles relating to the sale of Plot 6 to Mr Bailey – not least when at least some of the documents relating to the sale of the other Plots have been included in the bundle. There are also, for example, references in documents to various appraisals (for example there are references to an appraisal undertaken by Chestertons for the purposes of the enabling development), but these are not included in the bundle.

318. As regards the transactions that took place between Mr and Mrs Whyte. Although I can appreciate why the documentation as regards their relationship might be "thin", the documentation included in the bundle is extraordinarily thin indeed, and I cannot believe that there is nothing more.

319. Given the absence of Mr Whyte as a witness, the gaps in the documentary evidence, and (for the reasons I give below) the unreliability of Mrs Whyte's witness evidence, I draw inferences from such reliable evidence that there is (or from the absence of evidence) to plug those gaps.

Mrs Whyte

320. I have acknowledged that given the time that has elapsed between the events that are the subject of this appeal and the hearing, I would expect memory to fade, and that Mrs Whyte might find it difficult to recall events with complete accuracy. But even after taking this into account, I find that Mrs Whyte is not a reliable witness – not because of gaps in her memory or genuinely misremembering events – but because she is knowingly not telling the truth, or is knowingly not telling the complete truth. The evidence indicates that neither she nor her husband are in the habit of always telling the truth.

321. It is very noticeable that Mrs Whyte's story changes depending on the circumstances. An example of this can be seen in relation to the narrative on values and valuations for the Plots – she asserts to HMRC during the course of their enquiries, and to this Tribunal through Mr Southern in his skeleton argument, that the prices paid for the Plots by Mr Whyte and Mr Bailey were informed by valuations. In Mr Whyte's letter of 25 May 2001 he refers to ¼ acre plots having a value of £150,000 (the amount suggested in Knight Frank's letter to him). However GG&P's cost plan of 22 November 2001, nine plots are stated to have a combined value of £1,000,000 (and GG&P subsequently confirm to HMRC that these values were provided to them by Mr Whyte). The report to RDC's Development Control Committee recommends the sale of six plots in order to make up a conservation deficit of £578,000. Ultimately six Plots are sold by Mrs Whyte (admittedly "serviced") for £1,322,812 in aggregate. On 13 August 2010, BDO tell HMRC that the price paid by Mr Bailey for Plot 6 was based on a Knight Frank valuation. HMRC made several requests during the course of their enquiries for copies of these valuations, and eventually on 15 July 2010 issued an information notice under Schedule 36, Finance Act 2008 requiring the valuations for Plots 1 to 5 to be produced. In response, BDO wrote on 18 August 2010 that Mrs Whyte was not aware of any such valuations – yet on 26 June 2012 BDO say in a letter to HMRC that "Knight Frank were engaged in relation to the values of the plots over which the [restrictive] covenant fell. Chestertons were engaged to value the site plots. Mrs Whyte does not have a copy of this valuation and we understand Chestertons

are no longer trading." So, in 2010 Mrs Whyte (through BDO) says there were no valuations (at least as regards Plots 1 to 5), but two years later in 2012 she says that there were.

322. The only valuation produced in evidence at the hearing was Knight Frank's letter of May 2001. And given the manner in which the value is caveated in their letter, I do not consider that it can be relied upon as a proper measure of the market value of a Plot in 2001. And even if it provides a basis for valuing Plots, as it gives an indicative valuation of £150,000 for a bare plot, I find that the price paid by Mr Bailey (£100,000 for a serviced plot) could not have been based on this "valuation".

323. Mrs Whyte in her witness statement says that she had a keen interest in period architecture. She describes the restoration of Bunny Hall as a

> "labour of love" which would satisfy my interest and passion in architecture but also be a beautiful home for my family to live in.

She says that she "fell in love" with Bunny Hall, and that her decision to buy it was "not a rational but an emotional decision". It was on any basis a huge and risky venture – and one that she (literally) lived through, as she and her family moved into the Hall (which was still a building site) on 2 March 2002. During the course of her oral evidence, she said that when she bought the Hall, she did not know how she was going to finance the conservation work – she wanted it so much – and she would have to undertake the work slowly, in stages, as her finances allowed. She described her "excitement" at the grant of planning consent for the enabling development, as this would allow her "to bring Bunny Hall back to its former glory as a family home far more quickly that I originally expected".

324. Given this background, I would have expected her to remember the overall "shape" of events, even if her recollection of precise details were hazy. Yet, despite her passion for architecture and the restoration of the Hall being a labour of love, she denied any knowledge of the discussions and correspondence that Mr Whyte had with RBC, English Heritage, and his professional advisors occurring prior to the purchase by her of Bunny Hall. Indeed, her evidence was that she had not even discussed these matters with her husband before she purchased the Estate. In particular, she denied any knowledge of the pre-purchase discussions and negotiations relating to the possibility of an enabling development and had not discussed this with her husband.

325. It must have been a major decision to sell plots of land within the Estate for the construction of homes, and I do not believe that the fact that this was being discussed by her husband with English Heritage and RBC had not come to her attention. I find it implausible that she had no discussions with her husband about the restoration works and the possibility of an enabling development prior to her purchase of the Estate. I find it equally implausible that she could not remember whether English Heritage made a grant towards the restoration costs of the Hall.

326. The circumstances in which Mrs Whyte came to sell Plot 6 to Mr Bailey are opaque and her explanation is unsatisfactory. How did a supposed stranger come to know about the fact that she was contemplating selling building plots in the Grounds? She cannot provide any account of how and when Mr Bailey contacted her. How did he find her contact details - did he just walk along the road and knock on her door? I find her account implausible. Although she was able to produce in evidence the legal documents relating to the transfer of Plots 1 to 5 to her husband, she was unable to produce any legal documents relating to the sale of Plot 6 to Mr Bailey.

327. Mrs Whyte also has a tendency to stick to an account, even when she is shown documentary evidence that demonstrates otherwise. This can be seen, for example, in relation

to (i) the negotiations that Mr Whyte had with RBC and English Heritage prior to her purchase of the Estate about the likelihood of consent being given for an enabling development, where her response was "he was just asking questions", when it was clear that Mr Whyte was seeking assurances that consent would be forthcoming, (ii) her continuing denial that GG&P were advising on an enabling development, notwithstanding express references to the development in their correspondence, (iii) her denial that TFD's invoice of 30 June 2006 included any of the costs of servicing the plots, notwithstanding the reference to "the houses" (in contradistinction to "Bunny Hall") in the heading and in the body of the covering letter, and (iv) her refusal to acknowledge that the reference to "proposed plots" in the 2001 planning application for the access road was a reference to the building plots for the enabling development.

328. But I find that the reality is that she really did have clear knowledge about events – for example she could remember the precise date on which she moved into the Hall (2 March 2002). And if she had clear knowledge of that date, why did she not have even a vague memory of other matters?

329. When I consider her evidence as a whole, it is apparent is that she denies knowledge of matters that she believes might be unhelpful to her case.

330. I find that I cannot believe everything that Mrs Whyte says, whether in her witness statement or in her oral evidence. I therefore place little weight on her evidence, save to the extent that it is corroborated by other, more reliable, evidence, or where her evidence is self-evidently not contentious.

331. I am supported in this view by the evidence of the notes of a meeting held on 31 July 2007 between Mr Whyte and HMRC (which was also attended by his advisors, Hacker Young). The record set out in these meeting notes indicates that the recital in the s106 Agreement that Mrs Whyte had incurred costs of £1.25 million in the restoration of the Hall as at the date of that agreement was false – and that Mr Whyte (and I infer Mrs Whyte) knew it was wrong. At the meeting, Mr Lewis (of HMRC) said that the business records of TFD only show costs of £1.08 million as having been incurred by TFD as at 30 June 2005. The notes continue:

> It appeared Mrs Whyte has claimed that she had spent money in order to get the enabling planning permission for further development of Bunny Hall. Mr Warsop [of Hacker Young] said that this s106 document was a red herring and if £1.25m was spent on it then the £1.83m final cost would not be accurate.
>
> Lewis pointed out that this agreement was a legal document and it had been signed by Heather Whyte claiming the above. Mr Warsop said that these figures were not in the accounting records and were not accurate. Mr Whyte said he had only submitted this document in order to get enabling planning permission.
>
> Lewis said that neither he nor Heather should sign documents with statements on that are not true. Mr Whyte said that he did not dispute what was written in black and white, but Lewis should be aware that in the real world one has to put these things down on paper to get what one wants. Mr Warsop agreed that Mr Whyte or his wife should not sign things that were not accurate; however, he could not say that the accounts were inaccurate.

There has been no suggestion that these notes do not represent an accurate record of the meeting, and they show that Mr Whyte is prepared to make false statements "in order to get what one wants", and Mrs Whyte is prepared to connive with him.

332. I do not believe Mrs Whyte when she said that she had no knowledge of any of Mr Whyte's business projects generally at the time she was working for TFD in office administration. I find it implausible that someone working in the office of a small firm of

builders (or for that matter, any small business) – even if they are undertaking administrative work – would have no knowledge of any kind of what the business was doing.

333. I do not believe Mrs Whyte when she says that Sunningdale Barn was built as a home for her parents. If this was the case, (i) why was this point not raised by Mr Whyte in the meeting Mr Whyte had with HMRC on 31 July 2007 when he agreed that the conversion and sale of the barn was a trading transaction, (ii) why was the barn purchased in the joint names of Mr and Mrs Whyte, whereas all the other properties purchased as family homes were bought in Mrs Whyte's sole name to insulate them from the potential insolvency of Mr Whyte, and (iii) why didn't her parents move into Sunningdale Barn when the purchase of the Rectory fell through?

334. Nor do I believe her evidence that Sunningdale Barn was sold at the same time to the same purchasers as Gotham Moor Farm. Included in the bundle is a letter to Mrs Whyte from Berryman's (her solicitors) dated 21 August 2009 which addresses Mr Whyte's IVA, and the split in beneficial ownership of their respective assets. Included in the letter is a reconciliation of transactions and payments. This states that Sunningdale Barn was sold on 10 December 2001, the net proceeds of sale were £346,348.50, and that Mrs Whyte remitted £345,000 in partial repayment of Mr Whyte's loan. Gotham Moor Farm and some adjoining land was sold on 8 February 2002. The sale price of the house and land was £325,000 and Mrs Whyte additionally accepted the purchaser's property in part-exchange. The net cash proceeds of sale (after repaying the mortgage) were £177,778.49, of which £105,000 was remitted to Mr Whyte. The part-exchanged property was transferred into Mr Whyte's name, and he retained the proceeds of £221,053.43 from its subsequent sale. Berryman's letter shows that Sunningdale Barn and Gotham Moor Farm were sold separately, and I infer to different buyers.

335. There are inconsistencies in the evidence as regards the sale of Gotham Moor Farm (Berryman's 21 August 2009 letter states that this sale completed on 8 February 2002) and the date on which Mrs Whyte moved into Bunny Hall (in her witness statement she says this was on 2 March 2002, and documents included in the bundle confirm that this is the date on which Mrs Whyte moved into the Hall and started to pay Council Tax there). Where did Mrs Whyte live between 8 February and 2 March 2002?

336. I do not believe Mrs Whyte has a passion for architecture (Georgian or otherwise), or that she fell in love with Bunny Hall and wanted to restore it as a labour of love. All the evidence is that it was Mr Whyte, and Mr Whyte alone, that took responsibility for the restoration of the Hall. HMP state in correspondence with HMRC that they only ever had dealings with Mr Whyte, and never had any contact with Mrs Whyte - even though it was Mrs Whyte who was their client. If the restoration of the Hall really was a labour of love, and architecture was her passion, I consider that Mrs Whyte would have been actively engaged in every aspect of its restoration and the enabling development, and would have had contact with the professional team instructed on her behalf.

337. I do not believe that Mrs Whyte would have purchased Bunny Hall in the absence of any indication from English Heritage and RBC that they would consent to an enabling development in the Grounds. It is clear from Mr Whyte's letter of 25 May 2001 to RBC that he could not justify incurring the costs of restoration without an enabling development.

338. I find also that obtaining consent to undertake an enabling development would provide Mr Whyte with an opportunity to profit from buying the Plots himself, and then building and selling the houses on them (notwithstanding his statements to RBC and English Heritage that TFD were not housebuilders). In the case of Plot 6 (which was sold to Mr Bailey), Mr Whyte would have the opportunity to generate profits from the construction of a house for Mr Bailey on the Plot. I find that Mrs Whyte intended to provide Mr Whyte with an opportunity of

generating profits from the sale of houses on Plots 1 to 5 (and by building a house for Mr Bailey on Plot 6) by selling Plots 1 to 5 to him – otherwise the Plots would have been sold to unconnected third parties as bare sites.

339. It is clear (and I find) that Mrs Whyte would not have been able to afford to acquire and restore Bunny Hall without the active co-operation and financial assistance of Mr Whyte, given her income and assets at the time. Even following the realisations from the enabling development and the sale of her assets, she ended up with an amount in excess of £400,000 remaining outstanding and owing to Mr Whyte for the restoration works on the Hall undertaken by his business. I find that Mrs Whyte would not have been able to afford to restore the Hall if she had had to meet the restoration costs on arm's length terms.

340. Although Mrs Whyte says that she dealt with "all the invoices" sent to her, no such invoices are included in the bundle. There is only one invoice in the bundle, which was from TFD to Mrs Whyte after the conclusion of all the works, which was for all the work done to the Hall and in respect of the enabling development. Berryman's, when advising Mrs Whyte on Mr Whyte's IVA make no mention of any payments other than those made out of the proceeds of sale of Sunningdale Barn, Gotham Moor Farm, and the sale of the Plots, all of which are discussed in this decision. I find that Mrs Whyte could not have "dealt with all the invoices my husband sent me", as there were none. And I find that Mrs Whyte did not make any payments in respect of the renovations to the Hall or in respect of the enabling development, other than the payments made to Mr Whyte out of the proceeds of sale of Sunningdale Barn, Gotham Moor Farm and the Plots.

341. Nor do I consider Mrs Whyte's evidence credible that she could have bought the Estate and lived in it whilst it was restored piecemeal. It is clear that substantial work had to be undertaken in order just to stabilise the Hall and make the existing apartment habitable. Mrs Whyte's evidence (if it is to be believed) is that:

(1) she had to spend "a significant amount of money to make the area in which the family were living comfortable";

(2) at the time planning consent was granted for the enabling development in December 2003 at least £1,250,000 had been spent on restoration of the Hall (this figure is taken from the s106 Agreement); and

(3) this money was spent on not just on making the area in which the family were living "liveable", but on securing the structure of the Hall (such as dealing with the roof, collapsed beams, the electricity supply).

342. In the light of the other evidence available (which I find to be more reliable), I do not believe Mrs Whyte's evidence. I know, for example, from the notes of HMRC's meeting with Mr Whyte, that he lied when he told RBC that £1,250,000 had been spent on restoring the Hall. Nonetheless, I believe that a considerable amount would have had to have been spent to stabilise the Hall and make the apartment habitable - and on any basis, I find that this would have been beyond Mrs Whyte's means. I find that there was no basis on which she could have moved with her family into a decaying and semi-derelict Georgian mansion, and lived there through piecemeal restoration works - and she knew it.

343. It was Mr Whyte who provided the finance to Mrs Whyte for the purchase and restoration in the form of either loans or credit for building work. And it is clear Mr Whyte would not have gone ahead if RBC and English Heritage had not given an indication that consent for an enabling development of some kind would most likely be permitted.

344. For the reasons given above, I do not believe Mrs Whyte's evidence that she had no knowledge prior to her purchase of the Estate of Mr Whyte's discussions and negotiations with

RBC and English Heritage to obtain planning permission to undertake an enabling development in its Grounds. And for similar reasons, I do not believe Mrs Whyte when she says that she was unaware that Mr Whyte had instructed professionals to advise on an enabling development, nor do I believe her statement that GG&P were working solely on the restoration of the Hall (or that their November 2001 costs plan related solely to the Hall), especially in the light of their reference to the enabling development in their letter of 31 October 2001 to English Heritage and the references to the sale of plots in their costs plan of November 2001. I also note that in the TFD work ledgers, there are several line items for GG&P under "other fees" and "surveying" which are allocated entirely to the infrastructure works to the new houses on the Plots, which I find shows that some of GG&P's work related to the enabling development.

345. I do not believe Mrs Whyte's evidence that the application for planning consent (dated 27 September 2001) for the access road did not refer to the enabling development. I find that the reference to the "proposed plots" can only have been to the Plots, and I find that Mrs Whyte knew this at the time she made the application. And the fact that the access road initially extended only to the Plots demonstrates that one of the main reasons for its construction was to service the Plots and the new houses to be built on them. It was only later extended to the Hall (and in the meantime, access to the Hall was via the existing road to the north).

346. I do not believe Mrs Whyte's evidence that TFD's invoice dated 30 June 2006 related solely to the restoration costs incurred on the Hall. The reference to "houses" in the heading and body of the covering letter is clearly in contradistinction to "Bunny Hall", and I find can only refer to the houses being constructed on the Plots. I am supported in this view by the work ledgers, which show that the total costs for work on both the Hall and the Plots equal the amount invoiced (inclusive of a 5% profit margin, as itemised on the work ledgers). I find that the invoice related to work both on the restoration of the Hall and the creation and servicing of the Plots, and that Mrs Whyte knew this at the time the invoice was sent to her.

347. I find the explanations about the need for Mrs Whyte to sell "serviced plots" to TFD (rather than just the bare land) unconvincing. There is no evidence to support Mr Southern's submission that banks would only lend Mr Whyte money to buy serviced plots. As the intention was that the price of the Plots would largely be netted-off against the costs of restoring the Hall, it is not as if significant cash would need to be borrowed by Mr Whyte to buy the Plots anyway. As Mrs Whyte chose not to call Mr Whyte as a witness, I do not have the benefit of his evidence as to the reasons (if this is correct). This is an expert Tribunal, well versed in dealing with property developers and property development, and I find Mr Southern's submission that Mr Whyte could only obtain finance to acquire the Plots "serviced" (in the absence of any supporting evidence) implausible, and I expressed my scepticism about his explanation at the hearing. In any event, the reality was that Mr Whyte financed the costs of servicing the Plots himself prior to purchasing them, as he extended Mrs Whyte credit for the costs he incurred, only recovering these costs either by netting them against the purchase price of the Plots or being paid by her much later (following TFD's invoice of 30 June 2006). I consider that the Tribunal is not being told the whole story about why only serviced plots could be purchased by Mr Whyte.

348. And I do not believe Mrs Whyte when she says that neither she nor her husband knew Mr Bailey prior to his purchase of Plot 6, and that his offer to buy Plot 6 came from out of the blue. This is inherently implausible, for the reasons I have given. I do not believe that he was unknown to her and her husband at the time he made the offer, nor do I believe that he was neither a business associate nor friend of her husband. Nor do I believe Mrs Whyte when she says that she believed that Mr Bailey's offer of £100,000 for Plot 6 represented the open market value of a plot at the time he made the offer. On 23 May 2001 (prior to purchasing the Estate) Knight Frank had advised Mr Whyte that the market value of a ¼ acre plot was around

£150,000 with planning consent (I infer that the valuation is on the basis of bare land, as there is no reference to the plot being "serviced" or to foundations having been dug), and given the relationship between Mr and Mrs Whyte, it is inconceivable that she would have agreed to sell one of the Plots without having first discussed this with Mr Whyte, as it was Mr Whyte who undertook all the negotiations relating to the restoration and the enabling development. For obvious reasons, a serviced plot with mains connections and foundations and floor slab in place (as was Plot 6 at the time of disposal) would have been sold for more than Knight Frank's suggested value. And as the contract for the sale of Plot 6 was not included in the bundle, there is no evidence to corroborate Mrs Whyte's contention that Mr Bailey was required to pay for the construction of the access road, and I do not believe her evidence to this effect.

349. I consider that it is likely (on the balance of probabilities) and I find that Mr Bailey was acquainted with either Mrs Whyte or her husband, and came to know of the proposal to build houses in the Grounds as a result of that acquaintance, and because of his friendship or business relationship with Mr or Mrs Whyte, I find that he was offered Plot 6 at a discount to its true market value, and Mr and Mrs Whyte were aware that the price was a discount to market value at all relevant times. I find that the terms of the sale of Plot 6 constituted a bargain made otherwise than at arm's length.

350. I find also that Mr Bailey did not contribute to the costs of the access road or procured its construction. The evidence in BDO's letter of 26 June 2012 is that the road was constructed in two stages, the first to service the Plots, and the second stage was to continue the road to the Hall. There is no suggestion or evidence that indicates that the short stretch of road from Plot 5 to Plot 6 was built or funded separately.

351. On 15 July 2010 HMRC issued an information notice under Schedule 36, Finance Act 2008 requesting details of all valuations relating to the sale of Plots 1 to 5 inclusive to Mr Whyte. BDO (Mrs Whyte's then accountants) responded on 18 August 2010 stating that Mrs Whyte was not aware of any third-party valuations for these Plots. On 13 August 2010 BDO wrote to HMRC responding to questions asked by HMRC about the pricing of Plot 6:

> The reason the sale was for a lower amount [than Plots 1 – 5] is because the sale was agreed between the parties some significant time previously, indeed prior to planning permission on the basis of valuations undertaken by Knight Frank as part of the English Heritage/planning permission process.

The language here is not wholly clear, but I consider that the most appropriate reading is that the price of Plot 6 was agreed with Mr Bailey prior to planning permission having been given, and on the basis of a Knight Frank valuation of a plot without planning consent. On 28 September 2010 HMRC asked for a copy of Knight Frank's valuations of all the Plots and supporting a low valuation of Plot 6. No response to this request is included in the Bundle, and no submission or reference to any such valuation was made during the course of the hearing. I find that there were no valuations provided by Knight Frank other than the valuations in their 24 May 2001 letter, and these valuations did not (on any basis) include a valuation for Plot 6 without the benefit of planning consent. I find that the statement in BDO's letter is incorrect. As BDO did not provide HMRC with a copy of the valuation, I find that it is more likely than not that they made the statement about the valuation on the basis of instructions given to them by Mrs Whyte and is another indication that she does not always tell the truth.

352. I have doubts about Mrs Whyte's evidence as to the reasons why she sold Stanford Hall, and I believe that her family's difficult financial situation at the time may well have been a contributory factor, given that Mr Whyte's IVA took effect in autumn 2009, and the notes of the meeting with the VOA on 22 October 2013 refer to "the bank being in control of the Hall"

by late 2010. However, as this has no bearing on the issues before me, I make no finding in this respect.

353. Mr Southern placed emphasis in his submissions on the fact that Mrs Whyte kept her financial affairs completely separate from those of Mr Whyte. Mrs Whyte says in her witness statement that she sought to separate her finances from those of her husband and that the reason Bunny Hall was not registered in joint names was to insulate the Hall from the risk of Mr Whyte becoming bankrupt, and I find that this is correct – given Mr Whyte's history of insolvency, this makes sense, and was what happened at Gotham Moor Farm, where the family home was owned solely by Mrs Whyte. Interestingly, the notes of a meeting with HMRC on 31 July 2007 record that Mr Whyte did not agree that this was the reason – but given that it so clearly must have been the reason, Mr Whyte's denial just shows yet again that he does not always tell the truth.

354. However, I consider that whilst Mr and Mrs Whyte might have intended to keep their finances separate, they were not always consistent in doing so. Also, it appears that when Mr Whyte's finances deteriorated, any separation broke down. Mrs Whyte included as an exhibit to her witness statement a copy of a letter to her from Berryman's dated 21 August 2009 about her husband's proposed IVA as evidence of the separation of their financial affairs. I find that, to the contrary, it shows how intertwined their affairs were and became, and that a detailed legal analysis had to be undertaken in order to clarify and separate the ownership of Stanford Hall, a villa in Mallorca, and a boat. Although the letter is exhibited as if it were an audit evidencing the separation of Mr and Mrs Whyte's finances, it is in fact a letter of advice to Mrs Whyte advising her on the risks of claims being made against her by Mr Whyte's creditors, or whether she might have any claims against him:

> You have asked me to review transactions relating to Bunny Hall, Stanford Hall, your villa in Mallorca and the boat, Tickety Boo for the purposes of advising you, first, as to whether Chek has a beneficial interest in any of the assets which could be available to his creditors and, secondly advising you as to whether you have any claim against Chek.

The reconciliation of amounts owed by Mrs Whyte to Mr Whyte in respect of the work done by TFD at the Estate is described as "an estimated statement of account" and has clearly not been verified or audited in any way.

355. The letter analyses the complexities of the way Stanford Hall, the Mallorca villa and their boat was purchased and financed. But importantly, the letter discusses a joint overdraft facility of £700,000 secured on Bunny Hall and the existence of a second charge over Mrs Whyte's interest in Stanford Hall (to secure borrowings of £2,375,000 by Mr Whyte). And although the joint overdraft facility was subsequently repaid by Mrs Whyte (using an overdraft facility in her own name), the existence of a joint overdraft and the second charge shows that Mr and Mrs Whyte's finances were intertwined. The fact also that funds had to be lent by Mrs Whyte to Mr Whyte (and vice versa) shows that they were financially dependent on each other and could not maintain themselves independently. It seems likely, and I infer, that as Mr Whyte's financial situation deteriorated, it became necessary to borrow on the security of Bunny Hall and Stanford Hall in order to support Mr Whyte's business – which meant that the any intended insulation of the ownership of family homes from Mr Whyte's business broke down.

356. One of the aspects of this case that I find strange is the disinterest that Mrs Whyte claims to have had in the restoration of the Hall and the enabling development, but also how all the correspondence is addressed to Mr Whyte, and it is Mr Whyte who undertakes all the negotiations and participates in discussions to the exclusion of Mrs Whyte.

357. In my view the reality is that Mrs Whyte was probably a mere cypher for Mr Whyte, allowing her name to be used by him in an attempt to insulate non-business assets from the risk of Mr Whyte's possible insolvency. The fact that the contract to purchase the Stanford Hall Estate was apparently signed in Mr Whyte's sole name, but Stanford Hall itself and part of its grounds was subsequently transferred to Mrs Whyte is consistent with this explanation (Berryman's letter to Mrs Whyte about Mr Whyte's IVA proposal goes into some detail about this). This is also consistent with the works at Gotham Moor Farm, where the notes of a meeting that Mr Whyte had with HMRC on 6 December 2005 record that it was Mr Whyte who made all the planning applications for the works to Gotham Moor Farm, even though it was owned by Mrs Whyte alone.

Mr Garratt

358. I found Mr Garratt's expert evidence of limited assistance. I find that he blurred the line between expert and advocate (for example, in his criticisms of UK tax law and policy), and that in his reports he sometimes blurred the distinction between facts and assumptions. There were other aspects of his reports that did not withstand scrutiny.

359. To take one example, in his report, Mr Garratt states that it is not possible to take a profit from an enabling development – but his explanation did not withstand scrutiny when he was taken to English Heritage's booklet, which expressly allows a commercial developer to take a profit. An example of Mr Garratt blurring assumptions and facts is his evidence on risk – and who assumed risk in relation to the work done by TFD in preparing the plots. Mr Garratt in his evidence states that this was done at TFD's risk – but when cross-examined on this point it became clear this was just an assumption that he had made. Similarly in the course of his oral evidence he said that the agreement between Mr and Mrs Whyte in relation to the servicing of the Plots was that Mrs Whyte would cover the cost of servicing the Plots – rather than procuring that they were serviced before title was transferred. As with his statement on risk, this can only have been an assumption on his part as there was no evidence of any kind to support this statement.

360. There are other aspects of his report that do not stand up to scrutiny.

361. One example is the triangle of land below the access road, which he includes within his permitted area. First, this area of land was not within Mrs Whyte's ownership – and so could never form part of the garden or grounds of the Hall. Secondly, Mr Garratt places great weight on the boundaries of the permitted area being "enclosed" by physical or natural features, yet Mr Garratt did not consider the fact that the access road (and the associated fencing) was constructed at an early stage (prior to work commencing on the Plots) – so the triangle must have been "fenced out" at the time the first Plot was sold in 2003, irrespective of its ownership.

362. Another example is the absence of detail in his report, so for example in his report he does not state the size of the Hall – whether gross internal area in square metres, or even in the number of bedrooms. And whilst I appreciate that in his opinion there is not exact mathematical relationship between the size of the house and the size of its permitted area, the size of the house must be an important factor in being able to determine the "comparability" of other properties to the Hall.

363. In calculating the “conservation deficit”, Mr Garratt uses the sale prices actually achieved for the Plots but sets these against the appraised anticipated costs of the renovation works to the Hall. He was asked in cross-examination why he did not use the £1.55m actually charged as set out in TFD’s invoice, and his reply was that there might have been other invoices. In fact, the evidence is that there were no other invoices, as the reconciliation appended to Berryman’s letter of 21 August 2009 (about Mr Whyte’s proposed IVA) states that the total expenditure incurred by TFD was £1,550,838.38 – namely the invoiced amount (and I note that

this amount does not differentiate between the costs incurred on restoring the Hall and the works relating to the enabling development). In any event, Mr Garratt's approach to calculating the conservation deficit does not comply with English Heritage's guidance, which states that the conservation deficit (once appraised) should not be adjusted to take account of actual realisation proceeds or actual costs incurred (as this is a risk assumed by the developer).

364. I get the distinct impression from reading Mr Garratt's report that he is acting more as an advocate for Mrs Whyte than as an expert assisting the Tribunal. Looking at the report as a whole, it gives the impression that Mr Garratt's started from the conclusions, and then worked backwards to find reasons to justify his conclusions. In other words, his starting point is that his instructions were to justify the Plots being part of the permitted area and justify the conservation deficit being deductible in computing taxable income or profits. He then drafted his report with reasons that justified these conclusions. This would explain, for example, his choice of comparables and his emphasis on the need for "means of enclosure" – in order to justify the use of the ha-ha as providing the boundary of the permitted area (including the triangle of land not owned by Mrs Whyte).

365. Whilst I do not dismiss Mr Garratt's evidence altogether, it does not carry great weight.

Ms Williams

366. A potential difficulty with Ms Williams' evidence is that it was prepared in a hurry, and she was not able to visit Bunny Hall – this is not to criticise her personally, as these were circumstances entirely beyond her personal control - but I do need to consider the extent to which they could have a bearing on the weight that I attach to her evidence. And this is a factor that she draws to the Tribunal's attention in her report and on which she was cross-examined. I take note that this is also a challenge I face, as normally in these kinds of cases, the Tribunal would have given directions for a site inspection.

367. Mr Southern makes a number of criticisms of Ms Williams' evidence. First, he criticises Ms Williams for relying on the inspection notes of Mr Coster, and for failing to append these notes to her report. Mr Southern is correct to criticise Ms Williams for failing to attach those notes to her report, but as they were included in the bundle of evidence, there was no prejudice caused to the Tribunal by her failure, and Ms Williams apologised for her mistake. Mr Southern goes on to criticise Ms Williams for having placed any reliance on these notes, as they provide no specific inspection information regarding the Hall and the Estate, and in consequence cannot have provided any insight as to the nature and character of the property or the location of the permitted area. I do not agree with Mr Southern's criticism of these notes. Whilst they do not provide a detailed appraisal of the state of the Hall and the Grounds, they do contain a limited amount of useful information, such as the Hall is surrounded on two or three sides by urban/suburban development, that the outlook over open farmland to the east is pleasant, and that the garden to the east (with a fountain) was agricultural land when the Estate was acquired. The notes also confirm that the ha-ha was buried at the time the Estate was acquired, and that it was excavated as part of the renovation works.

368. Mr Southern criticises Ms Williams evidence that the Plots had been "denatured", and that her evidence was that she had been instructed by HMRC that this had happened. This is indeed correct, but Ms Williams goes on in her report to form her own opinion, and reaches the conclusion that HMRC were correct to concluded that the Plots did not form part of the garden and grounds. Mr Southern refers to the response that Ms Williams made to one of his questions about whether the nature of the land had changed – and Ms Williams said that she could only give a "lay person's view", as this was outside her expertise. Mr Southern submits that I have to consider her opinion as to the denaturing of the Plots in this context. However, I understand Ms Williams' response somewhat differently to Mr Southern, which is that Ms

Williams made it clear that she is not an expert on construction, that is not her discipline within the surveying profession. And rightly, Ms Williams qualifies her evidence to that extent. She similarly qualified her answer to another question about the costs incurred in an enabling development saying that she could not comment as she would need a quantity surveyor to review any appraisal. But even though Ms Williams particular surveying discipline might not be construction, she has greater expertise in relation to the development of property than do I, and I do not wholly dismiss her evidence on these matters. And in this context, I note that similar criticisms could be made of Mr Garratt's evidence, given that he qualified as a rural practice surveyor, and he claims no special qualification in relation to construction matters.

369. Mr Southern criticises Ms Williams for stating that construction work had commenced on Plots 1 to 3 prior to their sale, and for her evidence that the Plots were enclosed prior to sale, as there was no evidence to this effect. Ms Williams confirmed that there was no direct evidence as to whether the Plots were fenced, but inferred that they would have been fenced, given the requirements of health and safety regulations. I accept her opinion evidence on this as reliable. As regards the state of the Plots, her evidence was that although none of the Plots had been subject to a building inspection prior to 3 December, the Plots had been inspected shortly thereafter, and in her opinion it was likely that construction work had commenced prior to their disposal – and she backed-up this opinion by reference to TFD's work ledgers, which showed that costs had been incurred on the enabling development prior to 3 December. I consider Mr Southern's criticisms in this regard unwarranted.

370. The events in this appeal took place some twenty years ago, and so the situation "on the ground" is no longer as it was at the time the Plots were created and sold. Given these circumstances, I consider and find that it is unlikely that an inspection by Ms Williams of the Estate could have made any material difference as to her evidence in relation to the size and location of the permitted area for Bunny Hall. And for the same reasons, I find that a site inspection by the Tribunal would also have been of no material assistance.

371. Putting the lack of a site inspection aside, I found that Ms Williams was prepared to compromise or adapt her opinions in response to Mr Southern's cross-examination. She acknowledged that her comparables were not exact, but explained why, and the conclusions she sought to draw from them, taking account of their limitations. I consider that these are hallmarks of an expert who is seeking to assist the Tribunal, rather than acting as an advocate for her clients' case.

372. Overall, I find that Ms Williams is a conscientious expert witness, and I accept her evidence as reliable, subject to the limitations that she herself sets out in her report and the compromises and adaptations made during the course of her cross-examination.

Factual findings

373. On the basis of the evidence before me, I make the following factual findings:

374. Bunny Hall was vacant since around 1990 and had fallen into serious disrepair. From at least 1999 (possibly earlier) anyone interested in acquiring the Hall would be aware that restoring it would be a costly project which would only make economic sense with some form of subsidy – whether a grant, or an enabling development (or a combination of both).

375. Both Mr and Mrs Whyte have experience of construction and property development prior to their involvement in Bunny Hall and the Estate. Mrs Whyte was sole proprietor of Matrix Design and Build, was a director of Union Brothers Ltd, and used to be a partner in TFD until she retired as a partner and the business continued in the sole name of Mr Whyte, with her continuing as an employee earning around £30,000pa. As a co-owner, she was a partner with Mr Whyte in the conversion and sale of Sunningdale Barn. Mr Whyte has a long history in

construction, having been a director of Union Brothers Limited, a partner with Mrs Whyte in TFD, and subsequently the sole proprietor of that business.

376. Mr and Mrs Whyte were introduced to David Wilson Homes (the then owners of Bunny Hall and the Estate) by Savills in 2000 or early 2001 and visited the property.

377. Mr and Mrs Whyte's intention was that if the purchase went ahead, the Estate would be purchased in the name of Mrs Whyte, with the intention that the ownership of the Hall and the Estate would be insulated from any risk of Mr Whyte's insolvency.

378. Mr Whyte entered into negotiations with RBC and English Heritage with a view to obtaining consent (or an indication that consent would be forthcoming) for an enabling development of houses in the Grounds. The purchase of Bunny Hall by Mrs Whyte would only happen if Mr Whyte was satisfied that there were reasonable (or better) prospects of English Heritage and RBC giving consent to an enabling development of new houses in the Grounds.

379. Prior to the purchase, RBC had indicated that they were likely to give consent to an enabling development of new houses in the Grounds – probably in the Wilderness Garden.

380. The precise number and location of the Plots had not been confirmed before Mrs Whyte purchased the Estate.

381. Mrs Whyte could not have afforded to acquire the Estate and fund the renovations to the Hall herself, given that her income was £30,000 pa (approx.) from working as an office administrator, even after taking account of the proceeds realised from the sale of Gotham Moor Farm, Sunningdale Barn, and the Plots.

382. Rather than the non-binding arrangements set out in paragraph 73 of Mr Southern's skeleton, I find that the following undocumented non-binding arrangements ("the Arrangements") were concluded between Mr and Mrs Whyte prior to the acquisition of the Estate in the name of Mrs Whyte:

(1) The Estate was purchased in the name of Mrs Whyte using funds lent to her by Mr Whyte unsecured and interest-free.

(2) The Estate was purchased in Mrs Whyte's name with a view to insulating it from the risk of Mr Whyte becoming insolvent.

(3) Mr Whyte (through his business TFD) would undertake and fund the renovations to the Hall.

(4) Mrs Whyte would transfer "serviced" building plots to Mr Whyte - the precise number and location of the building plots would be determined in the light of the outcome of the negotiation between Mr Whyte and English Heritage/RBC relating to the enabling development. Mrs Whyte did not know what it would entail to make a Plot "serviced", but Mr Whyte did. She was aware that it would mean that all utility services were in place.

(5) By transferring plots to Mr Whyte, Mrs Whyte intended to give Mr Whyte the opportunity to generate profits from building and selling houses on those plots. Mr Whyte (through his business TFD) would undertake the works required to clear the land on which the Plots were located, drain and fill-in the pond, "service" the Plots, and then build new houses for sale on the Plots, and he would benefit from the profits generated by these activities. These profits would then be available to subsidise the costs of renovating the Hall, and would mean that Mr Whyte had the resources to delay invoicing Mrs Whyte for the work done to the Hall (and ultimately, to leave some of the invoiced costs outstanding and owing).

(6) Mrs Whyte would repay the loan made by Mr Whyte for the purchase of the Estate out of the proceeds from the sale of Gotham Moor Farm and her interest in Sunningdale Barn.

(7) Most (if not all) of the consideration for the sale of the Plots would be netted against or paid towards the costs incurred by Mr Whyte in renovating the Hall (plus a small profit margin).

(8) Any balance remaining owing as between Mr and Mrs Whyte following completion of the renovations and sale of the Plots would be left outstanding as an interest-free unsecured debt.

383. The Arrangements were modified from time to time to take account of changes in circumstance, such as the need to make a payment to release the restrictive covenants, and to address the agreement to sell Plot 6 to Mr Bailey, and then build a house for him on the plot.

384. Mr Southern, in his skeleton argument for Mrs Whyte, describes Mrs Whyte's activities relating to the Estate as being "in practice a joint project between Mr and Mrs Whyte", and I agree.

385. Berryman's letter of 21 August 2009 dealing with the IVA proposal states that as at August 2009 (well after the completion of the renovations), the balance remaining owing by Mrs Whyte to Mr Whyte in respect of the Bunny Hall renovation work was £406,095.45, and (subject to the point made below about the proceeds from the sale of Sunningdale Barn) I find that this analysis is correct.

386. Mrs Whyte financed the cost of purchasing the Estate by borrowing from Mr Whyte under an undocumented unsecured interest-free loan. These borrowings were subsequently repaid from the proceeds of sale of Gotham Moor Farm and Sunningdale Barn. It seems likely that the

387. balance owed by Mrs Whyte to Mr Whyte will need to be adjusted in the light of the determination that half of the sale proceeds of Sunningdale Barn accrued to Mr Whyte as joint owner, and so only half of the sale proceeds of Sunningdale Barn could have been used by Mrs Whyte towards discharging Mr Whyte's loan.

388. Mrs Whyte purchased the Estate in July 2001 for £500,000. At the time she agreed to purchase the Estate, she did so with the intention of transferring part of the Estate to Mr Whyte for him to build new homes for sale.

389. At some point – it is not clear precisely when – Mr Whyte agreed ("subject to contract") on behalf of Mrs Whyte to sell Plot 6 (serviced) to Mr Bailey for £100,000. This price was materially less than the market value of Plot 6 – and Mr and Mrs Whyte both knew that it was materially less than market value, as Knight Frank had advised them in May 2001 that the market value of an unserviced building plot with the benefit of planning consent was £150,000. The reason Plot 6 was sold to Mr Bailey for less than its market value was because of the friendship or business relationship that either Mr or Mrs Whyte (or both) had with Mr Bailey. Mr Whyte agreed to build a house for Mr Bailey on Plot 6.

390. Consistent with the arrangements described above, on 27 September 2001 application was made for planning permission for the new access road that would serve both the Hall and the prospective new homes, and consent was given on 14 August 2002. The fact that Mrs Whyte's address is given as TFD (Midlands) Limited on the application form is consistent with there being overarching arrangements between herself and her husband which were managed by her husband.

391. The new access road to the Plots was constructed at some point after the grant of this planning permission, and was completed prior to 18 August 2003. The continuation of the access road beyond the Plots to the Hall was undertaken later.

392. On 10 December 2001, Sunningdale Barn was sold, and the net proceeds of sale being £346,348.50, of which £345,000 was remitted to Mr Whyte in partial repayment of the £500,000 loan to Mrs Whyte.

393. On 8 February 2002, Gotham Moor Farm and some adjoining land was sold. The sale price of the house and land was £325,000 and Mrs Whyte additionally accepted the purchaser's property (Parker Gardens) in part-exchange. The net cash proceeds of sale (after repaying the mortgage) were £177,778.49, of which £105,000 was remitted to Mr Whyte in partial repayment of his loan to Mrs Whyte. The part-exchanged property was transferred into Mr Whyte's name, and I find that this was payment "in kind" on account of the costs of restoring the Hall and repayment of the balance of the loan. Mr Whyte retained the proceeds of £221,053.43 from its subsequent sale on 9 May 2002.

394. On 2 March 2002 Mrs Whyte and her family moved into Bunny Hall. I find that since 2 March 2002 Mrs Whyte and her family used the Hall as their family home and main residence.

395. Since at least 1 July 2002 it had been decided that the location of any enabling development would be in the Wilderness Garden. This is clear from the letter English Heritage write to RBC on 1 July 2002 (referring to the impact of the development on the character of the wooded area – namely the Wilderness Garden), and subsequent correspondence between English Heritage, RBC, Mr Whyte and his professional advisors.

396. At some point (it is not clear when) the existence of the restrictive covenant was brought to the attention of Mr Whyte, and he agreed that £100,000 (£25,000 for each of the four plots subject to the covenant) be paid to release the covenant.

397. Application for planning consent for an enabling development of 9 dwellings in the Grounds was made on 21 May 2002.

398. Chestertons (who had been instructed by RBC and English Heritage) recommended in their report of 13 November 2002 that there was a case for an enabling development of five units in the Wilderness Garden. At a meeting "just before Christmas" 2002, English Heritage and RBC confirmed to Mr Whyte that they would recommend that consent be given to an enabling development of six units in the Wilderness Garden.

399. A revised layout plan with six dwellings was submitted to RBC on 8 May 2003. These were considered by RBC's Development Control Committee on 18 August 2003, which approved the enabling development, subject to conditions – including that Mrs Whyte enters into a s106 Agreement.

400. I recognise that one of the challenges that I face in deciding this appeal is the paucity of evidence about the state of the Grounds between 2001 to 2003. Although I do not believe Mrs Whyte when she says that she did not visit the location of the Plots at any relevant time, she has provided no evidence as to the state of the Grounds at the time the Plots were identified and sold. Mr Whyte (who, as the principal of TFD, is likely to have visited the Plots) did not give evidence. If a topological report had been prepared (as recommended at the time by English Heritage), it was not produced in evidence. There are no photographs of the Grounds at the relevant times included in the bundle. Although Mr Garrett and Mr Coster (Ms Williams' predecessor as HMRC's expert) had both visited Bunny Hall, their visits took place many years after the events in this appeal.

401. The only substantive evidence as to the state of the area of the Grounds occupied by the Plots are brief descriptions in some of the correspondence, the reports of the building inspectors (but the earliest inspection was a short time after the disposal of Plots 1 to 3), TFD's work ledgers and HMRC's spreadsheet.

402. This means that neither Mr Garrett nor Ms Williams can provide any direct evidence as to the state and nature of the Grounds at the time of the disposal of the Plots. Whilst both provided their expert opinion on the likely circumstances of the Plots at that time, their opinions were based on the same limited documentary evidence as is before me - and I have to weigh their respective opinions not only against each other, but also the documentary evidence.

403. I have no hesitation in disagreeing with Mr Garratt's opinion that no work had commenced on the Plots prior to 3 December 2003. The work ledgers and spreadsheet show that work commenced prior to 8 May 2003. The building inspection reports show that some considerable work had been carried out on plots 1, 2 and 3 by the time of the first inspections, which occurred 7 - 12 weeks after the sale date of those plots. I agree with Ms Williams and find that it is more likely than not that the excavation work must have commenced many weeks previously in order to have reached the stage described in the reports (taking account of the fact that it is more likely than not that construction work would have halted between Christmas and the New Year holidays). And given the location of the Plots in the Wilderness Garden, before any excavation work could have commenced, or mains services be brought to the Plots, I find that the site would have had to have been cleared of trees and vegetation, and the large existing pond would have had to have been drained and filled-in.

404. An analysis of TFD's work ledgers and HMRC's spreadsheet shows that there were considerable costs outlay on the Plots prior to 8 May 2003 and I find that this work must have been of a nature to alter the character of the land - the expenses are referred to as groundworks, haulage, plant hire and such like. The ledgers do not distinguish between the six plots, but logically it is likely (and I find) that the initial work would have been to clear the site of trees and vegetation, to drain and fill-in the pond, and to construct the new access road. Work would then continue on the individual Plots, starting with Plots 1 to 3 before moving on to the other Plots.

405. I therefore find that Mr Whyte (through his business TFD) commenced work on the land on which the Plots were located some time prior to 8 May 2003. By the time Plots 1 to 3 were transferred to Mr Whyte on 3 December 2003, the area of land in which the Plots were located had been cleared of trees and other vegetation, and the existing pond was drained and filled. Trenches had been excavated in order to bring mains services to the Plots, a start had been made on digging foundations for the new houses on Plots 1 to 3, and a link road constructed to the new access road to provide vehicular access to the Plots. By the time Plot 4 was transferred, construction on the house on that Plot had progressed beyond foundations to the preparation for pouring the floor slab, by laying the steel reinforcing mesh. The evidence as to the state of Plot 5 is less clear from the reports of the building inspectors, but I find that foundations had been dug. As regards Plot 6, I find that by the time it was transferred, not only was the floor slab ready to be poured, but a start had been made on laying bricks.

406. I also agree with Ms Williams, that in order to comply with health and safety laws and regulations, the construction site (comprising at least the land occupied by the six Plots) would need to have been fenced-off, in order to minimise the risk of any accidents, and I so find. I find that any such fencing would have had to have been sufficient to keep a casual visitor from entering the construction site – and would therefore have had to have been significantly more substantial than just a horizontal wire or tape, although I recognise that it would be temporary

in nature. The fencing would have had to be in place by the time clearance work started on the Plots, and so I find that the fencing would have been in place prior to 8 May 2003.

407. Mrs Whyte's evidence is that she used the "garden area", presumably for recreation, until 3 December 2003 (when the first Plots were sold). I do not believe that her use of the garden extended to the southern part of the Wilderness Garden after 8 May 2003 (and possibly earlier). The southern part of the Wilderness Garden would have been a construction site, with trees being felled, vegetation cleared, and the pond being drained and filled-in. It would have been a dangerous place, and totally unsuited to being used for recreation. When asked in terms whether she used the area of the Plots, she avoided answering the question, saying she didn't understand it. It is implausible that Mrs Whyte would have used that area as a garden or grounds at that time.

408. On 3 December 2003, the s106 Agreement was executed, and RBC issued its planning permission for the enabling development of six houses in the Grounds. The s106 Agreement was in the form summarised in Annex 1. I find that the effect of the s106 Agreement is that Mrs Whyte was obliged to undertake restoration of the Hall in accordance with the terms set out in the schedules to that agreement. The s106 Agreement permits construction work to commence on four Plots immediately upon execution. The agreement provides that construction work on the houses on the other two Plots can only take place in phases, as restoration of the Hall progresses and reaches the benchmarks set out in the agreement. The s106 Agreement places no positive obligation on Mrs Whyte to undertake the enabling development – rather the agreement obliges Mrs Whyte to complete the restoration of the Hall, and restricts her from building new homes on two out of the five Plots pending reaching benchmarks in the restoration work. Contrary to Mr Southern's submissions, I find that there is no provision in the s106 Agreement obliging Mrs Whyte to use the proceeds of sale of the Plots to fund the renovation, although clearly it made financial sense for her so to do. Nor is there any provision in the s106 Agreement preventing sales of the Plots, the restriction is that construction work cannot commence on Plots 5 and 6 until the relevant benchmarks for the restoration of the Hall have been reached.

409. I also find, contrary to Mr Southern's submissions, that there is nothing in the terms of the planning permissions nor in the s106 Agreement that prohibits Mrs Whyte from making a profit. I also find, contrary to Mr Southern's submissions, that enabling developments can be used to make development profits – indeed English Heritage's guidance expressly provides for commercial developers to make a profit from restoration projects. The guidance also makes it clear that any project appraisal used for the purposes of evaluating an enabling development is not re-visited after planning consent is given. This is because English Heritage are concerned to ensure that the developer takes the financial risks for the project – particularly if values fall (or costs increase) – and accept that a developer may make a "windfall" profit if values rise (or costs fall).

410. Plots 1, 2, and 3 were sold to Mr Whyte on 3 December 2003 for £668,900, immediately after the grant of planning consent and the execution of the s106 Agreement. The purchase price was settled as to £500,000 against the cost of the works undertaken by TFD and £168,900 in cash. Out of the cash, £100,000 was paid for the release of the restrictive covenants. After deduction of costs, £66,695.37 was remitted to Mrs Whyte.

411. I find that construction work in respect of the new houses had commenced on these Plots prior to their sale to Mr Whyte. Following the transfer of these three Plots to Mr Whyte, he continued to build the houses on those Plots, which were then sold to third parties.

412. Plot 4 was sold to Mr Whyte on 12 March 2004 for £215,000. It is unclear why the transfer did not take place at the same time as Plots 1 to 3. Of the purchase consideration,

£107,550 was paid in cash and the balance of £107,460 was set-off against money owed to Mr Whyte for construction costs. After deduction of legal costs, the net cash remitted to Mrs Whyte was £105,146.66. Construction works had commenced on the house being built on Plot 4 prior to its sale to Mr Whyte. Following the transfer of this Plot to Mr Whyte, he continued to build a house on the Plot, which was then sold to a third party.

413. Plot 5 was sold to Mr Whyte on 8 November 2005 for £250,000. (Berryman's letter about the IVA proposal gives the date as 13 December, but the TP1 included in the bundle is dated 8 November 2005, and given the conflict of evidence, I prefer the date on the TP1). No cash was transferred. I find that the entire purchase price was set-off against money owed to Mr Whyte for construction costs. Construction works had commenced on the house being built on Plot 5 prior to its sale to Mr Whyte. I find that Plot 5 was transferred as soon as the relevant benchmark in the s106 Agreement had been met. Following the transfer of this Plot to Mr Whyte, he continued to build a house on the Plot, which was then sold to a third party.

414. Plot 6 was sold to Mr Bailey on 16 March 2003 for £100,000, the net proceeds of sale of £98,912.64 was remitted to, and retained by, Mrs Whyte. Construction of the house being built on Plot 6 had commenced prior to its sale to Mr Bailey. I find that the price paid by Mr Bailey did not represent an arms-length price for Plot 6 and it was significantly less than its open market value. I find that the reason Mrs Whyte sold Plot 6 to Mr Bailey at this price was because of his friendship with either Mr or Mrs Whyte (or both), or his business relationship with Mr Whyte. I find that Plot 6 was transferred as soon as the relevant benchmark in the s106 Agreement had been met. Following the transfer of this Plot to Mr Bailey, Mr Whyte continued to build a house on the Plot for Mr Bailey for a fee.

ISSUES FOR DETERMINATION

415. The following issues fall for determination:

Single Overall Transaction

416. As a matter of tax law, can Mrs Whyte treat her disposals of the Plots as part of the same overall transaction as her renovations to the Hall? If so, what are the tax consequences?

417. Mrs Whyte says that her disposals of the Plots were part of a "composite transaction" with her renovations and such a transaction is a single transaction for tax purposes. HMRC disagree; the disposal of the Plots were chargeable events in their own right.

418. Mr Southern submits that Mrs Whyte acquired the Hall and grounds with the intention of restoring the Hall and grounds as her home. She recognised that this could only be financed by sale of the building plots. The Hall and Grounds (including the land on which the Plots were located) were acquired as part of a single property holding. There was not one acquisition of the Hall and grounds and a separate acquisition of the land which became the six building plots.

419. He submits that there was one composite transaction encompassing the restoration of the Hall and the enabling development of the Plots, which were used to finance the restoration, and that the terms of the s106 Agreement are sufficient to show that these elements cannot be separated, whether legally, economically, or factually: "what public policy had joined together, HMRC should not separate". He submits that the sale of the Plots was conditional on the renovation of the Hall, and the renovation of the Hall was conditional on the sale of the Plots. The two were mutually dependent. The pre-condition for both was that Mrs Whyte should not make a profit. The obligation to use the proceeds of sale solely to pay for the renovation project was a planning obligation, imposed through the s106 Agreement. If Mrs Whyte had breached her planning obligations, Mr Southern submits that RBC, as the local authority would have used its enforcement powers, by means of its statutory land charge and obtaining an injunction, to enable it to secure completion of the works.

420. Mr Southern submits that it would be an error to regard the sale of the six Plots as a series of transactions separate from the restoration project. It is not possible to divide the acquisition artificially in the light of hindsight into two assets, house and land to be retained and land to be sold. This, he says, is wholly artificial and designed to manufacture a non-existent tax charge. Mr Southern submits that in consequence:

(1) The restoration of Bunny Hall was not a commercial activity;

(2) No trade with a view to profit could be carried on by Mrs Whyte;

(3) No chargeable gain could be realised by Mrs Whyte;

(4) Mrs Whyte was contractually bound to apply the proceeds of the enabling development to pay for the restoration; and

(5) Had she not done so, the local authority held a statutory charge over the land held by her to secure enforcement of the planning obligation.

421. I agree with Mr Southern that Mrs Whyte acquired the Hall and its Grounds with a view to the restoration of the Hall, which would be financed (at least in part) by the sale of the Plots. I also agree that if Mrs Whyte failed to complete the repairs to the Hall as specified in the s106 Agreement, RBC could enforce her obligation through the local land charge. His other submissions are misplaced and have no foundation.

422. First, Mr Southern does not explain what he means by "one composite transaction" for the purposes of UK income tax and UK capital gains tax. He cites *Balhousie Holdings Ltd v HMRC* [2021] UKSC 11, but that decision of the Supreme Court was concerned not with a single "composite transaction", but with the treatment of "the composite effect of transactions" (a subtle but important distinction) for the purposes of EU VAT law, and whether the composite effect of a sale and leaseback is treated as a single supply or multiple supplies for VAT purposes. Mr Southern does not explain how principles of EU VAT law relating to the identification of supplies can be read across into UK law relating to direct taxes, and I find that they cannot be so read.

423. Further, Mr Southern's submissions that there is some kind of composite transaction in this appeal is in any event misplaced. His submissions about the legal, economic, and factual effect of the various elements of his purported composite transaction are plainly wrong. The s106 Agreement does not place any obligation on Mrs Whyte to utilise the proceeds arising from the sale of the Plots towards the costs of restoring the Hall. Indeed, the s106 Agreement places no obligation on Mrs Whyte to construct houses on the Plots, let alone sell them – the agreement is merely permissive as regards the enabling development. The obligation placed upon her is to restore the Hall: clause 4.3 requires her to have finished the repairs scheduled in the agreement within twelve months. As regards the enabling development, she is under a restriction not to commence construction on two of the six plots until benchmarks in the restoration work have been reached.

424. I would add that there was not even a single contract for the sale of Plots 1 to 5 (inclusive) to Mr Whyte. The evidence is that Mr and Mrs Whyte were prepared to proceed without any formal contracts, and that the Plots were transferred to Mr Whyte without any contracts.

425. Mr Southern is also mistaken in his submission that the terms of an enabling development mean that Mrs Whyte cannot realise a profit or gain. The English Heritage guidance is clear on its face that commercial developers (for whom the guidance is primarily relevant) are expected to make a commercial profit. In addition, the guidance makes it clear that once the enabling development is approved, all commercial risks fall on the developer – and one reason for being allowed to make a profit is because they assume these commercial risks. If values fall (or costs

increase), the developer is bound (under the model s106 Agreement) to complete the restoration work even though he will make a loss. Equally, if values increase (or costs fall), the developer can retain any "windfall" profit.

426. For completeness, I would mention that I find that the principles in *Furniss v Dawson* [1984] AC 474 have no application here. Whilst there clearly is economic linkage between the sale of the Plots and the refurbishment of the Hall, they are not a series of preordained transactions in the sense used in *Furniss*. In any event, in the light of *Barclays Mercantile Business Finance v Mawson* [2005] 1 AC 684, possibly the better formulation of the *Furniss* principle is not to recharacterize a series of transactions into one composite transaction, but rather to adopt a purposive approach to statutory construction.

427. I find that there was no "one composite transaction".

Trading

428. Were the disposals of the Plots adventures in the nature of a trade for income tax purposes? Mrs Whyte says that they were not. HMRC say that they were.

The "badges of trade"

429. The report of the Royal Commission on the Taxation of Profits and Income in 1955 identified six "badges" of trade. Since then, the concept has been refined and a useful summary of the badges of trade is contained in *Marson v Morton* (1986) 59 TC 381 at 391.

430. Although not cited to me, HMRC provide a helpful list of the badges in their Business Income Manual at BIM20205:

Badge	**Description**
Profit-seeking motive	An intention to make a profit supports trading, but by itself is not conclusive
The number of transactions	Systematic and repeated transactions will support "trade".
The nature of the asset	Is the asset of such a type or amount that it can only be turned to advantage by a sale? Or did it yield an income or give "pride of possession", for example, a picture for personal enjoyment?
Existence of similar trading transactions or interests	Transactions that are similar to those of an existing trade may themselves be trading.
Changes to the asset	Was the asset repaired, modified or improved to make it more easily saleable or saleable at a greater profit?
The way the sale was carried out	Was the asset sold in a way that was typical of trading organisations? Alternatively, did it have to be sold to raise cash for an emergency?
The source of finance	Was money borrowed to buy the asset? Could the funds only be repaid by selling the asset?
Interval of time between purchase and sale	Assets that are the subject of trade will normally, but not always, be sold quickly. Therefore, an intention to resell an asset shortly after purchase will support trading. However, an asset, which is to be held indefinitely, is much less likely to be a subject of trade.
Method of acquisition	An asset that is acquired by inheritance, or as a gift, is less likely to be the subject of trade.

Case law on trading

431. Mr Pritchard and Mr Southern referred me to a number of cases which address the motivation of a taxpayer in evidencing the existence of an adventure in the nature of a trade.

432. The facts in *The Hudson's Bay Co Ltd v Stevens* (1909) 5 TC 424 are unusual. The Company was incorporated by Royal Charter in 1670 and was granted an enormous tract of land in the north-west of Canada with very important trading rights. In 1869 the company surrendered to the Crown a large portion of their land (which was subsequently incorporated into Canada). The consideration for the surrender was a cash sum, plus a right to claim one-twentieth of certain settlement grants made by the Crown in the next 50 years. The company sold some of the "consideration" land it received. The question arose whether the profits realised from these sales was trading income or capital gains. The Court of Appeal held that it was capital:

> The real question is whether this money can be regarded as profits or gains derived by the Company from carrying on a trade or business. In my opinion it cannot. The Company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of all estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to resale; the Company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their Charter.

433. *IRC v Fraser* (1942) 24 TC 498 concerns the purchase by a woodcutter of whisky in bond. The whisky was purchased in 1937 and 1938 for £407 and sold in 1940 for £1131. The whisky was purchased with the intention that it be resold at a profit, and the woodcutter had no other intention. This was the woodcutter's sole dealing in whisky. He had no special knowledge of the drinks trade, the whisky was never blended nor advertised, and was at all times held in a bonded warehouse. The General Commissioners held (by majority) that the profit realised was not liable to income tax as the profits from an adventure in the nature of a trade. On an appeal, the Court of Session held that the profits were taxable as an adventure in the nature of a trade, as the woodcutter purchased a large quantity, greatly in excess of what could be used by himself, and which could be turned to no account except by sale.

434. *Leach v Pogson* (1962) 40 TC 585 is a case concerning a serial entrepreneur, who founded and sold driving schools. Between 1954 and 1959 he had founded and sold about 30 such driving schools. The Special Commissioners held that the taxpayer was engaged in a trade of selling driving schools. On appeal to the High Court, it was held that to throw light on the taxpayer's motivation for his first sale, the Special Commissioners were entitled to take into account the subsequent 29 transactions.

435. *Ram Iswera v Commissioner of Inland Revenue* [1965] 1 WLR 663 concerned the purchase of land by Mrs Ram Iswera, who wanted to live near to her daughters' boarding school. Mr Pritchard submits that the facts in this case are similar to those in this appeal, and the decision of the Privy Council is applicable to the facts in this case. In *Ram Iswera*, the owners of the land refused to sell only a part of the site and insisted on selling the whole site for Ra 450,000. Mrs Ram Iswera borrowed money to fund the deposit of Ra 45,000, and divided the site up into twelve building lots – of which she sold nine, and retained three. Of these three, she retained two (on which to build her own home) and she transferred one back to the vendors. The sale of the nine plots realised Rs 434,725 which she used to pay the balance of the purchase price. The transactions were held to be liable to income tax as an adventure in the nature of a trade, and she was required to bring the two plots she retained into account on the basis of their market value. Lord Reid (giving the decision of the Privy Council) said:

> The case is unusual in that on the one hand there are here many of the ordinary characteristics of trading while, on the other hand, the result was that the

> appellant, in addition to making a profit, obtained what she had been seeking —an opportunity to reside near her daughters' school.
>
> […]
>
> Clearly she did not buy the whole site as a capital investment. It was an essential part of her plan that the greater part of it should immediately be sold to sub-purchasers because without the money paid by them she could not have found the money to pay the balance due to the vendor. No doubt she acquired the part of the site which she retained as a capital investment, but in order to acquire it she had to buy, divide, and immediately resell the rest of the site.
>
> The Board of Review, after setting out in their decision facts which they considered relevant, said "in these circumstances, it seems necessary to determine the dominant motivation, and ascertain whether this motivation connotes an adventure in the nature of a trade." Then they examined the facts from that point of view, and they concluded: " We therefore feel that although Mrs. Ram Iswera may have been motivated by a desire to leave her home at Hulftsdorf and reside in a house near St. Bridget's Convent, nevertheless the dominant motivation of the transaction which she ultimately undertook appears to us to be a blocking-up of the premises and the selling of these blocks so as to make a profit on the transaction and obtaining a block for herself below the market value."
>
> […]
>
> Before their Lordships, counsel for the appellant came near to submitting that, if it is a purpose of the taxpayer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In their Lordships' judgment that is going much too far. If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.
>
> In the present case not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its subdivision and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site. The case may be a borderline one in the sense that the Board of Review might have taken a different view of some of the evidence. But, on the facts as found by the board, their Lordships find it impossible to hold that in law they were not entitled to reach their conclusion.

436. *Taylor v Good* (1974) 49 TC 277 concerns the purchase by a grocer of a house with 9.5 acres of grounds. The grocer lived in a small council flat over one of his shops. The house was being sold by auction and was in a bad state of repair, but he knew the property as both of his parents had been in service there, and he had worked their occasionally in the school holidays. The taxpayer put in a bid without expecting it to be successful, but to his surprise it was. At the time he bought the house, he did not know what to do with it. He thought about living there, but having inspected the house with his wife, she rejected living there as impractical. He applied for planning permission to demolish the house, and build 90 homes on the land, and this was eventually granted after a public enquiry. The taxpayer never offered the property for sale, but various unsolicited offers were made to buy the property following the grant of planning permission. The Court of Appeal held that where a taxpayer, not being a property developer, bought a property with no initial intention of selling it for a profit but later took

steps to enhance its value by obtaining planning permission for development, and later sold it for development, those activities did not amount to an adventure or concern in the nature of trade, assessable to income tax. There was a question of whether at some point the taxpayer had appropriated the property from capital to trading stock – but the Court of Appeal found that there was no question in this case of "absorption into a trade of dealing in land of lands previously acquired with no thought of dealing".

437. *Simmons v IRC* (1980) 53 TC 461 concerns the disposal of properties by a liquidator. The company had been incorporated to invest in land, with the intention that the company be later floated. However, because of deteriorating economic circumstances, the company took the decision to liquidate and the properties that it had purchased were sold by the liquidator. The House of Lords declined to interfere with the findings of fact by the Special Commissioners that the company's original intention when acquiring the properties was "primarily for the purpose of creating and retaining investments", and that therefore the profits realised on disposal were capital gains.

438. *Marson v Morton* (1986) 59 TC 381 concerned taxpayers who had never previously bought land but acquired some land with planning permission on the advice of a property developer/estate agent, with the intention of holding it as a medium to long-term investment. Three months later they sold the land at a large profit to a company in which the property developer/estate agent had an interest. The taxpayers had taken no steps in the interim to sell the land. The High Court upheld the decision of the General Commissioners that the disposal was capital in nature – being in the "no-man's land" where different minds could have come to different conclusions on whether there was an adventure in the nature of trade. It was held that the General Commissioners had not misdirected themselves in law given that the case was one of possible investment.

439. *Kirkham v Williams* (1991) 64 TC 253 concerned the purchase by a dealer and demolition contractor of a 10 acre site which included a mill. He bought the site for the purposes of providing an office and storage for his demolition and plant hire businesses. He also undertook some farming on the land. Prior to buying the site, he applied for planning permission to build an agricultural worker's house on the site, and that application and one made subsequently were both refused. A couple of years later, the taxpayer obtained consent for the construction of an industrial/agricultural house, permission was granted for first occupation by the taxpayer, with prior transfer by consent. The taxpayer never intended to live in the house, but for security purposes he occupied the house temporarily, but lived in a caravan on the site in the summer. He then sold the land (together with the house and the mill), and moved to a farm which he had bought. The Court of Appeal (by a 2-1 majority) allowed the taxpayers appeal, overturning the decision of the General Commissioners that the arrangements were trading. The General Commissioners had held that the taxpayer's principal purpose when acquiring the site was to use it for office accommodation and storage. The Court of Appeal held that any subsidiary purpose to develop and sell the land could not be implemented concurrently with the principal purpose, and was therefore not compatible with holding the land as trading stock. In his judgment, Lloyd LJ distinguishes the circumstances in *Kirkham* from those in *Ram Iswera* (at 282):

> Viewing the primary facts and the inferences which the Commissioners could properly draw from them in the light least favourable to the taxpayer he has held that the taxpayer had two purposes in mind, namely, (1) providing himself with storage and office space and (2) developing and selling the site as a whole. But the second purpose could not be implemented concurrently with the first purpose, unlike the position in *Iswera v Commissioner of Inland Revenue* [1965] 1 WLR 663 where, as Lord Reid pointed out, the subdivision and immediate sale of the bulk of the land was an essential part of the

> taxpayer's plan. In the present case, by contrast, the second purpose was severely circumscribed, and its implementation indefinite in point of time. The taxpayer could not develop or sell the site until he had obtained planning permission, and found an alternative site for office space and storage. Nourse L.J. has held that such an intention is insufficient in law to give the property acquired by the taxpayer the character of trading stock.

HMRC's Submissions

440. Mr Pritchard submits that Mrs Whyte was engaged in an adventure in the nature of a trade, and that the profits arising from the sale of the Plots are liable to income tax as trade profits. He submits that the purpose of the enabling development was to realise a profit which could be used to fund the restoration of the Hall.

441. He submits that the sale of the Plots had all the characteristics of trading, and therefore Mrs Whyte was unequivocally trading. Alternatively, if the transactions were equivocal, he submits that, as a matter of fact, they amounted to an adventure in the nature of a trade for a commercial purpose.

442. In considering whether the activities amounted to an adventure in the nature of a trade, Mr Pritchard submitted that the "badges of trade" were a helpful guide in considering the issues. But the main factor in demonstrating whether there was an adventure in the nature of a trade was whether there was an intention to sell the Plots at the time the Estate was purchased.

443. He submits that the following acts support his submission that Mrs Whyte was engaged in an adventure in the nature of a trade:

(1) All of the potential developers and owners of the Hall (including both Mr and Mrs Whyte) recognised that there was a need for an enabling development.

(2) The restoration of the Hall and the enabling development in the Grounds was a project jointly undertaken by both Mr and Mrs Whyte. The arrangements were described by Mr Southern in his skeleton argument as a "barter arrangement: Mrs Whyte would buy the property; Mr Whyte's building firm would carry out the restoration; the restoration work would be paid for by the transfer of the six building plots". Mr Pritchard agreed - it was effectively a joint enterprise between Mr and Mrs Whyte and a key part of that enterprise was the development, and subsequent sale, of the Plots.

(3) Mr Whyte was aware that RBC and English Heritage had previously approved in principle a proposal from David Wilson Homes to convert the Hall into four flats and were in discussion about constructing new houses in the Grounds.

(4) Mr Whyte commenced negotiations and discussions with English Heritage and RBC about an enabling development in the Grounds prior to the acquisition by Mrs Whyte of the Estate, that he told RBC that he would not proceed to buy Bunny Hall without RBC having approved an enabling development, and RBC had indicated that they had no objection in principle to an enabling development prior to the acquisition.

(5) The planning application for the new access road was made shortly after Mrs Whyte had completed the purchase of the Hall, and the application stated in terms that it was to provide access to "the proposed plots for domestic dwellings" as well as the Hall.

(6) Mr Whyte commenced work on the Plots before planning permission had been granted.

(7) The growing sense of urgency for RBC to grant planning consent for the development, as can be seen from the report to RBC's Development Control Committee

in 2003 which states "Whilst the applicant has completed some 75% of the repairs, she is unable financially to complete repairs at present".

444. Mr Pritchard submits that the sale of the Plots is factually distinct from a case where a landowner happens to sell off a small parcel of their land. From the outset, Mr and Mrs Whyte's joint venture was about developing some of the Grounds, and using monies raised from those transactions towards the renovation of the Hall.

445. As regards the badges of trade, Mr Pritchard makes the following submissions:

(1) There were multiple transactions, as six Plots were sold, and there were four separate sale transactions.

(2) The disposals of the Plots were related to the trade which Mrs Whyte otherwise carried on. She was an employee of TFD (a business in which she had previously been a partner), and had previously been the sole proprietor of Matrix Design and Build, and a director of Union Brothers Limited. Mr Pritchard refers to Mrs Whyte's subsequent purchase of Stanford Hall (and the application for planning consent for an enabling development of a spa and retirement home to fund the restoration of Stanford Hall) as similar fact evidence, which informs (per *Leach*) the existence of a trading intention in relation to the Estate.

(3) Mr Whyte was a builder, which was a similar business to housebuilding, and the enabling development was a project carried out jointly with him, and Mr Whyte was appointed as Mrs Whyte's agent for the purposes of carrying out the enabling development.

(4) Development of land is a typical trading asset – Mr Pritchard referred me to the 2008 edition of English Heritage's booklet on enabling developments which states at paragraph 5.13.2: "The activities of commercial developers, including the disposal of property, are normally taxed as trading profits", and as an expert Tribunal, I recognise that this statement is largely correct.

(5) Carried on in a typical way: Mr Pritchard referred to the statement in Mr Southern's skeleton that "the bank would not lend money to TFD […] on the security of unprepared plots".

(6) Source of finance and short-term resale: Mrs Whyte had to sell the Plots in order to realise funds from which to repay Mr Whyte's loan and the costs of the renovation work to the Hall.

(7) The Plots were sold "serviced", and restrictive covenants on four of the Plots had been released.

(8) The land was broken down into the Plots.

(9) Mrs Whyte intended to sell building plots at the time she acquired the Estate in order to fund the costs of restoring the Hall.

(10) Whilst the Hall may have been acquired for personal enjoyment, the land on which the Plots were located was sold to generate cash to fund part of the costs of restoring the Hall.

446. Mr Pritchard submits that the cases of *Ram Iswera* and *Leach* are most relevant to the circumstances in this appeal. In *Ram Iswera* the taxpayer acquired the land with the intention of selling building plots in order to finance a home for her close to her daughters' school. *Leach* is a case which shows that the subsequent actions of a taxpayer can inform the court as to his previous trading intentions.

447. Mr Pritchard distinguishes *Kirkham* from the circumstances in this appeal, as in *Kirkham*, the taxpayer sells all the land he owns, rather than just plots. In addition, there is some discussion in the Court of Appeal about the nature of the findings made by the General Commissioners, and whether the subsidiary purpose of the taxpayer might have been farming, rather than developing and selling the site. Mr Pritchard submits that *Kirkham* is a highly fact-specific decision, and is not of general application. Mr Pritchard submits that *Taylor* is an example of a case where there was no intention on the part of the taxpayer to sell at the outset, unlike the circumstances in this appeal, where Mrs Whyte had an intention to sell the Plots when she acquired the Estate. Similarly, in *Simmons* the taxpayer company had acquired the properties as an investment, however things "went wrong", and the company was liquidated, and the properties sold in the liquidation, and as with *Taylor* there was no trading intention at the time the properties were acquired. He submits that *Hudson Bay* has an unusual fact pattern, and does not set out any general principles of law. Mr Pritchard submits that *Fraser*, as a case concerning whisky purchased in bond for the purposes of resale, has no relevance to the circumstances of this appeal.

448. Mr Pritchard submits that this is a case of unequivocal trading, but if it is a case of equivocal trading, then a greater weight would be placed on intention, but the result would be the same.

Mrs Whyte's submissions

449. Mr Southern submits that on the basis that his "one composite transaction" analysis is correct, the trading issue cannot arise.

450. Mr Southern submits that the older approach to characterising activities as "trade" was to focus on whether the badges of trade were present. He submits that the results of this exercise are often inconclusive. The modern approach has been to move away from the badges of trade approach and consider the relationship between the individual features and the overall transaction.

451. He submits that Mrs Whyte's activities do not amount to trading (nor an adventure in the nature of a trade):

(1) Restoring heritage property is not a commercial activity. That is why applying a commercial test it is cheaper to demolish than to restore.

(2) The property was acquired to make into a family home. That was the basis of the application and grant of the eventual planning permission. That is not a trading intention. The Hall was not acquired to exploit a trading opportunity in the sense of selling the associated land.

(3) The Estate was purchased in a single transaction. There were never two acquisitions, being an acquisition of a site intended for development and a separate acquisition of the Hall and the remainder of the Grounds for restoration as a family home. Given the fact that plot designation was not established, and planning permission was not given until at least two years after acquisition, there was no identifiable putative separate 'trading' asset which could have been acquired at the same time as the Hall and remainder of the estate.

(4) The property was acquired two-and-a-half years before the grant of planning permissions. There was no certainty that planning permission would be granted, or how many plots could be sold. As RBC and English Heritage pointed out, Mrs Whyte was incurring a risk that consent might never be granted.

(5) Mrs Whyte bought the Estate for the purpose of living in the Hall as a family home. The only purpose of selling the plots, and the only reason why it was allowed, was to

fund the renovation. She would have bought the estate even if there were no prospect of securing the necessary planning consents for a development. That is and can only be a capital transaction.

(6) It is a common place that a company which holds property as an investment can sell off part of the property to fund retention of the rest.

(7) It was a precondition of the permission when eventually granted that the project would have negative residual value. This in turn required that all the proceeds from the enabling development should be used to fund the renovation. That is not a trading purpose. Nor was it a matter of choice. It was a matter of legal obligation.

(8) As HMRC say, in their Statement of Case: "the Section 106 Agreement was that the properties were to be developed in tandem with the repairs to the Hall". The sale of the Plots could only take place when English Heritage and RBC were satisfied that a specified stage of restoration work had been completed.

(9) To the extent that Mrs Whyte had mixed motives in acquiring the Estate, it is necessary to assign a transaction to the dominant motivation, which in this case would be capital.

452. Mr Southern submits that the renovation of the Hall is inseparable from the sale of the Plots, which form what he describes as "a concinnity of parts". He submits that the grant of planning permission was conditional on the undertaking of the agreed programme for the restoration of the Hall and grounds, and the sale of Plots was conditional on completion of a prescribed phase of the works, and to separate out the sale of the Plots and regard them in isolation from the larger context is to "enter an Alice-through-the-looking-glass World, in which reality is reversed". He submits that a transaction must be characterised as a whole. He submits that *Ram Iswera* shows that a transaction cannot be analysed as having a capital element in part, and a trading element in part. In consequence, as per *Simmons*, it is classified at the time of its acquisition as either stock-in-trade or as capital, it cannot be both. This is an unequivocal case. Moreover, as the Plots were not identified and planning permission was not given until two years after acquisition, there was no identifiable separate trading asset which could have been acquired at the same time as the Hall and remainder of the Estate.

453. Mr Southern considers that *Taylor* and *Marston* both demonstrate that the intention of the taxpayer at the time of acquisition is determinative, and as Mrs Whyte had no intention to dispose of any part of the Estate at the time she acquired it, the disposal of the Plots were capital in nature. Any segregation of the Estate into capital and a trading elements could only take place at the time the Estate was acquired. But at the time the Estate was acquired, there were no identifiable plots – the identification of the Plots only took place with the grant of the planning permission for the enabling development in 2003. Further, submits Mr Southern, there was no change in Mrs Whyte's motivation subsequently, her intention at the time she acquired the Estate was to live in the property, and this intention never changed. To the extent that there might have been mixed motivations in acquiring the Estate, the dominant motivation prevails for tax purposes, and that motivation must be capital.

454. Mr Southern submitted that the sale of the Plots by Mrs Whyte was just an incidence of the ordinary ownership of land, where a landowner sells part of an estate that he has acquired, just as it was for the *Hudson Bay Company*.

455. Mr Southern objects to the introduction of "similar fact" evidence in relation to Stanford Hall on the basis of *DPP v Boardman* [1975] AC 421, however I agree with Mr Pritchard that *Boardman* (a criminal case) is of no application to evidence in civil cases. And in any event, this Tribunal under its Rules has broad discretion to admit any evidence (irrespective of the

rules of evidence applicable in civil courts) and place such weight on such evidence as it considers appropriate.

456. As regards the badges of trade, Mr Southern makes the following submissions:

(1) This was a one-off transaction.

(2) The disposals of the Plots could not be a trading transaction because there was no trade. Mr Whyte's occupation as a builder cannot be imputed to Mrs Whyte, as their finances were carefully kept separate, she (and not he) was the owner of the Estate, and she was the person who entered into the relevant contracts. To the extent that Mr Whyte executed the arrangements, he did so as Mrs Whyte's agent.

(3) The subject matter (the Estate as a whole) was capable of use for enjoyment or pride of possession.

(4) The disposal of the Plots was not carried on in way typical of trade, because Mrs Whyte had owned the land for two and half years before the first disposal was made.

(5) There was no question of short-term finance being used for a quick turnover. The Estate was acquired by Mrs Whyte borrowing £500,000 from Mr Whyte, which was repaid by the sale of two properties which she had previously owned.

(6) Work was done on the plots - in the sense that Plots 1 to 5 were sold as serviced plots. That simply meant that Mrs Whyte paid Mr Whyte as purchaser (as part of the overall renovation costs) to perform groundworks and site preparation, because he could only acquire serviced plots.

(7) The land that was sold was broken down into lots, but so was the land in *Taylor*. This process was largely out of her hands as the number of plots and their location was determined by RBC and English Heritage.

(8) Mrs Whyte's intention at the time of purchase was for her own occupation and enjoyment.

Discussion

457. In reaching my conclusions on the trading question, I have drawn inferences from the fact that Mr Whyte has not appeared as a witness. He was the person responsible for instructing the professional team, and undertook the negotiations relating to the enabling development with RBC and English Heritage. It was his firm that undertook the construction work. He would be ideally placed to explain in detail the negotiations that took place with RBC and English Heritage, why the RBC officers and English Heritage agreed to recommend that an enabling development should proceed, and when the boundaries of the Plots were identified. The fact that he has not given evidence (and there is no suggestion that he is estranged from Mrs Whyte, or is in any way incapable of giving evidence) gives me grounds to believe that material evidence is being deliberately withheld.

458. Whilst I agree that the more modern approach when considering whether a trade exists is not to place emphasis on the badges of trade, this is perhaps one case where the application of the badges provides some helpful guidance.

Profit seeking motive

459. I find that there was no "profit seeking motive" as regards the Hall itself or the Grounds (excluding the Plots) as Mr and Mrs Whyte intended to occupy the Hall as their family home and enjoy its Grounds – as in fact they did.

460. In his submissions, Mr Southern says that

> Mr Whyte was not the alter ego of Mrs Whyte. Their finances were carefully kept separate. She was the legal owner, and she was the person who entered into the required contracts. He was the executant of the project for Mrs Whyte.

I agree that Mrs Whyte was the legal owner of the Estate, and that she executed the transfers of the Plots (in her capacity as legal owner) (I only have seen the executed transfers of Plots 1 to 3, and Plot 5, but I find that it more likely than not that Mrs Whyte signed the transfers of Plots 4 and 6 in her capacity as the registered proprietor of the land being sold). However, I do not agree that their finances were "carefully kept separate", nor do I agree that Mr Whyte was the "executant of the project for Mrs Whyte". This was clearly a joint project (and Mr Southern himself described it as such), and it was intended that Plots 1 to 6 would be sold so that Mr Whyte could make a profit from building houses on the Plots, and (in the case of Plots 1 to 5) selling them.

461. I find that there was an intention on the part of both of Mr and Mrs Whyte at the time the Estate was purchased that an enabling development would be undertaken in the Grounds, with a view to realising cash which would be used towards the costs of restoring the Hall. The sale of five of the Plots to Mr Whyte would give him the opportunity to generate a profit from building houses on the Plots and selling them. The sale of one of the Plots to Mr Bailey would give Mr Whyte the opportunity to generate profits from constructing a house for Mr Bailey on that Plot.

462. From the perspective of Mrs Whyte, the intention was to generate positive cash-flow from the sale of the Plots (so that the price realised from the sale of the Plots exceeded the costs of servicing the Plots). From the perspective of Mr Whyte, I infer that his intention was that TFD would generate profits from the sale of the completed houses (or, in the case of Plot 6, from the fee charged for constructing a house for Mr Bailey). Although I have no direct evidence to this effect, it would not make any sense for Mr Whyte to intend to make a loss from building and (in the case of Plots 1 to 5) selling the houses.

Number of transactions

463. I find that there were multiple transactions. There were six Plots, of which five were sold to Mr Whyte, and one to Mr Bailey. Three were sold initially in one "block", and the remaining three sold individually.

Nature of the asset

464. The Plots could not yield an income, or give "pride of possession", they were intended to be turned to an advantage through sale.

465. However the Hall and the remainder of the Grounds, were intended to be retained as a family home, and would give "pride of possession".

Existence of similar trading transactions or interests

466. Prior to the purchase of the Estate, Mr and Mrs Whyte jointly engaged in the conversion of Sunningdale Barn into a dwelling, which was then sold at a profit. It was agreed with HMRC that they would both be taxed on the profits from this activity as trade profits.

467. Mrs Whyte was the sole proprietor of Matrix Design and Build, and was subsequently a director in Union Brothers Limited. She was then a partner with Mr Whyte in TFD. She later resigned as a partner in TFD and became an employee in that business. Mrs Whyte says in her evidence that her involvement in the business was in an administrative capacity, and I am prepared to believe that she is not a skilled construction worker. She did not say what administrative tasks she undertook within TFD, but given her salary was around £30,000pa, it clearly was not menial. In the light of her history as a director, partner, and sole proprietor of

various building contractors, I find that she had been engaged in the business of building and construction work over many years. Even if housebuilding is not exactly the same as construction, I find that there are sufficient similarities for it to be a relevant consideration for the purposes of the "similar trading" badge.

468. I find that Mrs Whyte was engaged in similar trading transactions prior to the sale of the Plots.

469. I take note that Mrs Whyte subsequently purchased Stanford Hall. HMRC state in their Statement of Case that she obtained planning consent jointly with Mr Whyte for an enabling development of a spa and retirement home in its grounds to fund the restoration of Stanford Hall. This was not challenged by Mrs Whyte and is a factor that supports my finding that Mrs Whyte engages in similar trading transactions.

470. I consider that it is relevant that the arrangements for the purchase and renovation of the Hall, and the undertaking of the enabling development took the form of some kind of joint venture with Mr Whyte – and that Mr Whyte is himself a builder. However, I place greater weight on the involvement of Mrs Whyte in construction businesses and in the conversion of Sunningdale Barn prior to her acquisition of the Estate.

Changes to the asset

471. I find that the Plots were modified or changed to make them more easily saleable or saleable at a greater profit as follows:

(1) The land allocated for the enabling development was divided into six Plots.

(2) Planning permission for the construction of new houses on the Plots was obtained.

(3) In the case of four of the Plots, payment was made to remove a restrictive covenant which would have prevented the construction of the houses on the Plots.

(4) The land on which the Plots were situated was cleared of trees and other vegetation, and the pond drained and filled.

(5) An access road to the Plots was constructed.

(6) Mains services were delivered to the Plots.

(7) Construction work had commenced on all of the Plots to a greater or lesser extent, depending on the Plot.

The way the sale was carried out

472. The Plots were sold in order to raise cash to meet, in part, the costs incurred by Mrs Whyte for the renovation of the Hall.

The source of finance

473. The Estate was purchased by Mrs Whyte using funds borrowed "temporarily" from Mr Whyte, these borrowings were repaid from the sale of Gotham Moor Farm and Sunningdale Barn. The renovations to the Hall were financed by Mr Whyte, and he was repaid, in part, from the sale of the Plots.

474. I find that the Plots had to be sold in order to pay Mr Whyte for the costs of the renovations to the Hall and the costs of servicing the Plots.

Interval of time between purchase and sale

475. I find that it was always the intention of Mrs Whyte to sell building plots in order to contribute towards the costs of restoring the Hall. This intention was in place at the time she acquired the Estate.

476. I find that the Plots were sold as soon as was reasonably possible. Mrs Whyte agreed verbally to sell Plot 6 to Mr Bailey before planning consent for the enabling development was granted. The first three Plots were sold as soon as planning consent for the enabling development was granted. It is not clear why Mr Whyte deferred the purchase of Plot 4. The other two plots were sold once the benchmarks in the s106 Agreement were met.

Method of acquisition

477. The Estate was acquired by purchase by Mrs Whyte. She intended to live in the Hall as her family home.

Intentions when acquiring the Estate

478. The analysis of Mrs Whyte's circumstances as regards the badges of trade are strongly weighed in favour of there being an adventure in the nature of a trade.

479. However, the analysis of Mrs Whyte's intentions as regards the Plots when she acquired the Estate weighs against there being a trading motive at the time of acquisition. This is because the number and location of the Plots was not determined until after she had acquired the Estate.

480. During the course of submissions, I raised the question of whether the Estate was acquired as trading stock, but the Plots were subsequently appropriated to capital – or whether the Estate was acquired as a capital asset, and the Plots subsequently appropriated to trading stock.

481. Mr Pritchard submitted that the area occupied by the Plots always formed part of Mrs Whyte's trading stock from the time it was acquired, whereas the rest of the Estate was held as a capital asset. Mr Southern's submission was that it was not possible to split the Estate in this way, as the area of the Plots had not been identified at the time the Estate was acquired, and it was not possible for land to be acquired with mixed intentions. Mr Southern cited *Taylor* in support of his submission that laying out sewers or roads on land acquired as capital did not give rise to a trade.

482. I find that Mr Pritchard's approach is incompatible with facts that I have found, given that I have found that the area of the Plots was not identified until May 2003. I agree with Mr Southern, that the acquisition of the Estate must be treated in its entirety as either the acquisition of a capital asset, or as the acquisition of stock-in-trade - it cannot be both. To the extent that the motivation is mixed, the predominant intention prevails.

483. As no land had been identified (other than in the most general of terms) for the enabling development at the time the Estate was acquired, if the disposal of the Plots is to give rise to trade profits, then either:

(1) The whole of the Estate must have been acquired as a capital asset, and the Plots later appropriated to stock-in-trade in May 2003; or

(2) The whole of the Estate must have been acquired as stock-in-trade, and the balance of the Estate was appropriated to capital in May 2003.

In both cases, a tax liability would arise when land was appropriated to (or from) trading stock either under s161(1) TCGA, or under the principles in *Sharkey v Wernher* (1955) 36 TC 275 (not cited to me, although raised by me in the course of submissions). A further liability would arise subsequently on the disposal of the Plots.

484. I would distinguish *Ram Iswera*, as in that case, Mrs Ram Iswera had identified exactly which plots she intended to sell, and which she intended to retain, when she acquired the land, and her intention was clearly to sell the overwhelming majority of the land that she acquired. I

consider that Mrs Whyte's circumstances have greater similarities to *Taylor* and to *Kirkham*, where the intention to sell did not crystalise until some time after the property was acquired.

485. I found *Hudson Bay Company* of limited relevance, given the unusual circumstances in which the relevant land was acquired by the company, and *Simmons* was also of limited relevance given the unusual circumstances giving rise to the disposals. I found *Fraser* of no great assistance – save to the extent that it confirmed (in the vein of motherhood and apple pie) that a person acquiring an asset with the intention of selling it at a profit is probably engaged in a trade (or adventure in the nature of a trade). I also found *Marson* of no assistance, as the High Court had held that there were no grounds to overturn the factual findings of the General Commissioners (it was an *Edwards v Bairstow* type of appeal), and that the factual circumstances were ones where different minds could legitimately have come to different conclusions.

486. As the acquisition of the Estate cannot be split into a trading and non-trading part, and as it cannot be acquired with mixed intentions, I need to determine the predominant intention of the acquisition. I find that the predominant intention of Mr and Mrs Whyte at the time the Estate was acquired was capital in nature – Mr and Mrs Whyte acquired the Estate in order to have a family home. The enabling development, whilst undoubtedly one of the purposes of the acquisition, was subordinate to the predominant intention of acquiring a home. I therefore find that the Estate was acquired as a capital asset.

487. If Mrs Whyte had merely obtained planning consent for the enabling development, and then sold bare plots, as was the case in *Taylor*, I would have found that there was no subsequent appropriation of the area of the Plots from capital to stock-in-trade. Given the comments of Russell LJ in his judgment in *Taylor* that even laying out roads and sewers on land acquired as a capital asset may not give rise to a trade, I would have given Mrs Whyte the benefit of the doubt if the work done whilst the Plots were in her ownership was merely obtaining planning consent (and, possibly, building the access road, and bringing utilities to the Plots). However, the evidence is that Mrs Whyte went beyond this, and she had commenced developing the Plots herself, not just by clearing the site of trees and vegetation, draining and filling-in the pond, installing utilities, and constructing the access road, but also by starting construction work on the houses on the Plots, by digging foundations, and in the case of some of the plots, preparing the floor slab for concrete pouring, and laying bricks.

488. Unlike the taxpayers in *Hudson Bay* or *Taylor*, Mrs Whyte has a history of involvement in construction trades – she was the sole proprietor of Matrix Design and Building, a director of Union Brothers Limited, a partner with her husband in TFD Midland (and subsequently an employee of that business). She had jointly (with her husband) converted Sunningdale Barn. And I find that construction trades are very similar to a housebuilding business.

489. I note in *Taylor* that the findings of the Court of Appeal were predicated on the taxpayer not being a property developer, and that their finding that there was no appropriation of capital to trading stock was on the basis that the property was acquired "with no thought of dealing". In contrast, Mrs Whyte has a history of involvement in construction, and she acquired the Estate with every intention of selling plots in order to fund restoration work to the Hall.

490. I find that the construction works in respect of the houses on the Plots went beyond the mere sale of land as a capital asset. These were not the activities of an ordinary landowner who sells parts of an estate which he acquired by purchase. I find that Mrs Whyte was not merely taking steps to enhance the value of the property in the eyes of a developer who might wish to buy it for development. To the contrary, I find that she had actually commenced developing it herself.

491. I find that the intention to identify and sell building plots as part of an enabling development existed from the time Mrs Whyte acquired the Estate. I therefore find that as soon as the boundaries of the Plots were identified, the Plots were appropriated from capital to trading stock – namely when the plan showing the six Plots was submitted to RBC on 8 May 2003. I find that from 8 May 2003, Mrs Whyte was engaged in an adventure in the nature of a trade – she was actively engaged in constructing houses with a view to selling the Plots with the benefit of the partially constructed houses upon them. In reaching this finding, I adopt the reasoning in *Leach*, that Mrs Whyte's activities in relation to Plots 4, 5, and 6 (particularly Plot 4, where the reinforcement mesh for the floor slab was in place at the time of sale, and Plot 6, where the floor slab had been poured and bricks had been laid), informs her earlier trade activities in relation to the other Plots.

492. I find that a disposal for the purposes of capital gains tax occurred on 8 May 2003 pursuant to s161(1) TCGA.

493. Mrs Whyte is liable to income tax in respect of any subsequent profits generated by her adventure in the nature of a trade in respect of the Plots.

Private Residence Relief

494. I need to consider whether Mrs Whyte can rely upon PRR to relieve all or part of any gain arising on the disposal of the Plots when they were appropriated to stock. Alternatively, if this decision is appealed, and I am found to have been wrong in determining that the Plots were appropriated to trading stock, can Mrs Whyte rely on PRR to exempt her disposal of the Plots from CGT?

495. This gives rise to two sub-issues: (1) were the Plots part of the Hall's gardens or grounds at the time of their disposal ("the Denature Argument"); alternatively (2) were any of the Plots outside of the "permitted area" ("the Permitted Area Argument")?

496. HMRC say that the Plots were not part of the Hall's gardens or grounds at the time of their disposal; Mrs Whyte disagrees. Alternatively, HMRC say that Plots 1 to 3 and half of Plot 4 were outside of the "permitted area"; Mrs Whyte disagrees.

Denaturing

HMRC's Submissions

497. Mr Pritchard submits that it is a question of fact for me to decide whether the Plots (at the time they were sold) formed part of the "garden or grounds" of the Hall for the purposes of s222 TCGA. However, in reaching my decision, I can take account of the views expressed by Mr Garratt and Ms Williams.

498. It is necessary, he submits, to consider the state of the land at the time the Plots were sold. Mr Pritchard referred me to the decision of the High Court in *Varty v Lynes* (1976) 51 TC 419, which concerned a taxpayer who disposed of his home and part of his garden in 1971, and sold the remainder of his garden (with planning permission) in 1972. The question before the court was whether the land sold in the second disposal was part of the garden or grounds of the home for the purposes of PRR. The High Court held that the words "land which he has for his own occupation and enjoyment with that residence as its garden or grounds" referred to the land at the time of the disposal, and as the land in question no longer formed part of the garden or grounds of the home at the time it was sold, it did not benefit from PRR.

499. Mr Pritchard submits that as "garden or grounds" is not defined in the legislation, it is relevant to consider both the natural meaning of that phrase and the guidance produced by HMRC. I was referred to Inland Revenue's Tax Bulletin 18 and HMRC Manuals at CG64360.

500. Mr Pritchard draws my attention to the exclusion from garden or grounds of "land that is fenced off" in Tax Bulletin 18, and "land under development" in CG64360.

501. Mr Pritchard submits that the Plots were not part of the garden or grounds of the Hall at the time they were sold for the following reasons.

502. First, the Plots were being sold as "serviced plots". Mr Pritchard notes that Mrs Whyte said that she was unable to give any evidence about the state of the Plots as she never visited them. If she is to be believed, this would indicate that she was not using the area of the Plots as the garden or grounds of the Hall. And Mr Pritchard poses the rhetorical question – why would she, given that she intended to sell them? Mr Garratt's evidence was that "serviced plots" meant plots that were prepared, with utilities installed. In other words, says Mr Pritchard, work would have been done on the plots before sale. Although Mr Garratt's evidence was that no work had been done on Plots 1 to 3 prior to their sale, neither he nor Ms Williams had seen the Plots at the times when they were sold, so neither could give direct evidence on the point.

503. Ms Williams' evidence was that health and safety legislation would require some kind of fence or barrier to minimise the risk of accidents to casual visitors.

504. Mr Pritchard referred to the work ledgers of TFD which show that works were done to the Plots prior to the first sale of Plots 1 to 3 in December 2003. He also referred to the building inspection reports of RBC on 19 January 2004 (just over a month after the sale) which records that work was in progress, and that Plot 1 had been excavated to a depth of 2m across the plot.

505. Mr Pritchard submits that, on the balance of probabilities:

(1) The Plots had been worked at the time they were sold, and had been excavated; and

(2) The Plots would have been fenced (or some other kind of barrier erected) in order to comply with health and safety legislation.

506. For these reasons, and in the light of HMRC's guidance in Tax Bulletin 18 and CG64360, Mr Pritchard submitted that the Plots no longer formed part of the garden or grounds of the Hall at the time they were sold, because not only were the Plots both a development site and were fenced-off from the rest of the Grounds, but also Mrs Whyte intended to sell the Plots for development into houses.

507. However, submits Mr Pritchard, the existence of a fence is not necessary to show that an area of land does not form part of a house's garden or grounds, as other features can "denature" the land (for example ploughing). He submits that in this case the excavations and other building work "denature" the Plots so that they can no longer be treated as the garden or grounds of the Hall.

508. I was referred by Mr Pritchard to the decision of this Tribunal in *Dickinson v HMRC* [2013] UKFTT 653 (TC). This was a decision made pursuant to s28ZA TMA 1970, which provides for joint referrals to be made by HMRC and a taxpayer to the FTT for the determination of any question arising in the course of an enquiry. For various reasons the taxpayer (Mrs Dickinson) decided to sell part of her garden to a company (Ilex) of which she was a director. Ilex was to construct four houses on the land. The consideration for the sale was to be paid in four instalments, as each house was sold. No deposit was payable on exchange. Mrs Dickinson signed the contract for the sale and sent it (undated) to her solicitors on 19 May 2007 in readiness for exchange. However, the solicitors for Ilex had discovered that the road giving access to the land had not been adopted by the local authority, and exchange did not occur until after confirmation that the road would be adopted had been given, and exchange took place on 27 July 2007. It seems that neither Ilex nor Mrs Dickinson were aware of the delay in exchanging contracts, and she gave Ilex permission to commence groundworks for the

development, which it did on 7 June 2007. The sold land had not been fenced off, as there was a natural demarcation line formed by a hedge. The issue for the FTT to determine was whether the land was part of the garden or grounds of Mrs Dickinson's house on the date that it was sold (being 27 July 2007).

509. The Tribunal decision stated that:

> 25. The expression "garden or grounds" in s 222(1)(b) must be given its ordinary everyday meaning. The words "garden and grounds" can include land not given over to gardens or other common domestic usage and may change from time to time. However for land to lose its character as "garden or grounds", the change must be permanent or regarded as permanent. The change cannot be transient or conditional.
>
> 26. Ilex was allowed onto the land disposed of to start foundation work on an informal basis. There was no agreement allowing Ilex access onto the land to carry out the works. There was no licence to occupy, nor any provision in the (draft) contract affording such rights. At any stage prior to formal exchange of contracts, if for example the access problem had proven to be insurmountable, either party was at liberty to "walk away" from the transaction.
>
> 27. If the transaction had not progressed to completion it could not be suggested that the land had temporarily ceased to be "garden or grounds", only to have reverted to its original status on the transaction becoming abortive.
>
> 28. The conclusion is that Ilex entering onto the land and starting the works did not constitute a disposal of the land. The land therefore retained its character as "garden or grounds" within the meaning of s 222(1)(b) until the time of its disposal on 27 July 2007 when contracts were exchanged.

510. Mr Pritchard distinguishes *Dickinson* from the circumstances of this appeal for the following reasons:

(1) The Tribunal made no factual findings.

(2) Both Mrs Dickinson and Ilex were under the erroneous belief that contracts for the sale had been exchanged.

(3) The FTT had found that Mrs Dickinson and Ilex were both at liberty to "walk away", whereas – on the basis of Mr Southern's submissions at least – Mrs Whyte was bound to sell the Plots under the terms of the s106 Agreement to finance the renovations to the Hall.

(4) The Tribunal held that for land to lose its character as "garden or grounds", the change must be permanent or regarded as permanent. There was no authority given for this statement, which Mr Pritchard submits is not good law. But if it was good law, Mrs Whyte had intended that the character of the Plots be changed, as she required the enabling development to go ahead on the Plots in order to pay for the renovations to the Hall.

(5) The Tribunal appears to have taken the position that there was no permanent (or regarded as permanent) change to the land as a consequence of Ilex commencing groundworks, as the land would have reverted to "garden or grounds" in the event that the transaction had aborted.

(6) Mr Garratt had identified the cessation of "control" as being the point at which land no longer formed part of the garden or grounds of a house. Nothing in the *Dickinson* decision supported this statement.

(7) In any event, Mr Pritchard submits that *Dickinson* as an FTT decision is not binding on me and was wrongly decided.

Mrs Whyte's submissions

511. Mr Garratt's opinion is that as at the date on which the six Plots were transferred by Mrs Whyte, they retained their status as forming part of the garden and grounds of the Hall. This is because the works could have been "tidied away and the land reinstated to its previous condition" and that "the changes on the ground were both transient and conditional". He expands on this in his Summary Opinion as follows:

> […] it is hard to conceive of an irreversible change in the condition of land. Take Fidler's Castle at Honeycrock Farm in Surrey. Mr Fidler erected a mock Tudor castle without first obtaining planning permission and occupied it as his home. He concealed his development behind a stack of straw bales, expecting to become immune from enforcement after four years. The High Court found that the local authority could not reasonably be expected to discover a development concealed in this way and ruled that the four-year period began when the bales were removed to reveal the building. Enforcement action followed and Fidler was required to remove his development. He failed to do so in time, was found in contempt of court and was given a new deadline and a suspended jail sentence. Three days before expiry of the new deadline the planning authority agreed the development had been substantially removed; it applied for a one-month extension to give Fidler time to completely remove the castle's remaining garden boundary and patio. My point is, if a castle can be removed to leave the land exactly as it was before, then any works preparatory to building houses near Bunny Hall could have been reversed ... right up to the point when Mrs Whyte ceded control of the land for enabling development. In July 2016 I gave the example that she might have aborted the enabling scheme at the last moment, having obtained the means to repair the Hall by winning the National Lottery. In the event she did not find alternative means to fund the conservation works and she ceded control of the land. I believe that the land ceased to be permitted area in the moment she ceded control rather than due to any works undertaken on it beforehand, which is on all fours with Dickinson.

512. Mr Southern submits that the Plots had not ceased to be part of the garden or grounds of the house for the following reasons:

(1) Mrs Whyte remained in occupation and control of the land occupied by the Plots until they were transferred to Mr Whyte and Mr Bailey. There was always a risk that completion of the disposals might not occur.

(2) The arrangement between Mrs and Mr Whyte was that Mr Whyte would install the services – namely gas, water, electricity and sewage – at Mrs Whyte's expense. However, there is no evidence that at the time the Plots were sold those services had been installed. The report of the building inspectors is not sufficient to draw any inference that Plots 1 to 3 had been serviced, and the reports for Plots 4 to 6 show that no services were installed at the time of disposal.

(3) Ms Williams' evidence was that she could not provide an expert opinion on the state of the Plots at the point of disposal – only a lay person's opinion. Mr Garratt's expert opinion was that the Plots were not fenced.

(4) There is no building work on land that is not capable of being undone – as in the case of the Fidler's castle example given by Mr Garratt. The work done by Mrs Whyte

was reversible. There was therefore no permanent change to the Plots before their disposal.

513. Mr Southern submitted that *Dickinson* had been correctly decided, and that as no permanent (or regarded as permanent) change had been made to the Plots, they continued to be part of the garden or grounds of the Hall until their disposal.

Discussion

514. As "garden or grounds" is not defined by statute, the phrase must bear its ordinary and natural meaning. Neither party challenged the adoption of the dictionary definition in CG64360 of "garden" as meaning "a piece of ground, usually partly grassed and adjoining a private house, used for growing flowers, fruit or vegetables, and as a place of recreation" nor the definition of "grounds" in both Tax Bulletin 18 and CG64360 as meaning "enclosed land surrounding or attached to a dwelling-house or other building serving chiefly for ornament or recreation". Subject to a couple of caveats, I find that these definitions are appropriate for describing a "garden" and "grounds" for the purposes of s222. My caveats are that (a) gardens may not always be grassed (and personal experience of small courtyard gardens in urban areas suggests that grassed gardens may be less usual than the definition of "garden" in CG64360 suggests); and (b) large gardens may include areas of "wildflowers" or "wilderness" or "woodland", and although these may give the impression of being wild, they may be carefully cultivated to achieve that appearance – and the Wilderness Garden in the Grounds is such an example.

515. The question I have to determine is whether at the time of their disposal, the Plots had been so altered in character ("denatured") that they were no longer capable of forming part of the garden or grounds of the Hall. I agree with Mr Pritchard that is an issue of fact for me to determine. In reaching my findings, I can take into account the views of Mr Garratt and Ms Williams, but their opinions are not in any way determinative.

516. I need to consider the state of the Plots both on 8 May 2003 and on 3 December 2003. On the basis that the Plots were appropriated to trading stock on 8 May 2003, there would have been a deemed disposal for capital gains tax purposes on that date, and I therefore need to consider whether the Plots were denatured to such an extent that they no longer formed part of the garden or grounds on that date. Alternatively, if I am incorrect, and there was no appropriation to trading stock, I need to consider whether the Plots were denatured prior to their disposals to Mr Whyte and to Mr Bailey on and after 3 December 2003.

517. I find that all of the Plots were denatured to such an extent that none of them formed part of the garden or grounds of the Hall - neither on 8 May 2003 nor on 3 December 2003. I find that nothing occurred that would cause any of the Plots to revert to being garden or grounds after either of those dates.

518. In reaching my conclusions on this point, I have drawn inferences from the fact that Mr Whyte has not appeared as a witness. He was the person responsible for instructing the professional team, and undertook the negotiations relating to the enabling development with RBC and English Heritage. It was his firm that undertook the construction work. He would be ideally placed to explain exactly what work was done and when in relation to the enabling development. The fact that he has not given evidence (and there is no suggestion that he is estranged from Mrs Whyte, or is in any way incapable of giving evidence) gives me grounds to believe that construction work commenced on the Plots at a very early stage.

519. Contrary to the submissions of Mr Southern, and the evidence of Mr Garratt, I find that construction work had commenced on the Plots by 8 May 2003, and the construction work was extensive. And my finding is supported by the TFD work ledgers, HMRC's spreadsheet, and

the reports of the building inspectors. While I appreciate that the building inspections as regards Plots 1 to 3 took place after those Plots had been sold to Mr Whyte, I infer not just from the inspection reports, but also from the work ledgers and spreadsheet that construction work must have commenced long before the first building inspection – not least to drain and fill-in the pond and to clear the site of trees and vegetation.

520. The evidence of TFD's work ledgers and the HMRC spreadsheet indicates that construction work in relation to the enabling development commenced on 31 July 2001, and there are 16 entries for groundworks that predate 8 May 2003. There are also entries relating to haulage, landscaping, plant hire and plant fuel that predate 8 May 2003. Of the costs recorded in the work ledgers in relation to the enabling works up until 3 December 2003 approximately 90% appear to have been incurred prior to 8 May 2003.

521. And this evidence is supported by the submissions made to RBC by the Nottinghamshire Wildlife Trust in respect of Mrs Whyte's planning application for the enabling development. Their letters of 23 July 2002 and 16 May 2003 comment on the fact that trees subject to TPOs (and therefore probably in the Wilderness Garden) had been felled without RBC's consent, indicating that tree clearance in the Wilderness Garden had commenced before 8 May 2003.

522. The inspection reports evidence excavation on the Plots. For example, Plot 1 had been "excavated to a level across the plot" to 2m depth at 19 January 2004. I infer that construction work must have started many weeks before the first inspection date in order for the excavations to have reached this depth. I find that excavation commenced on Plots 1 to 3 before 3 December 2003 – especially as it is likely that no construction work would have taken place between Christmas and the New Year holidays. The reports of the building inspectors clearly show, and I find, that excavation work on the other plots had commenced before they were transferred by Mrs Whyte to Mr Whyte and Mr Bailey.

523. I disagree with Mr Garratt's evidence that the Plots were not fenced. There is no direct evidence either way as to the fencing of the Plots. But on the balance of probabilities, I find that it is more likely than not that the southern end of the Wilderness Garden would have been fenced off from the remainder of the Grounds by the time construction work started, in order to prevent the risk of accidents, to comply with health and safety legislation and regulations. This would have had to have been reasonably substantial fencing in order to keep casual visitors away from the construction works. I therefore find that the southern area of the Wilderness Garden (including the area of the Plots) would have been fenced-off from the remainder of the Grounds by no later than 8 May 2003.

524. I find that the southern part of the Wilderness Garden (including the Plots) ceased to form part of the garden or grounds of the Hall by 8 May 2003 at the latest. I find that by 8 May 2003 at the latest, the southern part of the Wilderness Garden (including the Plots) was no longer being used for growing flowers, fruit or vegetables, it was no longer a place of ornament nor for recreation. It was a construction site. And I would have made this finding even if the area had not been fenced off from the rest of the Estate.

525. I agree with Mr Southern that there is no building work capable of being undone – even a nuclear power station is capable of being decommissioned, and its site eventually made safe and landscaped (I happen to be aware that Queen Mary College used to operate a nuclear reactor for research purposes which was located on the site of what is now the Olympic Park in London). But I find that this is an irrelevant consideration. If I obtain planning consent and build a commercial workshop at the bottom of my garden for use in my business (or to be rented to a third party), that part of my land will no longer form part of the garden or grounds of my house, notwithstanding that the workshop can subsequently be demolished, and that area of land restored to being garden again. On Mr Southern's submissions, the reference in

Dickinson to a change being "permanent or regarded as permanent" becomes meaningless, as nothing is permanent (I am tempted to include a biblical reference).

526. Clearly there are limitations to the extent to which building work causes land to cease to be garden or grounds. Constructing a summer house, an ornamental pond, or even a substantial monument or "folly" in a landscape garden, will not "denature" the relevant land, as the intention is that the land will continue to be enjoyed for ornament or recreation as part of the garden or grounds of the house once the work is completed.

527. But in this case, I find that there was never any intention that the Plots would form part of the Hall's garden or grounds once the Plots had been identified and construction had started. I find that Mr Garratt's evidence that the "changes on the ground were both transient and conditional" is wrong for the following reasons:

(1) Mr Whyte commenced the work to clear the area, drain and fill-in the pond, and build houses on the Plots whilst the Plots were in his wife's ownership and at her cost, with the clear understanding that Plots 1 to 5 would be transferred to him in due course (and Plot 6 transferred to Mr Bailey);

(2) Mr Whyte continued and completed building houses on those Plots after Mrs Whyte had disposed of them (whether to him or to Mr Bailey); and

(3) Mrs Whyte always had the intention of selling the Plots for development into houses.

528. I consider that *Dickinson* is an example of a hard case making bad law, and in consequence it should be restricted to its own particular facts. If the actual facts had been in accordance with the genuine and *bone fide* beliefs of Mrs Dickinson and Ilex (in other words, contracts had been exchanged by the time Ilex commenced its building works), Mrs Dickinson would probably have been entitled to PRR. It was only due to a series of unforeseen problems that not only was exchange delayed, but also that the delay was not brought to Mrs Dickinson's attention. I believe that the Tribunal in *Dickinson* was seeking to do justice to Mrs Dickinson in the unfortunate circumstances in which she found herself by stretching the meaning of "garden or grounds". Contrary to Mr Pritchard's submissions, it appears from the decision that Mrs Dickinson gave evidence to the Tribunal, and they did make factual findings. Nonetheless, I find that the basis on which the Tribunal reached its conclusions in *Dickinson* do not apply in Mrs Whyte's circumstances.

529. In any event, I am not bound by its *ratio*. But, to the extent that I need to distinguish *Dickinson*, I would do so on the basis that Ilex had commenced construction on the land in the erroneous belief that it was already under its ownership (or under contract to be sold to it). In contrast, in the case of Mrs Whyte, the building work undertaken on the Plots prior to sale was done at her request and expense in order that she could sell the Plots as "serviced".

530. In the light of the evidence of the TFD work ledgers and HMRC's spreadsheet, I find that construction work must have commenced in the southern part of the Wilderness Garden before 8 May 2003, in order to clear the land of trees and vegetation, to drain and fill-in the pond and to construct the access road. I find that health and safety legislation would require this area to be fenced off from the rest of the Grounds to prevent casual visitors from accessing this area.

531. As the Plots did not form part of the garden or grounds of the Hall, I find that the disposal of the Plots does not benefit from PRR – whether on an appropriation to trading stock on 8 May, or (if I were to be found to have been wrong in relation to the appropriation of the Plots to trading stock) alternatively on the disposal of the Plots to Mr Whyte and Mr Bailey.

Permitted area

532. However, in the event that this decision is appealed, and I am found to have been wrong in my findings on "denaturing", as I heard extensive evidence and submissions on the issue, I have considered what the "permitted area" of the Hall would have been, in the event that the Plots did form part of the Hall's garden or grounds at the time of disposal.

The law

533. Section 222 sets out a series of questions that need to be answered in order to determine the permitted area, namely:

(1) Does the size and character of the dwelling house require more than 0.5 ha of garden or grounds for its reasonable enjoyment as a residence?

(2) If more than 0.5 ha is required, what is the size of the area that is so required?

The size of the "permitted area" having been determined, the next quesiton only arises if the area of dwelling house's garden or grounds exceeds the permitted area. In that case:

(3) What part of the garden or grounds (up the permitted area) would be the most suitable for occupation and enjoyment with the residence?

534. The determination of the size of the permitted area was considered by Evans-Lombe J in *Longson v Baker* (2000) 73 TC 415, who held that Du Parq J's findings in *re Newhill CPO* [1938] 2 All ER 163 (relating to a similar phrase used in the Housing Act 1936) provided useful guidance (at 425):

> It is clear from the words "required for the reasonable enjoyment" in subs (3), that the test to be applied as to what any larger permitted area can consist of over the 0.5 hectares allowed by the section, is an objective test. In my judgment it is not objectively required, i.e. necessary, to keep horses at a house in order to enjoy it as a residence. An individual taxpayer may subjectively wish to do so but that is not the same thing.
>
> The taxpayer's arguments would, it seems to me, mean, that the permitted area might vary in accordance with the interests of the taxpayer family occupying the dwelling-house at the date of its disposal. In this case, if the Longsons' interest in horses were to change and the stables were adapted to serve as garages in place of stables to house, for instance, a collection of antique motorcars, the argument supporting the suggestion that 18 acres were required as a permitted area, would immediately disappear.
>
> It is apparent that if the taxpayer's submissions in this case are endorsed by this Court, there will be a substantial increase in the demand for horses amongst the owners of houses with grounds which have development potential. In my judgment, this cannot have been the statutory purpose of the legislature in legislating s 222 subs (3).
>
> In my judgment the Commissioners' approach to assessing the permitted area under s 222(3) in respect of this house, cannot be faulted under the statutory provisions. The Commissioners obtained assistance in arriving at their conclusions from the judgment of du Parcq J. in the case of *Newhill Compulsory Purchase Order, 1937, Payne's Application* [1938] 2 All ER 163, a case decided on 9 March 1938 under the provisions of s 75 of the Housing Act 1936. The material statutory provision being this:
>
> > "Nothing in this Act shall authorise the compulsory acquisition for the purposes of this part of this Act of any land, which at the date of the compulsory purchase order, forms part of any park, garden, or pleasure

> ground or is otherwise required for the amenity or convenience of any house."
>
> In the final passages of his judgment in that case, du Parcq J. said this:
>
> "That leaves only the question as to whether it was required for the amenity of the house or the convenience of the house, and that, whatever the local authority may have done or failed to do, the Minister has formed the opinion, as I understand Mr. Wrigley's affidavit, that the land was not required either for the amenities or for the convenience of the house. I call attention to the word 'required'. The use of it raises a question of fact which is necessarily a difficult one. Again, I do not wish to repeat myself, but one has to remember that it is pleasant, and, one may say, both an amenity and a convenience, to have a good deal of open space round one's house, but it does not follow that that open space is required for the amenity or the convenience of the house. 'Required', I think in this section, does not mean merely that the occupiers of the house would like to have it or that they would miss it if they lost it, or that anyone proposing to buy the house would think less of the house without it than he would if it were preserved to it. 'Required' means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury will be done to the property owner and a question like that is obviously a question of fact. The Minister, having made up his mind about it, as far as I can tell, on proper materials, and without misdirecting himself as to the true point at issue, it is not for me to interfere, when there are no materials upon which I can interfere."
>
> It seems to me that there is a sufficient analogy between the statutory provisions which du Parcq J. was considering in the case which I have just cited and those of s 222(3), that it was entirely legitimate for the Commissioner to take guidance from this authority. The authority of course highlights the central argument that I understand would have been made by the Revenue in this case, namely that what the Commissioners were here engaged in was a enquiry as to fact and what resulted was a finding of fact, not a question which is reviewable in this Court. The Commissioners were here finding as a question of fact what the permitted area of land should be as being an area required for the reasonable enjoyment of this house as a residence.

535. I agree with the submission made by Mr Pritchard that the statutory test requires me to consider whether the area of land is such that "without it there would be such a substantial deprivation of amenities or convenience that a real injury will be done to the property owner".

The experts' opinions

536. The size and location of the permitted area is a question of fact, which is determined by reference to comparables with the assistance of expert evidence.

537. I did not find Mr Garratt's evidence in relation to comparables to be of material assistance in determining the size and location of the permitted area of the Hall for the following reasons.

538. First, Mr Garratt states in his report that comparables "are not difficult to find" because "it is not uncommon for buildings similar to Bunny Hall to be conditionally exempt from inheritance tax […] and conditionally exempt properties are listed region by region on HMRC's web site." In his opinion appropriate comparables are houses which have been designated as conditionally exempt from IHT. But the reason that Mr Garratt has no difficulty in finding comparables is because he compares apples to Thursdays. His comparison is based on mansion houses for which conditional exemption has been granted from IHT under s31 IHTA, or

properties that have been gifted to the nation or placed into charitable trusts. Relief under s31 IHTA is based on completely different criteria to the requirements of s222 TCGA. Merely because the Treasury has granted conditional exemption does not make the property a relevant comparable for s222 purposes.

539. I cannot even begin to understand why a property that has been gifted to the nation or to a charitable trust should be in any way useful in providing a comparison for s222 purposes merely because it has been so gifted. I happen to be aware that Yoko Ono donated 251 Menlove Avenue (the childhood home of John Lennon) to the National Trust. Does the fact that it was donated to a charity make a 3-bedroom 1930s semi-detached villa in Liverpool's suburbs (which, incidentally, is Grade II listed) comparable to Bunny Hall?

540. Secondly, having provided a schedule of "comparables", the details he provides about the houses are so sketchy that it is impossible to determine whether the property might possibly in some way be comparable to Bunny Hall, in particular he provides no details about the size of the property (whether it be gross internal area, or number of rooms). The only details provided for Iscoyd Park, for example, are that it is "an 18th century red brick house in a park". He does not even state whether the property is listed (or its listing grade) – although I suspect that in order to justify the conditional exemption from IHT either the house or grounds would have to be listed – but this is just a suspicion, I have no evidence that this is the case.

541. Thirdly, save for five of the properties, he provides no details of the size of the associated land. Of the properties with plans, quantitative details are provided for only two. One of them is Weston Park, whose associated landholding is 405 ha. Mr Garratt admitted during cross-examination that a proportion of this land would be agricultural, so I am none the wiser as to the extent of Weston Park's garden or grounds. Ironically, he does provide sizes for the landholdings associated with three properties for which plans are not provided, but absent plans, it is impossible to determine the extent of their garden and grounds.

542. Fourthly, he gives no opinion as to the extent of the s222 permitted area for any of these "comparables". Rather, during the course of cross-examination, he said that he would need to undertake the same kind of exercise as the one he had undertaken for Bunny Hall in order to ascertain the permitted area for each property.

543. In his report he does say that:

> Only at Castern Hall, Papplewick Hall and Kinnersley Castle do the boundaries of the conditionally exempt land follow the presumed boundaries of these houses' permitted areas

But the plans for these properties in his report do not show the "presumed boundaries" of the permitted areas and he does not set out the presumptions on which he has ascertained the presumed boundaries. I therefore do not know his opinion of the extent or location of the permitted areas for those properties. He has done a disservice to his client by not having undertaken this exercise and included his opinion of the permitted areas of his "comparables" in his report. Without this information, his report carries little weight as regards comparables.

544. Finally, the majority of Mr Garratt's comparables are located outside the East Midlands. On any basis, it is difficult to understand how, for example, a 16th century castle in Scotland can be considered comparable to a Georgian mansion house in the East Midlands.

545. Mr Garratt acknowledges in his report that the s31 IHTA test is not the same as the test for s222, but he submits that the comparables show that:

> (a) the area essential for the protection of the character and amenities of the house (the s31 IHTA test) can never be less than the permitted area; and

(b) the boundaries of the s31 IHTA land invariably follow natural or man-made features of enclosure.

But Mr Garratt has not included in his report any plans showing the permitted area (or even his opinion as to the permitted area) for any of the comparables that he puts forward, so it is impossible to determine whether this opinion is based on any evidence. In addition, the large scale and small size of such plans as are included in the report mean that it is not even possible to determine whether the boundary of the s31 IHTA area follow any natural or man-made features.

546. Mr Garratt criticises Ms Williams' selection of comparables on the grounds that she has chosen large houses situated on plots that are too small. As Mr Garratt failed to find comparables of any validity, I have no basis for determining whether Mr Garratt's opinion that Ms Williams' comparables are situated on plots that are too small (given the size of the house) is based on any relevant evidence (or indeed any evidence).

547. Ms Williams admits in her report that she could not find any comparable properties that are precisely on "all fours" with Bunny Hall:

> 11.1. Houses of the size and age of Bunny Hall are not common and sales evidence from the immediate locality is limited. Many substantial historic houses of this type have been lost to demolition and the surviving properties are often now associated with reduced areas of land and associated properties.

548. I believe her. Bunny Hall is a Grade I listed building – of all listed buildings in England only 2.5% fall into Grade I – and so it seems inevitable that there will be no other building in England exactly like it. During the course of cross-examination Mr Southern asked her whether it was difficult to find comparable properties because Bunny Hall was unique – a question I found surprising given that the evidence of Mr Garratt (on whom Mrs Whyte relied) was that "comparables are not difficult to find […]". But Mr Williams accepted that it was unique and said that she sought properties to use as comparables which had similar characteristics to Bunny Hall.

549. Mr Southern criticised Ms Williams' report because she stated at paragraph 11.2:

> I must consider the minimum acreage required for the reasonable enjoyment of a dwelling house of the size and character of Bunny Hall.

Mr Southern is correct that "minimum" does not appear in the statute. Ms Williams, in response to Mr Southern's questions in cross-examination acknowledged that "minimum isn't a good word", and said that on reflection, in the light of the decision of the High Court in *Longson v Baker* she should have used the phrase "necessary or required". But the correction of this error did not result in any change to her opinion as to the size or location of the permitted area for Bunny Hall. I note that in her conclusions (at paragraph 11.11) she states that:

> I conclude that the area of garden and grounds required is likely between 1 and 3 hectare (4.94 and 7.41 acres).

And so, she has applied the correct test ("required") in her conclusion, even if the test was wrongly expressed in paragraph 11.2. I find that Ms Williams understood and applied the law correctly in giving her opinion as to the size of the permitted area.

550. During cross-examination, Mr Southern challenged her choice of Clifton Hall as a comparable as it had been shorn of all land and was open on all sides. Ms Williams' response was that she included it as a comparable in its condition at the time it was sold in 2006 (as a single dwelling), when it still had garden and grounds on all sides, to show what was reasonable

at the time. Whilst she agreed it was "perhaps small", but it was "within the basket of evidence" nonetheless. Mr Southern put it to her that most purchasers of properties of this size would want sufficient garden and grounds to be able to have a cup of coffee outside without being overlooked. Ms Williams replied that she did not dispute that this might be desirable, but that was not what the s222 test required. She said that in her view, Clifton Hall was (in its undivided state in 2006) a useful comparator, as it showed what a large 17-bedroom property required for garden and grounds at that time.

551. Mr Southern also challenged her choice of Walton Hall, as it was half the size of Bunny Hall, and was not detached, as it had cottages terraced to one side. Ms Williams agreed that Walton Hall was smaller than Bunny Hall, but it was a Grade II listed property. Although it had two cottages to one side, they were part of the same title, and were sold with vacant possession with Walton Hall. She was asked whether she had considered the ha-ha at Walton Hall, but she said that she had not – and for CGT purposes, she would have excluded the woodland to the north of the property from Walton Hall's permitted area.

552. As regards Normanton Manor, she regarded this as a useful comparable, because it had other reasonably nearby properties, but she acknowledged that it was not identical to Bunny Hall. Mr Southern challenged her evidence on the basis that Normanton Manor just showed that you could "get by" with less. Ms Williams said that Normanton Manor did not "get by with less", rather it showed what was reasonable and necessary, and was evidence of what was required. Mr Southern questioned her as to whether Normanton Manor just showed that someone will buy a house with that amount of land. Ms Williams' response was that she did not think that [s222] was a different test. For a comparable, she did not have to find a property identical to Bunny Hall, but one that is comparable. She agreed that Normanton Manor was different to Bunny Hall, it was built in 1920, it was smaller, and it was Grade II. Mr Southern put it to her that Normanton Manor had a large modern incongruous extension – but Ms Williams replied that there was a case for showing that extensions were different to the main listed house. When asked whether Normanton Manor was a large house on a plot that is too small, Ms Williams replied that there was no evidence for that, it was a large house on the plot that it sits on.

553. Ms Williams used the evidence of the comparables (particularly Clifton Hall and Normanton Manor) to determine that the permitted area of Bunny Hall should be between 1 ha and 3 ha (4.94 and 7.41 acres).

554. During the course of cross-examination, Ms Williams said that her disagreement with Mr Garratt about the permitted area was not about its size, but its location. In her view, the southern end of the Wilderness Garden had limited amenity value to the occupants of Bunny Hall, when compared with the lawned area to the east of the ha-ha, over which the occupants would want control.

555. In his report, Mr Garratt states that the following five principles apply to determine the permitted area of a house:

(1) At the relevant date it is in the same ownership as the dwelling-house

(2) It is used by the owner for his own occupation and enjoyment with his residence as garden or grounds

(3) It is enclosed land surrounding or attached to the dwelling-house serving chiefly for ornament or recreation

(4) It is required for the reasonable enjoyment of the dwelling-house, having regard to the size and character of that dwelling-house

(5) Where the ownership is more extensive it is the part most suitable.

556. Mr Garratt makes the following observations in his report about the Hall and the Estate:

(1) Historically the Hall was central to a country estate and had the benefit of a large park lying on its east side, a south-facing walled garden (north), outbuildings to its rear (north), formal and wooded gardens (south) and five or six access points to the main road (west). To the east of the Hall and its wooded garden was a ha-ha – a man-made ditch and wall designed to keep livestock out of the gardens without obscuring views from the Hall to the park.

(2) A tree preservation order restrains injury to trees in areas including the Wilderness Garden. Although Mr Garratt considered whether the area defined in the TPO might evidence the boundary of the permitted area, but the "guidance for finding [the boundary of the permitted area] does not include the presence of trees that merit protection". However, he considers that the TPO provides evidence that the Wilderness Garden was never previously divided and was a "continuous landscape type containing managed amenity trees".

557. Mr Southern makes the following additional observations:

(1) Bunny Hall is a grand country house, and a substantial area of garden or grounds is required for its reasonable enjoyment as a dwelling.

(2) Bunny Hall has only even been used as a single residence and never been sub-divided.

(3) In the original layout of the grounds the ha-ha divided the area of gardens and lawns from the area occupied by livestock. The restoration work approved by RBC and English Heritage included a requirement that the ha-ha be rebuilt. The ha-ha forms the border of the garden. The land within the ha-ha wall includes the Plots.

(4) All the Plots lie within the historic landscape to the south of the Hall known as the Wilderness Garden, which was designed to complement the Hall, falling within the ha-ha, as was recognised by English Heritage in their analysis of the historic development of the Bunny Hall Estate landscape quoted earlier.

(5) The lime walk, which is a noted historic feature, runs from north to south and reaches the southern edge of the Yellow Land[5]. It now runs between Plots 1 and 2. It was a condition of the landscape management agreement that an artificial pond should be created between Plots 1 and 2.

(6) The lawned parkland to the east of the Wilderness garden was not "enclosed" at the time the Plots were sold, but was enclosed subsequently. This explains why it was not included in Mr Garratt's permitted area at the time the Plots were sold, but was included in his later plan.

(7) The development by previous owners or barns to the north-east of the Hall shifted the centre of gravity of the permitted area southwards.

(8) The appropriate comparables are country houses which have been designated as conditionally exempt from inheritance tax. Mr Garratt in his report refers to 15[6] comparables (10 conditional exemptions, 5 gifts to the nation).

[5] The "Yellow Land" was a part of the Estate not subject to the restrictive covenant. Its southern boundary was around the location of Plot 4. The southern boundary of Ms Williams' permitted area is at roughly the same place.
[6] In fact, there are only 14 comparables, as noted earlier.

558. Mr Garratt from these principles and these observations provides his opinion that the permitted area of Bunny Hall is as set out in Figure 6. The reasons given in his report for his selection of the permitted area are (in essence):

(1) Regard must be had to natural and man-made features of enclosure existing on the ground.

(2) There is no requirement to minimise the permitted area.

(3) It is not necessary to define the permitted area by attributing a physical size and then attempting to set out the attribution on the ground.

559. These reasons were amplified during the course of his oral evidence:

(1) Section 222 required that the appropriate permitted area be identified, not the minimum permitted area.

(2) The perimeter of the permitted area had to be defined by reference to the "means of enclosure", being features on the ground. The reason the parkland area to the east of the Wilderness Garden was excluded from his opinion of the permitted area was because he placed great emphasis on the means of enclosure, and in his opinion, the ha-ha provided those means of enclosure.

560. Mr Southern criticises Ms Williams "alternative" opinion of the boundary of the permitted area as being a straight line across the Wilderness Garden, without regard to any physical features on the ground. He suggests that she is just adopting the area previously shown in Mr Coster's report (which I have not seen), which happens to coincide with old conveyancing delineations – particularly the boundary between the land subject to the restrictive covenants, and the land which is not.

Discussion

561. Ms Williams' choice of comparables are criticised as being large houses on plots that are too small. And I agree with Ms Williams that the plots on which her comparables stand may be small, but they are nonetheless evidence as to the extent of the garden and grounds of large houses that have been sold in the East Midlands. Whilst Mr Southern might consider that the purchaser of a large house might want the ability to drink a cup of coffee in his or her garden in complete privacy, that "want" is not what s222 requires. And the evidence shows that purchasers of large houses are prepared to drink their coffee in a garden that is not completely private.

562. I agree with Mr Southern and Mr Garratt that the comparables produced in evidence by Ms Williams are not identical to Bunny Hall – but I consider that would be impossible to find identical comparables, given Bunny Hall's status as a Grade I listed building. What Ms Williams has done is to produce in evidence properties that have sufficient similarities to Bunny Hall to be useful as comparisons.

563. In contrast, Mr Garratt's "comparables" do not provide any relevant evidence as to the extent of the garden or grounds of a dwelling comparable in any way to Bunny Hall.

564. Mr Garratt also sets about giving his opinion as to the size and location of the permitted area for Bunny Hall without regard to the requirements of s222. I find that his statement, that it was not necessary to define the permitted area by attributing a physical size and then attempting to set out the attribution on the ground, was wrong. He incorrectly determined the location of the permitted area of Bunny Hall by reference to the "means of enclosure", without regard to the amount of land required for the permitted area. During the course of cross-examination, he could not say how much land his view of the Hall's permitted area occupied. His response to the question about the size of permitted area, was that he identified the

permitted area by reference to "means of enclosure", and he could then measure the permitted area. Not only is this back-to-front, but it ignores the evidence of comparables. There was no reference in his report to the use of comparables in determining the size of the permitted area.

565. It is purely a matter of happenstance that the extent of the permitted area selected by Mr Garratt falls within the range of 1 ha and 3 ha determined by Ms Williams by reference to her choice of comparables. The irony is that, notwithstanding the criticisms of Ms Williams' choice of comparables, the extent of Mr Garratt's permitted area falls within the same range as Ms Williams. Which rather suggests that Ms Williams' choice of comparables was justified.

566. In choosing the location for the permitted area, Mr Garratt places great weight on the "means of enclosure". In contrast, Ms Williams choice is based on the use of the land.

567. I have no hesitation in preferring Ms Williams' evidence as to the location of the permitted area over Mr Garratt's, for the following reasons:

(1) Mr Garratt places too much weight on "means of enclosure" in in determining the perimeter of the permitted area. The reference to "enclosure" appears in the dictionary definition of "grounds" that is quoted in CG64360. But what is required in this case is not to determine the perimeter of the *grounds* of Bunny Hall, but rather the perimeter of that *part of the grounds* as is most suitable for occupation and enjoyment with the Hall. There is no mention in CG64360 or in the Tax Bulletins of "enclosure" when determining the perimeter of a *part* of the grounds.

(2) Neither Mr Garratt's report nor Mr Southern's submissions explain why Mr Garratt's view of the permitted area would be the most suitable part of the Grounds "for occupation and enjoyment" with the Hall. Their evidence and submissions are primarily based on historic features or boundary features, and not the manner in which the garden and grounds of the Hall are actually occupied and enjoyed at the time of the disposals of the Plots.

(3) The reason English Heritage recommended that the enabling development be located at the southern end of the Wilderness Garden is because that would have least impact on the Hall. I infer that this location is therefore the least relevant to the Hall from a listing perspective. Whilst the criteria for listing a building are not the same as "occupation and enjoyment", they do inform my decision. I agree with Ms Williams' evidence in cross-examination that the southern end of the Wilderness Garden is of limited value to the Hall when compared with the lawned parkland area to the east of the ha-ha. The owner of the Hall would want to retain control over the lawned parkland area in order to be able to preserve their uninterrupted views over the countryside. In contrast, the trees in the Wilderness Garden shield the views from the Hall towards the southern end of the Wilderness Garden.

(4) Mr Garratt includes land not owned by Mrs Whyte (the triangle) in his view of the permitted area.

(5) I disagree with Mr Southern's submissions that Ms Williams has just drawn an arbitrary straight line across the southern boundary of her alternative opinion (figure 4, Annex 2) – this corresponds to the southernmost extent of the lime walk as it existed prior to the enabling development, and the southernmost extent of the lawned parkland area to the east of the ha-ha.

(6) Although not required for the purposes of this appeal, Mr Garratt gives his opinion on the extent of the permitted area following the disposal of the Plots. In his opinion, the permitted area after the sales extends eastwards to encompass the lawned parkland areas to the east of the ha-ha. Mr Garratt says the following in his report:

> Mrs Whyte has responded to the disposal of part of the Hall's permitted area by adjusting her enclosure to substitute the loss with a new area. The 16th July 2016 permitted area is, in fact, larger than the 1st December 2003 permitted area. This is her prerogative. The area she chooses for her own occupation and enjoyment with her residence as its garden or grounds, including enclosed lands surrounding or attached to the dwelling-house serving chiefly for ornament or recreation, is a question of fact. If that area is larger than is appropriate having regard to the size and character of her dwelling-house only the most suitable part will qualify as the permitted area in any future disposal.

Mr Garratt's statement that it is Mrs Whyte's prerogative to choose the area for her own occupation and enjoyment is irrelevant to the determination of the permitted area for s222 purposes. The test in an objective one and is determined not by reference to the desires of any particular owner, but rather by reference to objective facts.

568. I find that the permitted area of Bunny Hall (both as at 8 May and on the subsequent transfers of the Plots to Mr Whyte and Mr Bailey) is as set out in figure 5 in Annex 2, with the boundary of the permitted area marked in green. However, if on an appeal it is found that the "denaturing" of the Plots does not cause them to cease to be part of the garden or grounds of the Hall, I would find that the permitted area (again both as at 8 May and on the subsequent transfers) is as set out in figure 4 with the boundary of the permitted area marked in green.

Offsetting the conservation deficit

569. Given that the disposal of the Plots is taxable, is Mrs Whyte entitled to deduct the "conservation deficit" from any profit or gain? Mrs Whyte says that she was entitled to offset the conservation deficit; HMRC disagree.

570. This issue can be addressed briefly, as it has no basis in law, and is wholly without merit.

571. The conservation deficit is a means of measuring the public subsidy (being the economic value of the grant of planning permission for an enabling development) required for the restoration of a historic building. It is calculated by reference to appraised values and costs – and not the costs actually incurred, nor the actual amounts realised on disposal. Once it has been determined, it is never adjusted, as English Heritage want to ensure that the developer takes the risk of any fall in values or increases in costs. And the developer is remunerated for taking this risk through the profit he makes.

572. The conservation deficit is not the measure of any loss actually suffered by anyone. It seeks to measure the economic loss that a developer (which might include an owner-occupier) would incur in restoring a historic building, but for the enabling development. The purpose of the enabling development is to generate sufficient after-tax profits to eliminate any economic loss.

573. Whether the economic loss in respect of the historic building (as distinct from the profits on the enabling development) is ever crystalised into an actual loss will depend on many factors – such as whether the historic building is ever sold, and the extent to which the actual values realised on a sale correspond to the originally appraised values. In addition, the amount of the economic loss will not correspond to any taxable loss because the rules relating to the quantification of profits and losses for tax purposes do not correspond to the manner in which economic loss is measured, and the possible availability of tax reliefs. And of course, the intention is that any economic loss suffered on the historic building is counteracted by the after-tax profit generated by the enabling development. So, overall, the owner should suffer no loss at all.

574. As regards income tax on trade profits (including the profits of an adventure in the nature of a trade), the income or profits are computed in accordance with GAAP. I have had no evidence of any kind which would indicate that a conservation deficit is deductible for the purposes of GAAP. I find that the conservation deficit is not deductible in computing income or profits for the purposes of income tax.

575. As regards capital gains tax, the disposal of the Plots is a part-disposal for the purposes of s42 TCGA. Section 42(2) requires expenditure to be apportioned using the well-known A/(A+B) formula. However, where the expenditure can be attributed wholly to the Plots, or to the retained property, the formula does not need to be invoked.

576. The only categories of expenditure that are deductible in computing chargeable gains (at least as regards this appeal) are those set out in s31, which are:

(1) acquisition costs, plus incidental costs of the acquisition;

(2) incidental costs of making the disposal;

(3) expenditure wholly and exclusively incurred on the asset for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and

(4) expenditure wholly and exclusively incurred in establishing, preserving or defending the seller's title to, or to a right over, the asset.

577. The conservation deficit does not fall into any of these categories. It is therefore not deductible in computing chargeable gain for the purposes of capital gains tax.

578. I find that the conservation deficit is not deductible in computing profits for the purposes of income tax, nor in computing chargeable gain for the purposes of capital gains tax.

Disposal proceeds held on trust

579. Did Mrs Whyte hold the proceeds of the disposals of the Plots on trust? If so, what are the tax consequences? Mrs Whyte says that she held the proceeds of the disposals on trust. HMRC disagrees and says, in any event, that it does not affect the appropriate tax treatment of the disposals.

580. Again, this can be addressed briefly, as it is an argument wholly without any basis in law or any merit.

581. Mr Southern submits that Mrs Whyte never had the free use of the money raised from the sale of the Plots. He submits that under the terms of the s106 Agreement, she was required to apply the funds raised from the sale of the Plots towards the restoration of the Hall. As she was required to apply the funds for a public benefit (namely the restoration of a historic building), a trust is imposed under the basis of *Quistclose Investments Ltd v Barclays Bank* [1970] AC 557 or there is a trust "in the higher sense" under *Tito v Waddell* (No 2) [1977] Ch 106 at 211. Mr Southern says that there is a trust "of a special kind, created by the statutory scheme".

582. This is – to put it bluntly – nonsense, and I am surprised that as eminent an advocate as Mr Southern is prepared to even argue it.

583. First, there was no obligation under the s106 Agreement for Mrs Whyte to apply the proceeds from the sale of the Plots towards the restoration of the Hall. Indeed, there was no obligation on Mrs Whyte to sell the Plots or undertake the enabling development. And even if there was, these would not be circumstances in which either *Quistclose* or *Tito* would have any application. I find that there was no trust.

Public interest

584. Is there an overriding public interest consideration requiring the disposals of the Plots to be considered, for tax purposes, in a particular way? Mrs Whyte says that there is such an overriding public interest. HMRC says that the only relevant public interest here is the strong public interest in collecting tax in accordance with the primary legislation made by Parliament.

585. Mr Southern submits that HMRC are seeking to assess and collect tax on an incorrect factual and legal basis. Moreover, in interpreting and applying the tax legislation regard should be had to the intention of Parliament and role of other public bodies in promoting in the public interest the restoration and conservation of heritage property. A result should not be produced which conflicts with the putative intention of Parliament.

586. This is another nonsensical submission, and Mr Southern does Mrs Whyte a disservice in making it. There is no basis to Mr Southern's submission that HMRC have ever sought to assess and collect tax inappropriately. Whilst there are legitimate arguments to be had as to the precise facts in this case and the application of the law to those facts, I find that the overriding public interest is that Mrs Whyte is taxed in accordance with the law - there is no public interest in her being taxed in any other way.

Disposal of Plot 6

587. In reaching my conclusions on the question of whether Plot 6 was sold in an arm's length transaction, I have drawn inferences from the fact that Mr Whyte has not appeared as a witness. It seems likely that he would be able to provide confirmation of any association that he might have had with Mr Bailey, or how Mr Bailey came to have knowledge of the proposed enabling development. It was his business, TFD, that constructed a house for Mr Bailey on Plot 6, so he might be able to provide evidence about the terms on which Mr Bailey acquired the Plot. The fact that he is not a witness suggests to me that important evidence is being withheld.

588. HMRC submit that the sale of Plot 6 to Mr Bailey did not take place on arm's length terms, and in consequence, s17 TCGA applies to impute market value to the disposal. Mrs Whyte submits that the sale was on arm's length terms and that there is no statutory authority to replace the transactional value with a notional value.

589. Mr Southern submits that Mr Bailey was sold a bare plot, and contracted separately with TFD for the construction of a house, which explains why the price of Plot 6 was less than the prices achieved for the other Plots. Mrs Whyte said that Mr Bailey agreed to pay for the construction of the access road to Plot 6. But there is no evidence to support these submissions or to corroborate Mrs Whyte's evidence, and this does not explain why construction work on Plot 6 had progressed above foundation stages before the Plot was transferred to Mr Bailey.

590. I find that Mrs Whyte has not given a satisfactory account of how she came to sell Plot 6 to Mr Bailey for £100,000. I have found that Mr or Mrs Whyte must have known Mr Bailey and agreed to sell Plot 6 to him at what they knew was a discount to its true market value. I have found that the sale to Mr Bailey was by way of a bargain otherwise than at arm's length.

591. I have found that there was an appropriation of the Plots to trading stock on 8 May 2003. As regards capital gains tax, the disposal under s161 would be deemed to take place for market value consideration. Any subsequent profit on the sale of the Plot to Mr Bailey must be computed in accordance with UK GAAP, subject to the deeming of market value under transfer pricing or other statutory provisions (if and to the extent applicable).

592. If this decision is appealed, and I am found to have been incorrect in my finding that there was an appropriation of the Plots to trading stock, then as I have found that the disposal by Mrs Whyte to Mr Bailey of Plot 6 was not by way of a bargain at arm's length, I find that s17 TCGA applies to impute market value to the disposal proceeds.

CONCLUSIONS

593. I have found that the Bunny Hall Estate was acquired by Mrs Whyte as a capital asset.

594. I have found that Mrs Whyte appropriated the six Plots to trading stock on 8 May 2003, which gave rise to a disposal at market value for the purposes of capital gains tax pursuant to s161 TCGA.

595. I have found that Mrs Whyte thereafter engaged in an adventure in the nature of a trade, and any profits arising on the subsequent disposal of the Plots would be trade profits liable to income tax.

596. I have found that the Plots were not within the permitted area of the Hall on 8 May 2003, and therefore the appropriation of the Plots to trading stock on that date was not exempt from CGT by reason of PRR.

597. I have found that the conservation deficit was not deductible in computing Mrs Whyte's income, profits, or gains.

598. I have found that there was no "single overall transaction", there was no trust impressed upon the proceeds of sale of the Plots, and there is no public interest in Mrs Whyte's tax liability being computed otherwise than in accordance with the requirements of tax legislation.

599. I have found that the sale of Plot 6 to Mr Bailey was not a bargain concluded at arm's length.

DISPOSITION

600. The appeal is dismissed.

601. I leave it to the parties to reach agreement on the amount of tax payable by Mrs Whyte. If they are unable to reach agreement, I give leave for them to make application to me to determine the liability.

602. To the extent that valuations of land are required for the computation of any liability to capital gains tax, such values will need to be determined by the Lands Chamber of the Upper Tribunal pursuant to s46D Taxes Management Act 1970, and I will make any necessary reference to that Chamber on the application of either party.

COSTS

603. Mr Pritchard did not argue against the principle that HMRC would accept liability pursuant to Rule 10(1)(b) for the additional costs suffered by Mrs Whyte as a result of the substitution of Ms Williams for Mr Coster as HMRC's expert. The parties reached agreement in respect of costs by the conclusion of the hearing, and Mrs Whyte accordingly withdrew her application for costs. I therefore make no order in respect of costs.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

604. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 26 JULY 2021

Cases discussed in Skeletons but not mentioned in this decision:

Ramsden v Dyson (1866) LR 1 HL 129
Lysaght v Edwards (1876) 2 ChD 499
Religious Tract and Book Society of Scotland v Forbes (1896) 3 TC 415
Grove v YMCA (1903) 4 TC 613
Balfour v Balfour [1919] 2 KB 571
CIR v Livingston (1926) 11 TC 538
CIR v Stonehaven Recreation Ground Trustees (1929) 15 TC 419
Re Newhill Compulsory Purchase Order [1938] 2 All ER 163
Beswick v Beswick [1968] AC 58
Wisdom v Chamberlain (Inspector of Taxes) (1968) 45 TC 92,
Oram (Inspector of Taxes) v Johnson (1980) 53 TC 319,
Chaney v Watkis (Inspector of Taxes) (1985) 58 TC 707
Ensign Tankers Leasing Ltd v Stokes (Inspector of Taxes) (1992) 64 TC 617
Lawson v Johnson Mathey Plc [1992] 2 AC 324
Vodafone Cellular v Shaw (Inspector of Taxes) (1997) 69 TC 376
Jerome v Kelly (Her Majesty's Inspector of Taxes) (2004) 76 TC 147
R. *(Davey) v Aylesbury Vale DC and Mentmore Towers Ltd* [2005] EWHC 359 (Admin)
O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534
Henke v Revenue and Customs Commissioners [2006] STC (SCD) 561
Newnham College v HMRC [2008] UKHL 23
Thorner v Major [2009] [2009] UKHL 18
Megantic Services Ltd v HMRC [2011] STC 1000
Tower MCashback LLP and another v HMRC [2011] 2 AC 457
Atlantic Electronics Ltd v HMRC [2013] EWCA Civ 651
Fountain and Fountain v HMRC [2015] UKFTT 0419 (TC)
R.(oao Aozora GMAC Investment Limited) v HMRC [2019] EWCA Civ 1643
Higgins v HMRC [2019] EWCA Civ 1860

ANNEX 1- EXTRACTS FROM SECTION 106 AGREEMENT

THIS AGREEMENT is made the 3rd day of December 2003

BETWEEN:

RUSHCLIFFE BOROUGH COUNCIL of the Civic Centre Pavilion Road West Bridgeford Nottingham NG2 5FE ("the Council") and

HEATHER WHYTE of Bunny Hall Loughborough Road Bunny NG11 6QT ("the Owner")

WHEREAS

(A) The owner is the proprietor of the freehold interest in the property known as Bunny Hall Loughborough Road Bunny title to which is registered at HM Land Registry under Title No NT358513

(B) The Owner has applied to the Council for planning permission to carry out the Development on the Development Site

(C) The Council has resolved to grant planning permission pursuant to the said applications provided that an agreement is entered into under Section 106 of the 1990 Act that provides for certain works of repair to be carried out to the Building in tandem with the Development

(D) The Building is included in the list compiled by the Secretary of State under Section 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and has been in a serious state of disrepair

(E) The Council and the Owner have agreed a scheme or repairs for the restoration of the Building which will cost in excess of £1,830,000 to carry out

(E) In anticipation of the completion of this agreement the Owner has already completed a significant proportion of The scheme of repairs at a cost in excess of £1,250,000

(F) The Council and the Owner agree that the balance of the cost of repairs will be financed by an enabling development in the form anticipated by the Development and the Planning Permission

NOW IT IS HEREBY AGREED AS FOLLOWS

1.0 INTERPRETATION

1.1 In this Agreement unless the context otherwise requires

- The "1990 Act" means the Town and Country Planning Act 1990 as amended

- The "Building" means the building known as Bunny Hall which is the situated upon Land and which is shown shaded in brown on the Plan

• The "Development" means the construction of six dwellings and associated works the subject of the Planning Application made by the· Owner to the Council and received on 20 June 2002 and any variation thereto properly approved by the Council

• The "Development Site" means the site the subject of the Planning Application which forms part of the Land and which is shown edged in blue on the Plan

• "Implement" means to carry out a material operation as defined in Section 56(4) of the 1990 Act

• The "Land" means the property described in Recital (A) of this Agreement that is shown edged in red on the Plan and each and every part thereof

• The. "Landscape Management Scheme" means a scheme approved by the Council in writing detailing the method for securing the long term future management maintenance protection and mitigation works associated with the landscaping scheme shown on Drawing Number 225.01 prepared by Walding Associates and forming part of the Planning Application and to be provided in ·accordance with Condition B of the Planning Permission

• "Occupied" does not include temporary occupation for the purposes of site security storage or as a show house

• The "Owner" includes successors in title

• The "Phase One Repairs" means the works listed in Part 1 of the Schedule of Repairs attached hereto

• The "Phase Two Repairs" means the works listed in Part 2 of the Schedule of Repairs attached hereto

• The "Phase Three Repairs" means the works listed in Part 3 of the Schedule of Repairs attached hereto

• The "Plan" means the Plan attached

• The " Planning Application" means planning application for thee Development the Council's reference for which is 02/00745/FUL

• The " Planning Permission" means planning permission to be granted pursuant to the Planning Application in the form of the draft attached hereto

1.2 Where the context so requires the singular includes the plural

1.3 Where the context so requires references to recitals clauses schedules and annexes are references to the same in this Agreement

2.0 LEGAL EFFECT

[…]

2.6 The Council shall forthwith register this Agreement as a local land charge

3.0 RESTRICTIONS UPON RESIDENTIAL DEVELOPMENT

The Owner hereby covenants with the Council

3.1 Not to commence suffer permit or allow to be commenced the errection of any dwelling on either the fifth or sixth plot of the Development shown edged and hatched green and edged and hatched yellow respectively on the Plan until the Phase Two repairs have been completed to the satisfaction of the Council

3.2 Not to commence suffer permit or allow to be commenced the erection of any dwelling on the sixth plot of the Development shown edged and hatched yellow on the Plan until the Phase Three repairs have been completed to the satisfaction of the Council

4.0 CARRYING OUT REPAIRS

The Owner further covenants with the Council

4.1 to commence the Phase Two repairs within 14 days of the date hereof and to proceed with the same will all due diligence

4.2 to commence the Phase Three repairs not later than the date of occupation of any dwelling on the fifth plot of the Development and to proceed with the same with all due diligence

4.3 within a period of twelve months from the date hereof to complete the scheme of repairs to the satisfaction of the Council

5.0 LANDSCAPE MANAGEMENT

The Owner further covenants with the Council

5.1 not to commence the Development until the Landscape Management Scheme has been submitted to and approved by the Council in writing

5.2 at her own expense entirely to carry out the long term future management maintenance protection and mitigation works . associated with the landscaping to be provided in accordance with Condition Number 8 of the Planning Permission in accordance with the Landscape Management Scheme

6.0 GENERAL

[…]

7.0 NOTIFICATION

7.1 The Owner shall notify the Council in writing of the anticipated dates of the following events

- Commencement of erection of the fifth dwelling to be constructed on the Development Site
- Commencement of erection of the sixth dwelling to be constructed on the Development Site
- Commencement of the Phase Three Repairs and the estimated duration of those works

7.2 The notices required by Clause 7.1 shall be given between seven and twenty-one days before the event to which they refer and any change in any anticipated date since notice was given under Clause 7.1 shall be similarly notified to the Council

IN WITNESS of which the parties hereto have executed this Deed the date and year first before written

SCHEDULE OF REPAIRS

Part 1 – Phase 1 Repairs

[…]

Part 2 – Phase 2 Repairs

[…]

Part 3 – Phase 3 Repairs

[…]

ANNEX 2 – PLANS

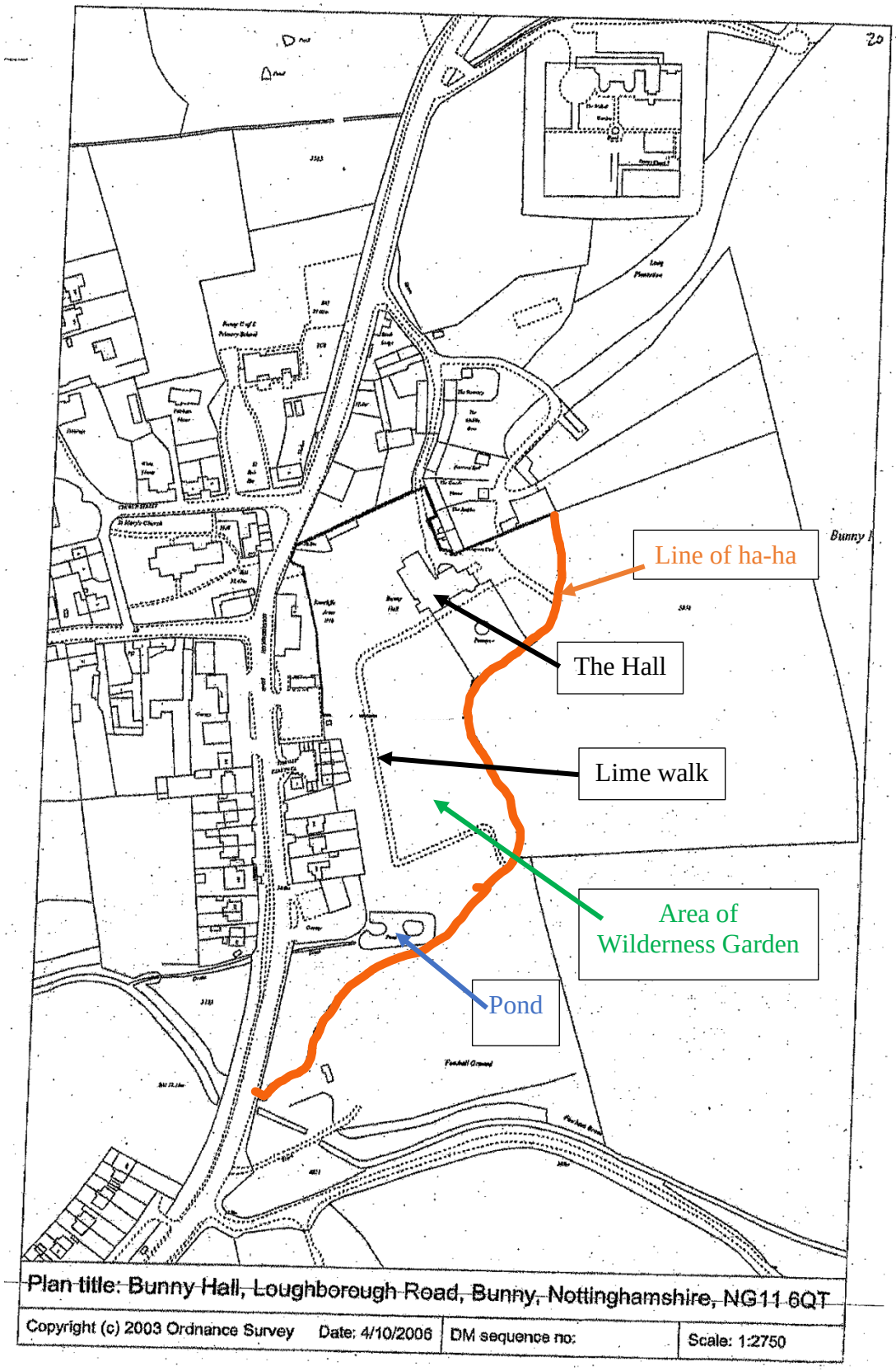

Figure **1- Bunny Hall Estate before purchase**

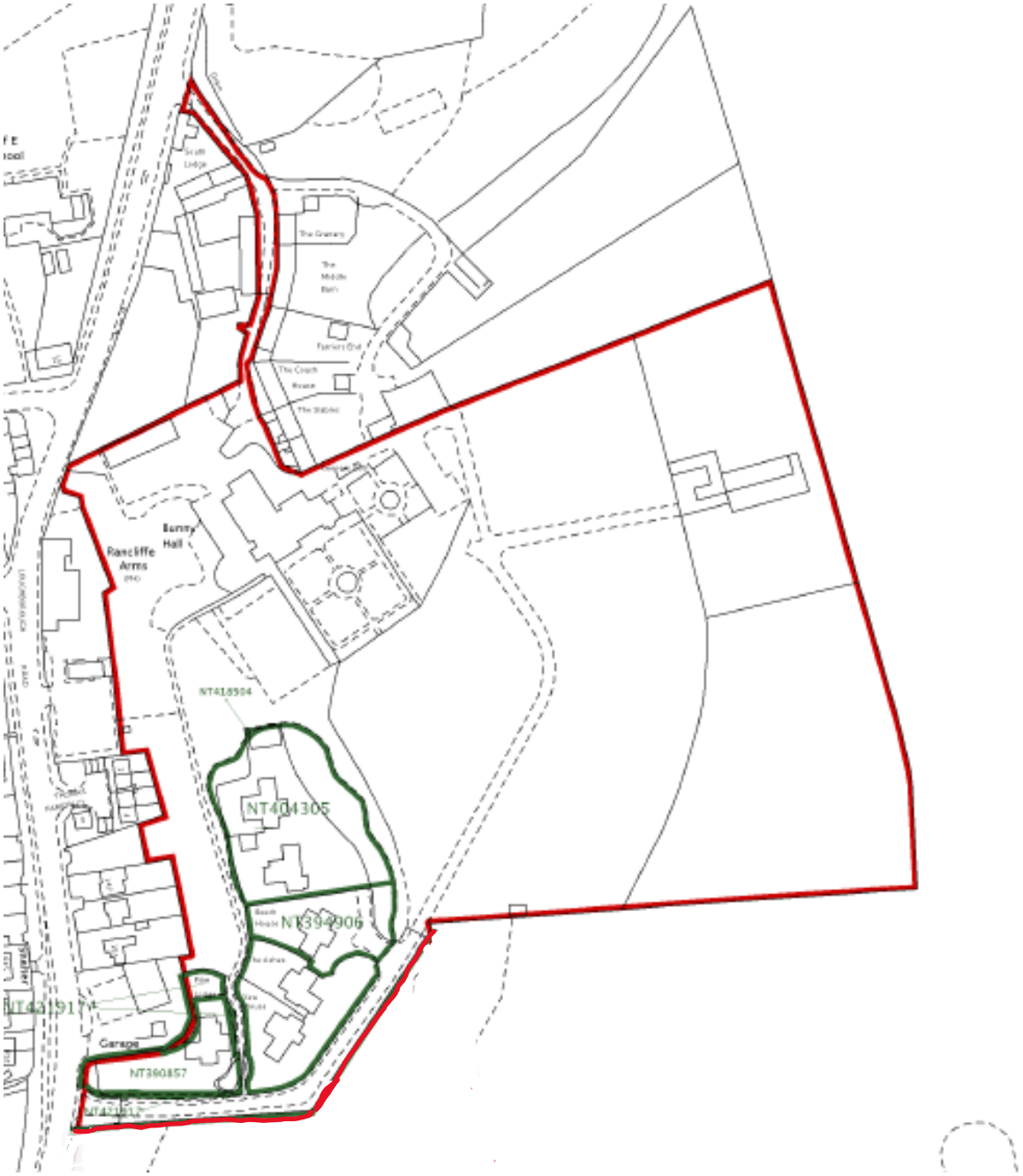

Figure 2 - Location of Plots within Estate

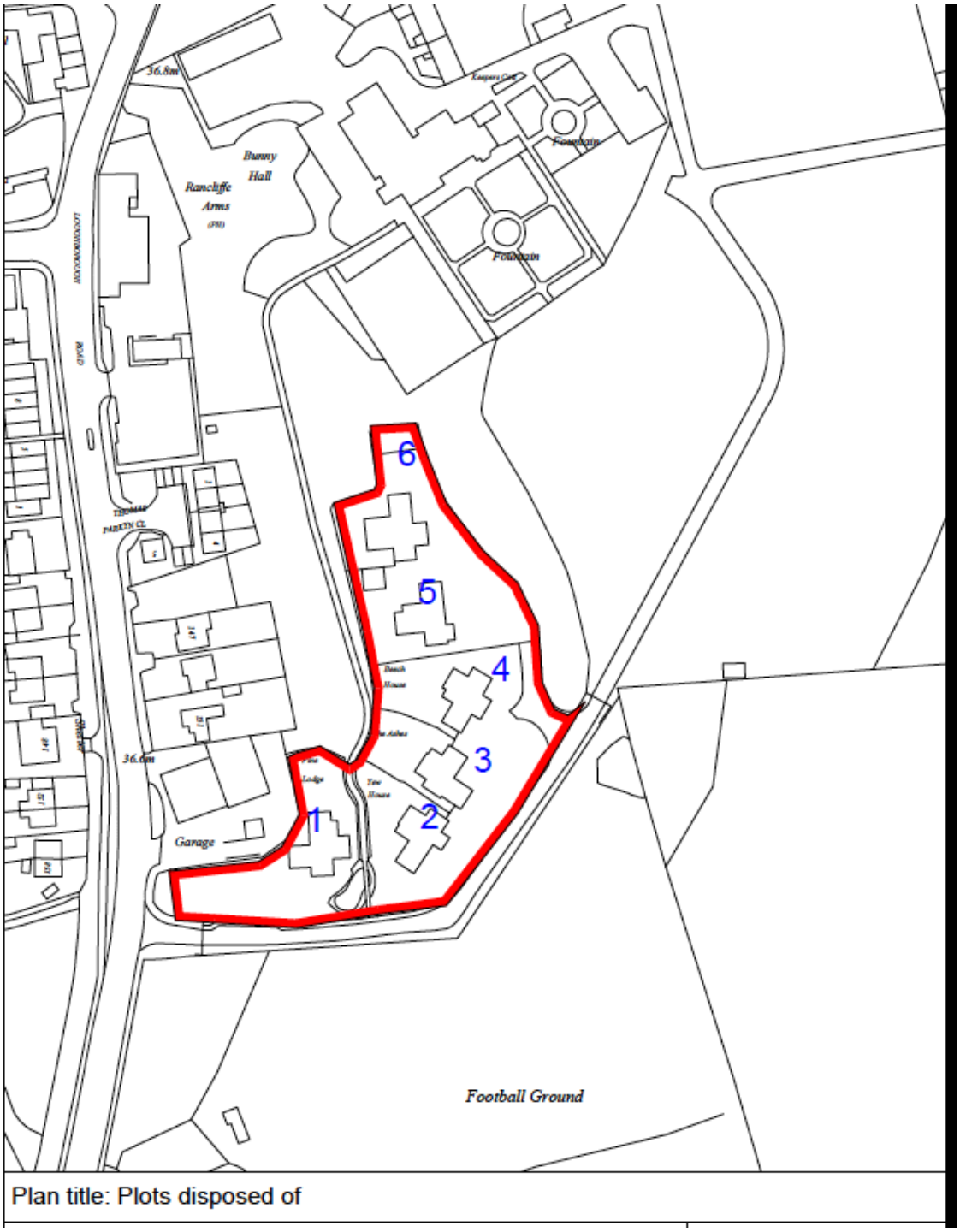

Figure 3 - Numbering of Plots

Figure 4 - HMRC's Expert's Alternative Permitted Area

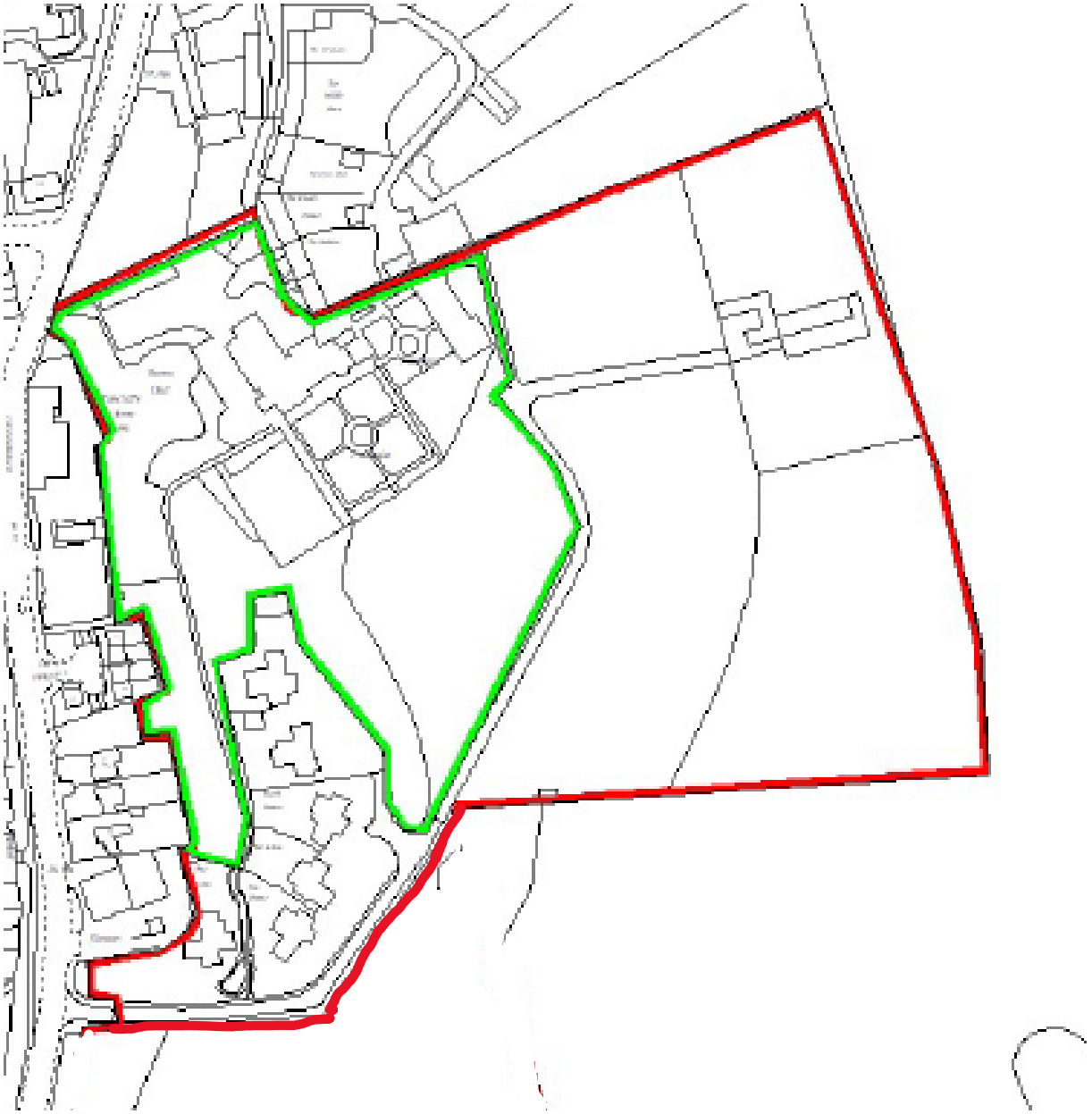

Figure 5 - HMRC's Expert's Permitted Area

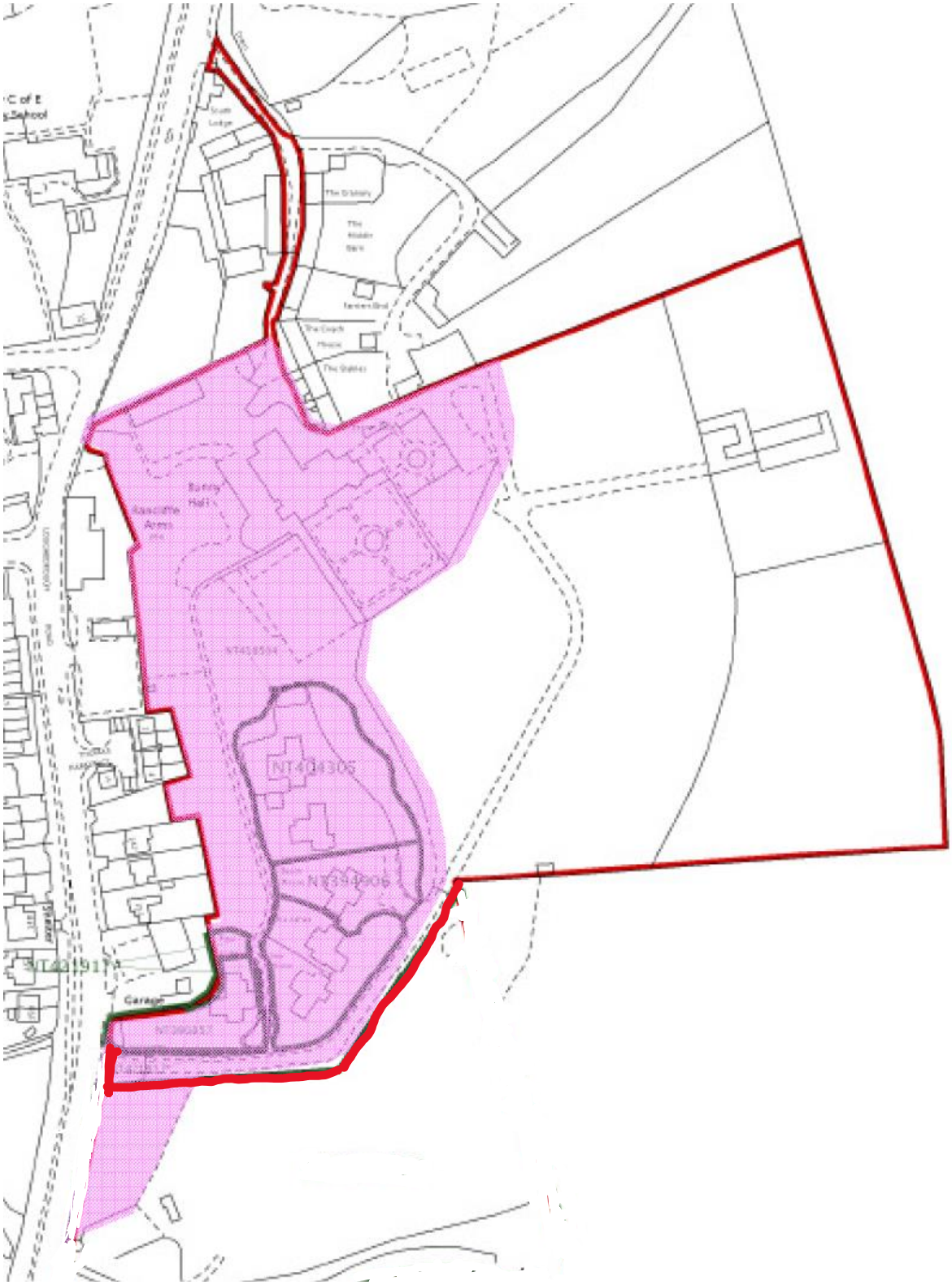

Figure 6 - Appellant's Expert's Permitted Area on 1 December 2003

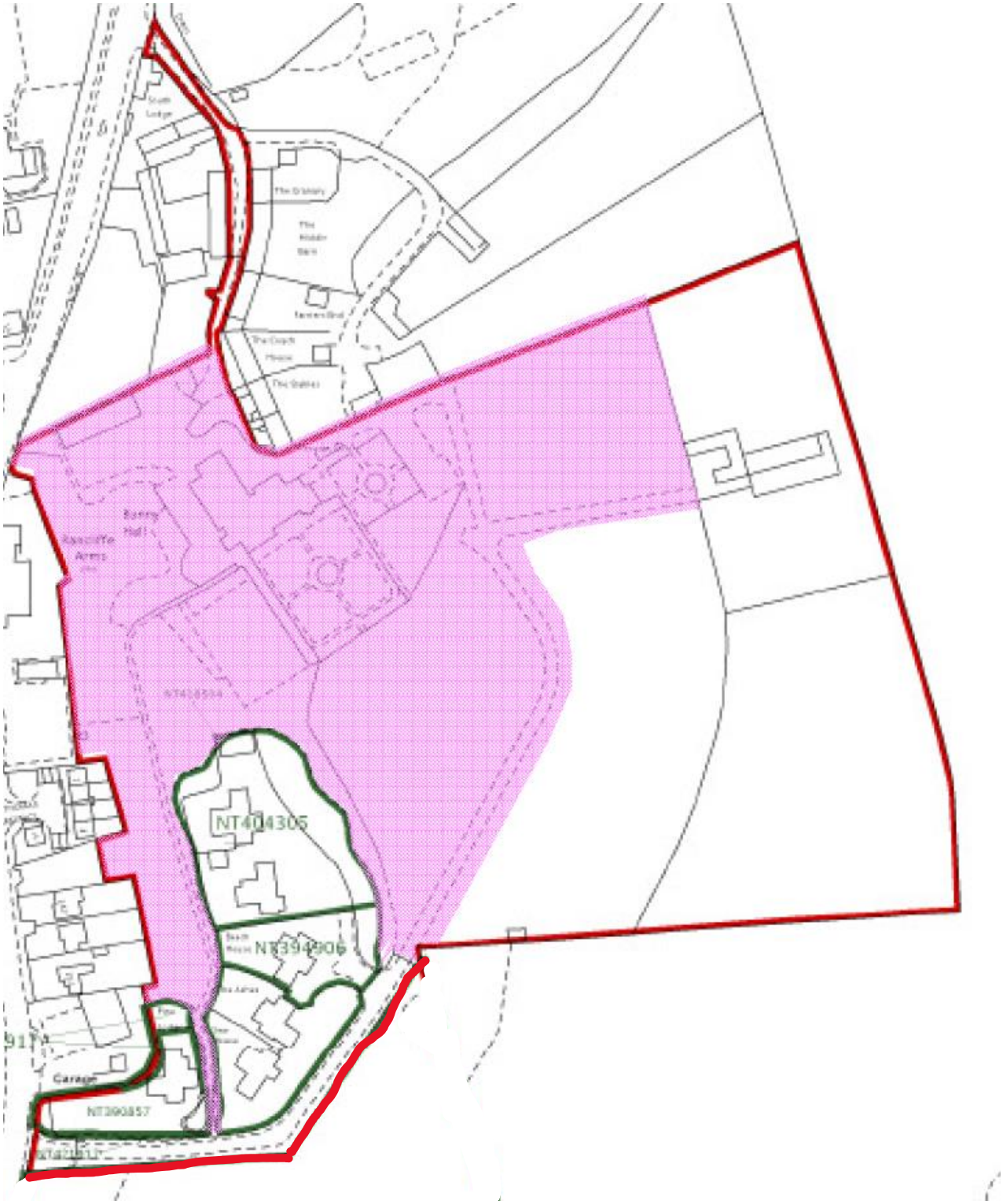

Figure 7 - Appellant's Expert's Permitted Area on 12 July 2016