VALUATION TRIBUNAL FOR ENGLAND

INTERIM DECISION

Non Domestic Rating Appeal; sports hall and premises, effect of a restriction on the use of the appeal hereditament; held that restriction ought not to be taken into account in assessment of rateable value.

RE: Woodlands Splash Lane Castor Peterborough PE5 7BD

APPEAL NUMBER: 054017371184/537N05

BETWEEN:	Pearl Group Services Limited	Appellant
	and	
	Mrs J Alexander	Respondent
	Valuation Officer	

PANEL: Mr M F Young (Vice-President)

SITTING AT: The Valuation Tribunal Office 120 Leman Street, London E1 8EU

ON: 29th January 2015

APPEARANCES: Mr Daniel Kolinsky of Counsel – for the Appellant
Ms Hui Ling McCarthy of Counsel - for the Respondent

Case Law Cited:
LCC v Erith and West Ham [1893] AC 562
Humber Ltd v Jones (VO) (1960) 6 RRC 161
Robinson Brothers (Brewers) v Durham County Assessment Committee [1938] AC 321
Lambeth Overseers v LCC [1897] AC 635
Port of London Authority v Orsett Union [1920] AC 273
Dawkins (VO) v Ash Brothers & Heaton Ltd [1969] 2AC 366
Poplar Assessment Committee v Roberts [1922] AC 93
R F Williams (VO) v Scottish & Newcastle Retail Ltd [2001 LLR 732
Eldred Bros Ltd v Record (VO) (1969) 16 RRC 87 (LT)
Burnell v Downham Market UDC [1952] 2 QB 55
Kingston-Upon-Hull Corporation v Clayton (VO) [1963] AC 28
Re Forestmere Properties Ltd's Application (1981) 41 P&CR 390

7/30

Summary of Decision on preliminary issue.

1. The covenant in the material lease of the appeal hereditament, restrictive of user to that of a private sports ground for a major employer of personnel located close to Peterborough, should be not taken into account in ascertaining its rateable value in the lists.

Introduction

2. Pearl Group Services Ltd made a proposal which was received by the Valuation Officer on 2 September 2010 challenging the existing assessment appearing in the 2005 Rating List. A challenge to the assessment in the 2010 Rating List was made by a proposal received on 3 November 2010.

Preliminary issue to be decided on 29 January 2015.

3. On 14 November 2014 I directed that there be a hearing to decide a preliminary issue which had been identified by the parties, namely whether or not a covenant in the material lease of the appeal hereditament, restrictive of user to that of a private sports ground for a major employer of personnel located close to Peterborough, should be taken into account in ascertaining its rateable value in the lists.

Facts.

4. The parties provided a Statement of Agreed Facts and Issues and a bundle of documents containing copies of:

    1) The proposals

    2) A letter of 22 June 1988 from Peterborough Development Corporation "PDC" to Pearl Assurance plc

    3) A letter of 29 June 1988 from Pearl Assurance plc to PDC

    4) An internal e-mail within Pearl Assurance plc of 29 June 1988

    5) A letter of 5 July 1988 from PDC the Department of the Environment ("DoE")

    6) Information to accompany consultation with DoE per Annex C of GM 7/88

    7) Letter of 19 July 1988 from DoE to PDC

    8) Letter of 26 July 1988 from PDC to Pearl Assurance plc

    9) Draft deed of warranty and undertaking between PDC and Nene Park Trust ("NPT") to Pearl Assurance plc.

    10) Lease dated 23 September 1988 between PDC and NPT

    11) Lease dated 31 July 1989 from NPT to Pearl Assurance plc

    12) NPT "Aims and Achievements' and 'About (NPT)' from NPT web site

    13) '2020' NPT 10 year vision and strategic plan booklet

14) E-mail from Martin O'Neill to Wayne Cox of 7 October 2009

15) Memorandum and Articles of Association of NPT

16) E-mail from Wayne Cox to NPT

17) NPT replies to questions

18) Statement of Agreed Facts and Issues

5. No witnesses were called to give evidence. The Appellant had twice applied for a summons to be issued under regulation 18 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 requesting the attendance at the hearing of the Chief Executive of NPT. I was not satisfied that the criteria set out in VTE/PS/A5 were satisfied and declined to direct the issue of the summons. The application was not renewed at the hearing. The Statement of Agreed Facts and Issues sets out the following facts and matters as agreed evidence.

6. The appeal hereditament ("Woodlands") is a sports ground and sports centre, purpose built in the late 1980's for employees of Pearl Assurance plc ("Pearl") who were relocating from London to Peterborough. At that time Pearl wished to offer some 2,200 of its employees their own sports centre and Woodlands is about 10 minutes from the relocated offices of Pearl.

7. Pearl's title to Woodlands is granted by NPT under the lease dated 31 July 1989 for a term of 998 years ("the lease"). The restriction on user is set out in clause 2(10) of the lease and states that Pearl "to the intent that the obligations may continue throughout the term hereby granted HEREBY COVENANTS with (NPT)..." (among other covenants):

> "Not to use the Demised Premises for any purpose or in any matter other than as described as follows: (a) as a private sports ground with ancillary and associated buildings and recreational facilities for the Lessee (party hereto) or a major employer of personnel in or close to Peterborough".

8. Pearl was wound up in the early part of this century, by which time the term created by the lease had vested in the appellant, the current ratepayer.

9. For a time, with effect from 1 April 2010, the assessment was split while the playing fields demised under the lease were sub-let to local sports clubs, latterly Peterborough United FC. The sports hall buildings remained unoccupied. There was no evidence put before me that this was regarded by NPT as a breach of the covenant restrictive of user.

10. Pearl had relocated to Peterborough as part of the regeneration promoted by PDC, which was established in 1968 by central government under the New Towns Act 1946 and the Peterborough New Town Designation Order 1967, which provided the PDC with statutory powers to fulfil its objectives. Those objectives included the provision of Nene Park, which includes Woodlands, and the protection of its amenities as part of the regeneration and development of Peterborough.

11. PDC refused to sell Woodlands to Pearl in 1988 but instead agreed to a long lease. This was because PDC believed any commercial benefit should be applied exclusively to support the NPT and according to Pearl's view of the position as set out in the memo. of 29 June 1998 the PDC was "determined to prevent Pearl from having the benefit of any development value which may arise from the land in the near future".

12. Before disposing of land by way of a lease PDC was requited to consult the DoE as required by Circular GM 7/88. It sought consent to do so by the letter dated 5 July 1988 which stated "this transaction is exceptional because the land to be leased by Pearl is part of Nene Park and the (PDC) freehold will be transferred in trust to the City Council on 1 September 1988 with (NPT) also having a head lease for 999 years. Therefore the leasing arrangement to Pearl will not in any way hinder the (PDC) disengagement". The annex to that letter described Woodlands as "an important fringe part of Nene Park" and stated that it was "essential to have an effective means of ensuring the land used is operated in accordance with current intentions". DoE did not object to the lease being granted

13. PDC was dissolved on 31 December 1988 having substantially achieved its objectives and its remaining assets were, under statute, transferred to the Commission for the New Towns. The reversion of Nene Park itself, under the lease dated 23 September 1988 PDC granted to NPT ("the NPT lease"), had been transferred to Peterborough City Council.

14. NPT was established in that year as a company limited by guarantee and a registered charity solely to hold and operate Nene Park. It has no express statutory basis, is financially independent and, according to the parties to this appeal, does not receive funding from local or central government or any public body. NPT web site summarises the objective of its founders thus:

> "The three partnership authorities considered the options for the future ownership and management of Nene Park and concluded that an independent trust set up solely to hold and operate the Park was the best vehicle. This would protect the Park from changes of policies and fashion in Local and Central Government and, if financially independent, it would be protected from the uncertainties of public funding and so (NPT) was created".

15. The core objective of NPT, as stated in its Memorandum and Articles of Association, is:

> "...to provide for the public benefit a park and recreation ground for the inhabitants of Peterborough and visitors with the object of improving the conditions of life for such persons".

16. The parties to the appeal agree that in addition to the lease of Nene Park for 999 years, NPT was endowed with commercial properties and other assets by PDC to enable it to general the income required to manage Nene Park.

The applicable law.

17. Paragraph 2 of Schedule 6 of the Local Government Finance Act 1988 provides, so far as relevant, as follows:

"(1) The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions—

(a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;

(b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;

(c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.

...

(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.

(6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.

(7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament,

(b) the mode or category of occupation of the hereditament,

(c) the quantity of minerals or other substances in or extracted from the hereditament,

(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,

(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and

(e) the use or occupation of other premises situated in the locality of the hereditament."

18. As established in *L.C.C. v Erith and West Ham* [1893] AC 562 per Lord Herschell LC at 588 the hereditament is to be valued by reference to the hypothetical tenant on the basis that it is vacant and to let. This, in turn, means that restrictive covenants entered into between the actual landlord and the actual tenant are to be disregarded for the purposes of the rating hypothesis set out in the statute, latterly the 1988 Act. Mr Kolinsky drew attention to how this was expressed by Lord Macmillan in *Robinson Brothers (Brewers) Ltd v County of Durham Assessment Committee (Area No. 7)* [1938] AC 321 at 336-337:

> "Where, as between landlord and tenant, personal elements extraneous to the ordinary relation of lessor and lessee are introduced into the contract of tenancy then the so-called rent paid is not rent in the economic any more than in the legal sense. As the phrase goes, there is present a consideration other than the

rent. Of this there is no better instance than the so-called rent paid by a tied tenant, for the rent is artificially reduced by reason of the personal restrictions imposed on him. Consequently the tied rent is properly disregarded in determining what rent the hypothetical tenant might reasonably be expected to pay on ordinary terms."

19. For the Respondent, Ms McCarthy acknowledged that the hypothetical tenant (and therefore the rateable value) will be taken to be affected by statutory powers or obligations which are "attached" to the hereditament whoever may be the actual tenant: *Lambeth Overseers v L.C.C.* [1897] AC 625

20. This came to be expressed as follows in *Port of London Authority v Assessment Committee of Orsett Union* [1920] AC 273, dealing with statutory restrictions on the use of profits from its dock estate by the P.L.A.

Per Lord Birkenhead at 284:

> "Firstly, the question of rateability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or indeed the only possible occupier, as a possible tenant. Thirdly, in cases such as the present where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, such as docks, the profits earned, and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all.
>
> In other words, if the law has prevented the hereditament being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the effect of such restriction will tend to diminish the value."

Per Viscount Haldane at 288:

> "If, however, the Legislature has prohibited them from making any profit at all, or any profits exceeding a specified amount, then their premises cannot be rated on any hypothesis as to possible profits inconsistent with this prohibition. The occupation is in such a case said to be "sterilised" in relation to any conceivable amount beyond the limit of the prohibition."

Per Lord Buckmaster at 305

> "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

21. In dealing with the impact on rateable value of a hereditament which was the subject of a compulsory purchase order for the purposes of a road widening scheme in *Dawkins (VO) v Ash Brothers & Heaton Ltd* [1969] 2 AC 366 at 382 Lord Pearce expressed the principle in this way:

> "So the actual owner's intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a Superior power on a hereditament within its jurisdiction different considerations apply. The order becomes an essential characteristic of the hereditament, regardless of who may be its owner or what its owner might intend. That particular hereditament has had branded on its walls the words "doomed to demolition whatever hypothetical landlord may own it".

22. It has been held, in *Burnell v Downham Market UDC* [1952] 2 QB 55, that restrictions under a deed of trust of land could be taken into account where the trusts in question "are in effect statutory trusts inasmuch as the conveyance in the present case operated by virtue of the Open Spaces Act 1906 to impose on the land the statutory obligations prescribed by that Act...in short, the duty of allowing it to be used by the public for the purposes of recreation".

Appellant's case.

23. This was, in barest summary, that the covenant restrictive of user in the lease of Woodlands is an expression of a statutory restriction and furthermore, a restriction that would apply to any occupant (and therefore the hypothetical tenant) of the hereditament.

24. Mr Kolinksy took as his point of departure the fact that PDC was established under statute with objects then prescribed by section 2(2) of the New Towns Act 1946. By the time of the grant of the lease to NPT these were provided by section 4(1) of the New Towns Act 1981. Moreover, in order to secure those objects of laying out and developing the new town at Peterborough, in accordance with approved proposals, the power of PDC to grant that lease was prescribed by section 17 of the 1981 Act:

> "(1) In relation to any land acquired by a development corporation, and—
> (a) subject to this section and to any direction given by the Secretary of State under this Act, and
> (b) whether or not, in the case of land within the area of the new town, the development of that particular land has been proposed or approved under section 7(1) above,
> the development corporation may dispose of that land—
> (i) to such persons,
> (ii) in such manner,
> (iii) subject to such covenants or conditions,
> as they consider expedient for securing the development of the new town in accordance with proposals approved by the Secretary of State under that section 7(1), or for purposes connected with the development of the new town.

(2) A development corporation has no power, except with the Secretary of State's consent (given generally or specially)—
(a) to transfer the freehold of any land, or
(b) to grant a lease of any land for a term of more than 99 years [or
(c) to dispose of any land by way of gift."

25. Whether or not the development of Woodlands was proposed or approved under section 7(1) of the 1981 Act is not now known to the parties. However, given the terms of section 17(1)(b) above that does not matter. On the basis of the statutory framework, Mr Kolinsky submitted for the Appellant that PDC power to dispose of Woodlands by way of the NPT lease was:

(a) that such disposal had to have been for the purpose of the development of the new town;

(b) for a purpose substantially the same as the statutory object of the PDC;

(c) required express ministerial consent, as did the lease by NPT to Pearl;

(d) subject to a requirement that control, by the terms of the lease, would be consistent with the statutory object of the PDC;

(e) was in the context of PDC having no general power to control the use of land after disposition, there being no continuing statutory role of the PDC in development control;

(f) had to be way of an instrument which contained the restrictive covenant to ensure the statutory duty was fulfilled and

(g) was made in fulfilment of obligations as to user in the NPT lease.

26. Mr Kolinsky argued that PDC was compelled to include covenants restrictive of user within the NPT lease in order to be within section 17(1) of the 1981 Act. He referred to recitals 1 and 3 of the NPT lease and the following covenants on the part of NPT:

Clause 2(b): to establish at Nene Park, among other things "... facilities for sports recreation and entertainment for the use and benefit of the inhabitants of Peterborough and the surrounding area and in the interests of social welfare"

Clause 2(m(ii): not to assign the term of the NPT lease without securing the consent of both the Charity Commissioner for England and the PDC who are obliged to refuse consent to any assignment "if it appears that there is any chance that the assignment or underletting will prevent or restrict the use of the Park or any part or parts thereof for the purposes specified in clause...2(b)...hereof".

Clause 2(m)(iii): against underletting of part of the Park without the written consent of PDC.

Clause 2(m)(iv): upon any such underletting of part the underlessee "..,is obliged to enter into a direct covenant with (PDC) to observe and perform the terms of the (NPT lease) so far as applicable to the underlease and in particular the provisions of clause 2(a) – (e) hereof so far as applicable to the property underlet".

27. He further submitted that the statutory purpose of the PDC was also reflected in the object of NPT itself, being "to provide for the recreation of the public by the provision of a park for the benefit of the inhabitants of Peterborough and visitors with the object of improving the conditions of life for such persons". This established a "matrix of provision" in the private law documents (the NPT lease and the deed creating the NPT) which exist to give effect to the statutory obligations and objects of PDC, being the only means by which this could be done. The covenant restrictive of user in the lease was required by PDC in negotiating that lease for the NPT which it was to establish with the City Council as part of completing its work. He drew particular attention to the following:

    Pearl's response to the PDC of 29 June 1988 which indicated that the PDC "attached particular importance to protecting the amenities of Nene Park. They believe that any peripheral commercial benefits should be applied exclusively to support the Trust Company which is being set up by the PDC to assume responsibility for the long term operation of the park".

    The PDC letter of 5 July 1988 to the Secretary of State for the Environment seeking consent for the grant of the lease in the terms set out at paragraph 12.

    Approval was given by letter of 19 July 1988 on those terms.

    The lease contains no other restrictions on user other than the covenant in issue, which is not in the same terms as clause 2(b) of the NPT lease.

28. Therefore, it was submitted for the appellant, the covenant restrictive of user is a mechanism adopted by the PDC to ensure that the long-term user of Woodlands is "consistent" with the statutory obligations under the 1981 Act. As such it is, in substance, a statutory restriction imposed with ministerial approval and ought to be taken into account when determining rateable value.

29. I deal with the appellant's submissions on release of the restrictive covenant in further detail below. The appellant does not consider that NPT has considered that issue fully and, on the basis of *Re Forestmere Properties Limited's Application* (1981 41 P & CR, submits that the Upper Tribunal is, in practice, very slow to release a covenant the benefit of which is held by a charitable trust pursuant to its objects.

The Respondent's submissions.

30. Counsel were in agreement as to the basic principles of rating and to the point where the authorities establish that statutory restrictions on the use of the hereditament may be taken in to account in arriving at the rateable value. However Ms McCarthy argued that the restrictive covenant in issue in this appeal did not have that necessary attribute: it was nothing more than a term or "accident" of this particular tenancy, being a private arrangement that can be released or otherwise lost. She pointed to the emphasis on the 'physical' state of the hereditament and locality as a deliberate feature of the legislation introduced to restrict the effect of the decision in *Clement (VO) v Addis Ltd* [1988] 1 WLR 301 with regard to section 20 of the General Rate Act 1967.

31. Ms McCarthy went on to submit that it was insufficient for the Appellant simply to argue that (the arrangements for tenure of) Nene Park were created as a result of the exercise of PDC powers under the New Towns legislation but she recognised that the case for the Appellant did not rest there: put shortly the Appellant had to establish that the material covenant has "equivalent standing to a statutory requirement" and because of that it could not lawfully be released or lost (at the instance of parties to the lease) such that it is properly to be regarded as integral to the hereditament itself. She contended that, at the very least, the Appellant's case fell at the insurmountable hurdle created by the right to apply to the Upper Tribunal for the discharge or modification of the restrictive covenant in issue under section 84 of the Law of Property Act 1925. I consider that below but before doing so set out the submissions of the Respondent on the terms of that covenant.

32. It was pointed out by Ms McCarthy that valuing the hereditament as it is requires the VO to value a sports ground and sports centre. The real dispute between the parties is, given the dissolution of Pearl, whether this has to be the value of that sports ground and sports centre let for use only by a "major employer of personnel located in or close to Peterborough". However she submitted that the origin of the covenant was no more than helpful background and not determinative of the position as at the material day for the valuations made. No current statutory restriction required the covenant to be maintained in its precise terms. NPT regarded it as the result of a private agreement between NPT and Pearl by which the Appellant was bound as successor in title.

33. The Respondent relied on the answers by NPT, by its former Chief Executive Mr James McCulloch to questions originally put by an e-mail of 29 May 2013 from Mr Cox of the VOA but updated following correspondence of 21 January 2014 and 16 January 2015 in an agreed document. In answer to the question "Does the (NPT) have the power to relax the user clause para. 10 above through negotiation between the parties in order to allow occupation by some other body who are not a major employer of personnel located in or close to Peterborough", Mr McCulloch answered "Yes". This was updated to add that any new use would be the subject to commercial negotiation and have to be consistent with the aims and objects of the Trust, its 'Vision 2020' strategy and with no lesser a covenant than that provided by Pearl. NPT had provided a copy of a letter from its solicitors to Pearl's Director of HR of 12 May 2000 where an indication of the hurdles which needed to be jumped in order for a change of use of part of Woodlands to be considered: none of these were statutory provisions. Mr McCulloch went on to say, in the answers for NPT, that NPT would support occupation of Woodlands by a party who met the objectives of the NPT but not the requirements of the user covenant, recognising that this would need landlord's consent of Peterborough City Council (under the NPT lease).

34. On this basis Ms McCarthy submitted that any desire on the part of the Trust to maintain the restrictive covenant was nothing more than the "whim" of a particular landlord, which should not be a consideration. I do not endorse that submission if it can be taken as meaning that NPT would act on impulse rather than reason or necessity : I am satisfied from what NPT has provided in evidence that it would act on a reasoned basis to ensure that Woodlands was used to best advantage in fulfilment of its objectives for Nene Park as a whole with its negotiating positon over enforcement, waiver or release of the restrictive covenant informed and constrained by its charitable purpose expressed in those objectives. However the ability, which NPT considers it has and I find that it has, to do so indicates that

the restrictive covenant in issue does not have the character of a statutory restriction. The fact that NPT is regulated under the Companies Act 2006 and by the Charity Commission does not mean its rights and obligations under the lease have the attributes of statutory rights and obligations.

35. Ms McCarthy did not accept that *Re. Forestmere Properties Ltd's Application* was authority for the proposition advanced by Mr Kolinsky that the Upper Tribunal is very slow to release a covenant the benefit of which is held by a charitable trust pursuant to its objects. I am inclined to agree with her on that: the Upper Tribunal did not decide that case on that basis but on an analysis of the purpose of the restrictive covenant in issue in terms of design of development sought by the applicants and principles of good estate management. I anticipate that the Upper Tribunal would be concerned to see that charitable trustees were acting in accordance with their duties to preserve the assets of the charity and that all necessary consents were obtained. I am not in a position to second-guess what the Upper Tribunal would do faced with an application for release of this restrictive covenant but it is not hard to conceive of uses of Woodlands which are consistent with the objectives of NPT but which would otherwise be restricted by the terms of the lease. I do not see how NPT would, of necessity, be acting in breach of any of its obligations by acting, in fulfilment of its purposes, to deal with a restrictive covenant which may be obsolete or impede the use of Woodlands for those purposes.

Decision and Reasons:

36. The agreed facts establish that PDC was acting in fulfilment of its statutory duty with regard to establishing NPT. In the context of Nene Park this did mean protecting is amenities, as was understood by Pearl. However PDC had also decided that, as part of its wider duties to develop the new town in Peterborough it would help facilitate the relocation of Pearl, a major insurance company, to the city and make available, subject to lease, Woodlands as its private staff sports ground and centre, doubtless anticipating Pearl or a successor business to it would continue for the duration. PDC clearly did not want Pearl to have the commercial benefit from any development of Woodlands but instead wanted any "peripheral" commercial benefit to go to NPT. PDC explained to the DoE, in its "Information..." at item 6 of the agreed bundle that while Pearl wanted to but the freehold of Woodlands "freehold sale of this particular land may not be in the best long-term estate management and financial interests" of NPT. That rather points to an intention to give NPT a strong commercial position in negotiating a release from the restrictive covenant, subject to all necessary consents, if Pearl decided not to provide the staff sports grounds and centre for its staff in or near Peterborough or assign the term of the lease to a successor business which did. It points away from the Appellant's position that the restrictive covenant was an intrinsic part of the hereditament.

37. The authorities on beneficial occupation are of limited assistance as it is accepted by the Appellant that it is in beneficial occupation in this case. Mr Kolinsky rightly pointed out that, as in *Burnell v Downham Market UDC* [1952] 2 QB 55, a private instrument can give effect to statutory requirement, in that case "inasmuch as the conveyance in the present case operated by virtue of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed by that Act..." per Evershed MR at 65. Section 10 of the 1906 provided:

"A local authority who have acquired any estate or interest in or control over any space or burial ground under this Act shall, subject to any conditions under which the estate, interest or control was so acquired:
(a) Hold and administer the open space or burial ground in trust, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and for no other purpose;"

Lord Evershed MR also recognised, in *Kingston-upon-Hull Corporation v Clayton (VO)* [1963] AC 28 that land may be held by a public authority by virtue of a statute or a deed which prevents beneficial occupation by that authority.

38. That position, in my judgment, is very different from a statutory corporation such as PDC needing, in fulfilment of its statutory objectives, to obtain approval for disposal of land to such persons, in such manner and subject to such covenants or conditions as it considers expedient for those purposes. PDC and Peterborough City Council were setting up NPT as a non-statutory corporation, free to fulfil its charitable purposes as it sees fit within its regulatory framework as a company limited by guarantee and a registered charity, with the benefit of the land granted to it subject to rights and obligations in leases to it and to which that land was subject. DoE had no objection to the agreement to the lease and this was taken as the necessary consent. Section 17 of the New Towns Act 1981 provides the means by which corporations such as the PDC dispose of land "as they consider expedient for securing the development of the new town" and once that disposal has taken place its statutory requirement is discharged.

39. I am not, therefore, persuaded by any of the arguments of Mr Kolinsky that the restrictive covenant in issue has the attributes of a statutory restriction for the purposes of rateable value as established in *Port of London Authority v Assessment Committee of Orsett Union.* I do not consider that the restrictive covenant is "essential to the hereditament itself": Woodlands is a sports ground and sports centre whether employees of a particular employer or the general public of Peterborough play sport there.

40. Nor do I consider there is here a basis on which 'human realities' ought to be taken into account for assessment of rateable value as explained by Lord Pearce in *Dawkins (VO) v Ash Brothers and Heaton Ltd*: the use to which Woodlands may be put outside the current restriction is a matter for negotiation between NPT and the Appellant as landlord and tenant, subject to any necessary consents being obtained.

41. The existence of a right under section 84 of the Law of Property Act 1925, if all else fails and as yet not exercised by the Appellant, to apply for release or variation of the restrictive covenant, if it cannot be negotiated, demonstrates that the covenant does not have the force of a statutory requirement.

42. In conclusion, I determine for the purposes of the preliminary issue that the restrictive covenant at clause 2(10) of the lease dated 31 July 1989 between Nene Park Trust and Pearl Assurance plc ought not to be taken into account in arriving at the rateable value of the appeal hereditament. I am not in a position to give guidance on any other aspect of that assessment, in so far as I am still invited to do so by the parties: that is beyond the scope of the preliminary issue.

Date: 20th March 2015

Appeal number 054017371184/537N05