RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Number: **CH1/15UB/OFR/2004/0002**

Decision on an Application under Section 13 Landlord and Tenant Act 1987

Applicant:	Cawsand Fort Management Co Ltd
Respondent:	Mrs K M Snailham (leaseholders' nominee)
Re:	The Fort, Cawsand, Torpoint, Cornwall
Date of Application:	14th September 2004
Date of Hearing:	27th and 28th January 2005
Venue:	Appeals Service, St Catherine's House, Notte Street, Plymouth
Representation:	Mr Guy Adams, Counsel, for the Applicant Mr David Mathias, Counsel, for the Respondent
Tribunal Members:	Mr A L Strowger MA (Cantab) (Chairman) Mr T N Shobrook BSc FRICS Ms C Rai, LLB
Date of Decision:	18th March 2005

DECISION

The Application and the proceedings

1 The Tribunal is asked to exercise its jurisdiction under section 13 of the Landlord and Tenant Act 1987 ("the Act") to determine a single issue arising out of proceedings in the Plymouth County Court in relation to a Notice served under section 12B of the Act ("the section 12B Notice). That issue relates to the identification of the precise extent of the appurtenances the leaseholders of residential buildings at Cawsand Fort are entitled to acquire under the Act. For the purposes of the Application to the Tribunal it was agreed by the parties that the 12B Notice served by the Respondent is valid and accordingly the Tribunal has jurisdiction to consider the Application.

2 Prior to the Hearing the Tribunal made a site inspection and the parties pointed out all the features to which they intended to make reference. A set out photographs of relevant features was taken by the Respondent's expert witness, Mr Alan Prisk, during the course of the inspection and made available to the parties and the Tribunal at the Hearing.

3 The Tribunal heard oral evidence from Mr Peter Dan Carroll, a director of the Applicant Company, the Respondent Mrs Kathleen Mary Snailham (nominee representative of the majority of leaseholders of flats and maisonettes ("the Flats") at the Fort) and Mr Alan Prisk, Planning Consultant and expert witness for the Respondent .

Background

4 Cawsand Fort (the Fort"), also known as Cawsand Battery, is an old Napoleonic fort believed to have been built in about 1867; it is Grade II Listed and a Scheduled Ancient Monument. Within the confines of the Fort, from some time after about 1987, a Mr Michael Joseph Peacock of Peacock Properties ("Peacock") developed a total of 30 residential units. Phase 1 comprised dwellings formed by alterations and extensions to the existing Fort along the southern boundary of the site. Phase 2 comprised dwellings along the eastern boundary of the site and are primarily new build. He also set up the Applicant Company.

5 Peacock developed and sold off 11 freehold properties (numbers 3-12 and "The Belvedere") and 19 leasehold properties (numbers 1, 2 and 14-30). Numbers 1-12 were developed in Phase 1 and are mostly terraced units on two floors (number 1 is a bungalow extending partly over the ground floor of number 2); all the Phase 1 properties are connected to mains sewerage. The Belvedere is an end terraced unit on 3 levels and is on the same septic tank sewerage system as units 14-30 which comprise maisonettes on two floors with single-storey flats above, each spanning the two maisonettes, and which were built in Phase 2 of the development. All the properties enjoy access over the common roadways coloured blue on the plans ("the Roadways"), footpaths coloured yellow ("the Footpaths") and common land coloured green ("the Green Land"). Plan B at page 190 of the Respondent's bundle is illustrative of the full extent of those rights. The leasehold properties also have rights to use the sewerage system, either granted expressly under the leases or by necessary implication. The sewerage system comprises a septic tank and soakaways ("the Septic Tank") and a macerator ("the Macerator"). The former is on and under adjoining land, known as 'the Soldier's Garden. The Macerator, connected by pipes to the Septic Tank, is located on part of the Green Land outside the wall of the Fort, on the

south-east corner. The sewerage system is shown on the plan on page 121 of the Respondent's bundle. The owners of a property called "The Firs", bought a small parcel of land, outside the wall of the Fort but immediately adjacent to it, from Peacock and acquired an easement over the shared roadway.

6 A copy of the lease of Plot 2 between Peacock and Mr and Mrs John Nicholas House is annexed at Appendix 10 of the Respondent's Response as being illustrative of the leases. The property demised is referred to as a plot of land edged red on the annexed plan, "together with the dwelling house and garage erected thereon or on some part thereof being Plot 2 and garage and parking bay..." (the plan does not show a parking bay edged red). The First Schedule at clause (a) grants "a full right in common with others so entitled thereto at all times and for all purposes to pass and repass with or without vehicles over the roads and parking area coloured blue on foot only over the footpaths coloured yellow and common areas coloured green on plan B annexed hereto forming part of the Estate Subject to the payment from time to time of a rateable proportion of the cost of maintaining and repairing the same." Clause (b) grants rights to drainage and services and also rights of entry "upon adjoining or neighbouring land included in the Estate" for the purpose of maintenance. The Second Schedule reserves like rights to the landlord. The demise includes part of the yellow pathway with rights over it reserved. Plan A appears to be correctly coloured in respect of the property. The second plan (also marked plan A on the copy produced, but which should have been marked plan B) shows the full extent of the paths, roadways and common areas in respect of the easements granted in the First Schedule.

7 Over the years there has been an apparent lack of care in colouring plans by conveyancers, with the result that instead of the same coloured plan B in respect of shared easements being attached to a "common" lease, there are a number of variations in the colouring, with parts of the green colouring being omitted from some plans. By way of example, on Plan B of Mr and Mrs Snailham's lease of plot 7 (included in the Respondent's bundle at page 210), the only land coloured green is the strip outside the wall of the Fort fronting the freehold block to New Road and the central area known as the Mound under which some garaging was excavated. The part of the Mound over the garages in not coloured green although it is on Plan B of some other leases produced. Some of the property owners appear to have informal use of space for storage in underground former ammunition chambers underneath the Mound.

8 Peacock covenanted, inter alia, under clause 4 (e) of the leases that "leases of other units within the Building will be in substantially the same form as this Lease (mutatis mutandis)". For the purpose of determining the application the Tribunal has had to assume that it was intended that all the leases should grant similar rights to those in the First Schedule and that Plan B in each case would show the full extent of those rights (as in the plan at page 190 of the Respondent's bundle).

9 Some, but not all, of the buyers acquired a share in the Applicant Company. To regulate the management and upkeep of the common areas, 9 of the 11 freeholders and all but 2 of the 19 leaseholders entered into Deeds of Easement and Covenant with the Applicant Company. However to add to confusion the Green Land – referred to as the 'Amenity land' in the Deed (see page 226) – does not cover the whole area shown on the lease plans – it excludes the land adjoining the roadway beyond the garaging leading to New Road. However it does extend the rights of way over the Mound into rights of enjoyment.

10 Over the years the Applicant Company has not been active in carrying out management obligations. Some of the property owners appear to have paid service charges and some not and there appears to have been on going disagreements between some of the owners and Peacock over a number of issues. When Peter Dan Carroll ("Mr Carroll"), a solicitor, bought a flat at the Fort with his wife in January 2000, negotiations with regard to the acquisition of the freehold by the property owners from Peacock, conducted between their respective solicitors, had been under way for some time but had not yet reached fruition. Acquisition of the shareholding in the Applicant Company and of the freehold interest was the reasonable expectation of the residents - in the sale agreements (see page 167 of the Respondent's bundle), Peacock undertook,

under clause 6 (i)
"on completion of the sale of the final plot of phase 2 of Cawsand Fort Cawsand Cornwall aforesaid to transfer all of his shareholding in the Cawsand Fort Management Company Limited (at no cost to such Company) to the remaining shareholders who are also owners of the freehold and leasehold interest in the plots forming phases 1 and 2 at Cawsand Fort aforesaid pro rata between such shareholders of that company the freehold and leasehold plots"
and under 6 (ii)
" to enter into a legally binding contract in the form annexed hereto with the Cawsand Fort Management Company Ltd within 7 days of the date hereof".

This is common practice in such developments.

(Note: this further document was not annexed to the sale agreement produced to the Tribunal).

11 Mr Carroll, who referred to having had experience of similar schemes elsewhere, was optimistic that he, in conjunction with another leaseholder, Mr Eric Groom, could, on behalf of the all the owners of properties at Cawsand Fort, successfully negotiate with Peacock for the acquisition of the shares of the Management Company and for the transfer to it of the freehold of the common areas and the freehold reversion of their leasehold titles. The extent to which consultation with other owners took place is disputed. However a price (that included discharging the arrears of service charges) was agreed with Peacock.

12 Peacock entered into an option agreement with Mr Carroll and MrGroom to transfer to them his shareholding in the Applicant Company and the freehold Title Number CL 24336. However the validity of the option agreement was questioned. It is not necessary for the Tribunal to consider in detail the unfortunate course of events and legal dispute that followed. Suffice it to say that, for whatever reason there was a great deal of acrimony and a totally different interpretation is placed by the parties on the events that occurred and the and motives that lay behind them. However the eventual outcome was that Mr Carroll and Mr Groom acquired Peacock's shareholding in the Applicant Company giving them a controlling interest and the freehold title of all the land at the Fort vested in Peacock was transferred to the Applicant Company in two parcels, Title Number CL 183133 comprising the leasehold building and Title Number CL 24336, comprising the remainder of the land at the Fort.

Oral Evidence

13 The Respondent gave evidence of the breakdown of trust between the owners and Mr Carroll. Mr Prisk, planning consultant and former local planning officer, commented on his report that contained an in-depth analysis of the planning background. He expressed the opinion that there was no possibility for commercial development at Fort Cawsand, given all the constraints of national and local planning policies – it is Grade 11 Listed and a Scheduled Monument. Nevertheless Mr Carroll expressed the view that there were development and commercial opportunities that he might wish to explore.

Consideration of the facts and the law

14 It is common ground that the building in which the tenants' flats are contained comprise premises to which Part 1 of the Landlord and Tenant Act 1987 ("the Act") applies. For the purposes of this Application it is agreed by the parties that a valid statutory purchase notice has been served under section 12B of the Act on the Applicant by the requisite number of tenants of the leasehold properties in the building at Cawsand Fort. Accordingly the Tribunal has jurisdiction to hear and determine under section 13 of the Act, the sole issue referred to it, namely the identification of the precise extent of the "appurtenances" to their leasehold premises that the tenants are entitled to acquire under the Act, and the appropriate provision in respect of those appurtenances – i.e whether in respect of the easements perpetual rights should be granted to the tenants or whether they should acquire the freehold interest in the land over or under which they presently enjoy those easements.

15 Both Counsel referred to the Court of Appeal case of Denetower Ltd v Toop (1991) WLR 945 C.A ("Denetower") and the Lands Tribunal case of Twinsectra Ltd v Jones (1998) 2 EGLR 129 ("Twinsectra"). Additionally Mr Adams referred to the case of Methuen-Campbell v Walters decided by the Court of Appeal in 1978. The Tribunal also considered the definition of appurtenances in Butterworth's Words and Phrases Legally Defined.

16 The premises to which the rights of tenants under the Act apply are defined in section 1(2) as premises that consist of the whole or part of a building and consist of two or more flats held by qualifying tenants. The section makes no reference to "appurtenances". That is to be found in Part III of the Act that deals with compulsory acquisition by tenants of their landlords' interest where the landlord has been in default. Section 29 states that in a compulsory acquisition order the court may, if it thinks fit, "(a) include any yard, garden, outhouse or appurtenance belonging to, or usually enjoyed with , the premises specified in the application on which the order is made". Sir Nicholas Brown-Wilkinson, as he then was, considered this anomaly in Denetower, expressing the view that the Act was "ill-drafted, complicated and confusing". In his judgement, section 29 (a) was inserted in Part III "out of an abundance of caution. Certainly there is no reason why the tenant who acquires under section 12 of the Act should not be entitled to acquire exactly the same property as could be acquired under Part III.". In Denetower he took the view that it would be to attribute to Parliament an entirely capricious intention to hold that the tenant's rights to purchase did not extend to the gardens and other appurtenances of the flats which are expressly or impliedly included in the demise. From Denetower one can conclude that it is a perfectly legitimate meaning of the word "building" to find that it includes the appurtenances of the building.

17 Sir Nicholas Brown-Wilkinson then went on in Denetower to decide, on the particular facts (at page 952 H) what were the appurtenances of the building in question. He did not, however, define the term. In Denetower the premises fitted comfortably within the provisions of the Act: two small blocks of flats with common parts and with small gardens front and back and rights over a shared roadway between them to garaging at the rear. His reasoning was that the gardens were included in the lease of the flats which are parts of the building and so were undoubtedly appurtenances; the tenants enjoyed no rights over the garages under or by virtue of their leases of the flats - the garages were held not to be appurtenances. He went on "As to the roadway and paths over which the tenants have either express or prescriptive rights of way, in my judgement they are appurtenances of the building." However the Court left it open to the rent assessment committee (now the LVT) to decide whether or not it was appropriate that the tenants should acquire the freehold of the roadway and paths (over which they enjoyed express or prescriptive rights) or be granted perpetual rights of way over them.

18 Twinsectra is a Lands Tribunal case that applied the principles of Denetower but added nothing to it that assists the present case. The Tribunal decided that easements were rights that could be compulsorily acquired as appurtenances and granted perpetual rights over the gardens and amenity land to the tenants. In any event in that case the applicant was not seeking the transfer of the freehold.

19 In the absence of any definition of 'appurtenances' by the Court of Appeal in Denetower it is necessary to seek guidance elsewhere for that. 'Words and Phrases' considers the historical meaning that originally referred to incorporeal rights attached to the land granted or demised such as rights of way but was not to include lands in addition to that granted or demised. However whilst the meaning is now accepted as to include land it is clearly established "beyond question that, broadly speaking, nothing will pass by the word 'appurtenances' which would not equally pass without the addition of that word". In Denetower reference was made to Trim v Sturminster Rural District Council (1938) 2 KB 508, CA in which it was stated "Certainly no case has been cited to us in which the word 'appurtenance' has even been extended to include land as meaning a corporeal hereditament which does not fall within the curtilage or yard itself, that is, not within the parcel of the demise of the house". The case of Methuen and Campbell takes the matter further and reviews and confirms the propositions laid down in Trim. Buckley L J says at 543 H "for one corporeal heriditament to fall within the curtilage of another the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter". The word "curtilage" is defined in the Concise Oxford English Dictionary as the "area attached to a dwelling" and in the Shorter Oxford English Dictionary as "a small court, yard or piece of ground attached to a dwelling house, and forming one enclosure with it". According to Butterworth the word appurtenances includes "all the incorporeal heriditaments attached to the land granted or demised such as rights-of-way, of piscary , and the like, but it does not include lands in addition to that granted".

Findings as to the law

20 The Act confers on tenants of flats rights with respect to the acquisition by them of their landlord's freehold reversion. Part I of the Act applies to premises if they consist of the whole or part of a building. Determining what are the "appurtenances" is a matter of fact and law. Denetower decided that a building could include its appurtenances. From its consideration of the relevant case law as set out above, the Tribunal finds that for the

purposes of Part I of the Act, an appurtenance of a building - meaning land - must fall within its curtilage. To extend 'appurtenance' to land not within the curtilage of the 'building' (the word used in the Act) has not been established by the authority of case law and would not accord with the definition of appurtenance as accepted by the Court of Appeal in the case of Methuen and Campbell v Walters. It is established law – and not disputed by the parties – that 'appurtenances' include the easements, expressed or implied, demised by the leases.

Findings of the Tribunal on the facts of the case

21 As Buckley L J said in Methuen and Campbell v Walters "it is a mixed question of fact and law but largely depends on the facts". Applying this reasoning to the facts of this case lead the Tribunal to find that the relevant premises for the purposes of the Act are the buildings containing the dwellings and their appurtenances. Appurtenances include appurtenant property within the curtilage – and this comprises the pathway and gardens, the steps from the roadway (including the store underneath the steps), being all the freehold Title Number CL 183133, and also includes the garages and parking bays as demised in the various leases. The Tribunal finds it appropriate that the freehold of all this property should be transferred to the Respondent.

22 The easements that are granted by the leases are 'appurtenances' – meaning appurtenant rights - but are not appurtenant land as they do not fall within the curtilage of the building. In the case of Denetower the Court decided that the roadway and pathway over which the tenants enjoyed rights of way were appurtenances. It suggested it was for a Rent Assessment Committee to consider whether the freehold of the roadway and pathway should be transferred or whether the grant of perpetual rights was more appropriate. It is not disputed by the parties that appurtenances in the case of the Fort include the easements granted by the leases – they are appurtenant rights. In Denetower, given the scale and geography – two small blocks of flats with the access road and pathway between them (arguably within the curtilage of the building) – it may well have been appropriate to consider the transfer of the freehold of the land over which the easements were granted. However the Tribunal considers that the position with the Fort is very different. Much of the land over which rights are granted is some distance away from the building. The Tribunal does not find it is within the curtilage of the building. The roadways, pathways, parking areas and the Green Land also serve property (the freehold dwellings and the Firs in respect of the access) other than the buildings that comprise the premises to which the Act applies; the Tribunal finds that it is appropriate to enlarge those easements into perpetual easements but not to transfer the freehold of the underlying land.

23 The Mound is something of an anomaly. The leases grant only access over it, although the Deeds of Easement and Covenant entered into by most of the owners (freehold and leasehold) refer to the "enjoyment" of it. Under the Mound lie the former ammunition chambers and some garages. The Tribunal does not find it appropriate for the transfer of the freehold of the Mound.

24 The sewerage system falls into two parts. The Macerator is located outside the wall of the Fort but within the Green Land. The Septic Tank and soakaways lie under the Soldiers' Garden and not on Green Land. In those circumstances the Tribunal finds it appropriate for the express and implied rights in respect of the drainage system as a whole and any other services enjoyed with the buildings to be enlarged into perpetual rights but not to transfer the freehold of the land under which those easements are enjoyed.

25 Mr Mathias sought to persuade the Tribunal that it should exercise its discretion in favour of the Respondent – to the extent that the whole of the site of the Fort should be found to be within the definition of appurtenances and that the Applicant should be divested of the freehold of it - because of the attitude and behaviour of Mr Carroll (and Mr Groom). Strong views were expressed by the Respondent on the subject; feelings obviously run high amongst the residents. However establishing the extent of the appurtenances and the entitlement to the transfer of freehold title or grant of perpetual rights is a matter of fact and law and the behaviour of the parties is not relevant to the Tribunal's decision. It was also put to the Tribunal that leaving the freehold vested in the Applicant could result in management problems in the future in view of the bad relations between Mr Carroll and the residents. Whilst the Tribunal acknowledges the legitimacy of these concerns, particularly in the light of the Statutory Listing of the Fort and status as an Ancient Monument, it is open to the residents to make an application to the Tribunal, if they so wish, for the appointment of a manager and take the management out of the hands of the Applicant.

26 Fears were also expressed about the Respondent's development plans at the Fort; however as Mr Prisk, the Respondent's own expert witness, stated in his conclusion at 6.1:

27 "the land the subject of this report is subject to some of the highest degrees of protection available under planning and historic buildings legislation"

28 In his final paragraph at 6.10 he states:

29 "The only realistic conclusion by any reasonable criteria is that under current planning legislation there is no likelihood of planning permission being granted clearly indicated in his evidence, the prospects for any commercial development of this land. Even if it were to be granted there is equally little likelihood of either listed building consent or scheduled monument consent being granted. It should also be noted that any development of this site requires a further Deed of Variation to the Section 52 Agreement on the land. There is no guarantee of such a Deed of Variation being agreed with the local planning authority and if they refused to give one there is no realistic means of appeal"

30 Clearly Cawsand Fort is well protected and the owners can take comfort from their own expert's report.

31 As this matter was referred to the Tribunal from the County Court with the concurrence of both parties to bring to an end a long running dispute that has led to protracted litigation, the Tribunal does not find it appropriate to make any order for costs.

Signed: **Dated: 18th March 2005**

A.L.Strowger, Chairman

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DECISION

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1 The Tribunal is asked to exercise its jurisdiction under section 13 of the Landlord and Tenant Act 1987 ("the Act") to determine a single issue arising out of proceedings in the Plymouth County Court in relation to a Notice served under section 12B of the Act ("the section 12B Notice). That issue relates to the identification of the precise extent of the appurtenances the leaseholders of residential buildings at Cawsand Fort are entitled to acquire under the Act. For the purposes of the Application to the Tribunal it was agreed by the parties that the 12B Notice served by the Respondent is valid and accordingly the Tribunal has jurisdiction to consider the Application.

2 Prior to the Hearing the Tribunal made a site inspection and the parties pointed out all the features to which they intended to make reference. A set out photographs of relevant features was taken by the Respondent's expert witness, Mr Alan Prisk, during the course of the inspection and made available to the parties and the Tribunal at the Hearing.

3 The Tribunal heard oral evidence from Mr Peter Dan Carroll, a director of the Applicant Company, the Respondent Mrs Kathleen Mary Snailham (nominee representative of the majority of leaseholders of flats and maisonettes ("the Flats") at the Fort) and Mr Alan Prisk, Planning Consultant and expert witness for the Respondent .

Background

4 Cawsand Fort (the Fort"), also known as Cawsand Battery, is an old Napoleonic fort believed to have been built in about 1867; it is Grade II Listed and a Scheduled Ancient Monument. Within the confines of the Fort, from some time after about 1987, a Mr Michael Joseph Peacock of Peacock Properties ("Peacock") developed a total of 30 residential units. Phase 1 comprised dwellings formed by alterations and extensions to the existing Fort along the southern boundary of the site. Phase 2 comprised dwellings along the eastern boundary of the site and are primarily new build. He also set up the Applicant Company.

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6 A copy of the lease of Plot 2 between Peacock and Mr and Mrs John Nicholas House is annexed at Appendix 10 of the Respondent's Response as being illustrative of the leases. The property demised is referred to as a plot of land edged red on the annexed plan, "together with the dwelling house and garage erected thereon or on some part thereof being Plot 2 and garage and parking bay..." (the plan does not show a parking bay edged red). The First Schedule at clause (a) grants "a full right in common with others so entitled thereto at all times and for all purposes to pass and repass with or without vehicles over the roads and parking area coloured blue on foot only over the footpaths coloured yellow and common areas coloured green on plan B annexed hereto forming part of the Estate Subject to the payment from time to time of a rateable proportion of the cost of maintaining and repairing the same." Clause (b) grants rights to drainage and services and also rights of entry "upon adjoining or neighbouring land included in the Estate" for the purpose of maintenance. The Second Schedule reserves like rights to the landlord. The demise includes part of the yellow pathway with rights over it reserved. Plan A appears to be correctly coloured in respect of the property. The second plan (also marked plan A on the copy produced, but which should have been marked plan B) shows the full extent of the paths, roadways and common areas in respect of the easements granted in the First Schedule.

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Oral Evidence

13 The Respondent gave evidence of the breakdown of trust between the owners and Mr Carroll. Mr Prisk, planning consultant and former local planning officer, commented on his report that contained an in-depth analysis of the planning background. He expressed the opinion that there was no possibility for commercial development at Fort Cawsand, given all the constraints of national and local planning policies – it is Grade 11 Listed and a Scheduled Monument. Nevertheless Mr Carroll expressed the view that there were development and commercial opportunities that he might wish to explore.

Consideration of the facts and the law

14 It is common ground that the building in which the tenants' flats are contained comprise premises to which Part 1 of the Landlord and Tenant Act 1987 ("the Act") applies. For the purposes of this Application it is agreed by the parties that a valid statutory purchase notice has been served under section 12B of the Act on the Applicant by the requisite number of tenants of the leasehold properties in the building at Cawsand Fort. Accordingly the Tribunal has jurisdiction to hear and determine under section 13 of the Act, the sole issue referred to it, namely the identification of the precise extent of the "appurtenances" to their leasehold premises that the tenants are entitled to acquire under the Act, and the appropriate provision in respect of those appurtenances – i.e whether in respect of the easements perpetual rights should be granted to the tenants or whether they should acquire the freehold interest in the land over or under which they presently enjoy those easements.

15 Both Counsel referred to the Court of Appeal case of Denetower Ltd v Toop (1991) WLR 945 C.A ("Denetower") and the Lands Tribunal case of Twinsectra Ltd v Jones (1998) 2 EGLR 129 ("Twinsectra"). Additionally Mr Adams referred to the case of Methuen-Campbell v Walters decided by the Court of Appeal in 1978. The Tribunal also considered the definition of appurtenances in Butterworth's Words and Phrases Legally Defined.

16 The premises to which the rights of tenants under the Act apply are defined in section 1(2) as premises that consist of the whole or part of a building and consist of two or more flats held by qualifying tenants. The section makes no reference to "appurtenances". That is to be found in Part III of the Act that deals with compulsory acquisition by tenants of their landlords' interest where the landlord has been in default. Section 29 states that in a compulsory acquisition order the court may, if it thinks fit, "(a) include any yard, garden, outhouse or appurtenance belonging to, or usually enjoyed with , the premises specified in the application on which the order is made". Sir Nicholas Brown-Wilkinson, as he then was, considered this anomaly in Denetower, expressing the view that the Act was "ill-drafted, complicated and confusing". In his judgement, section 29 (a) was inserted in Part III "out of an abundance of caution. Certainly there is no reason why the tenant who acquires under section 12 of the Act should not be entitled to acquire exactly the same property as could be acquired under Part III.". In Denetower he took the view that it would be to attribute to Parliament an entirely capricious intention to hold that the tenant's rights to purchase did not extend to the gardens and other appurtenances of the flats which are expressly or impliedly included in the demise. From Denetower one can conclude that it is a perfectly legitimate meaning of the word "building" to find that it includes the appurtenances of the building.

17 Sir Nicholas Brown-Wilkinson then went on in Denetower to decide, on the particular facts (at page 952 H) what were the appurtenances of the building in question. He did not, however, define the term. In Denetower the premises fitted comfortably within the provisions of the Act: two small blocks of flats with common parts and with small gardens front and back and rights over a shared roadway between them to garaging at the rear. His reasoning was that the gardens were included in the lease of the flats which are parts of the building and so were undoubtedly appurtenances; the tenants enjoyed no rights over the garages under or by virtue of their leases of the flats - the garages were held not to be appurtenances. He went on "As to the roadway and paths over which the tenants have either express or prescriptive rights of way, in my judgement they are appurtenances of the building." However the Court left it open to the rent assessment committee (now the LVT) to decide whether or not it was appropriate that the tenants should acquire the freehold of the roadway and paths (over which they enjoyed express or prescriptive rights) or be granted perpetual rights of way over them.

18 Twinsectra is a Lands Tribunal case that applied the principles of Denetower but added nothing to it that assists the present case. The Tribunal decided that easements were rights that could be compulsorily acquired as appurtenances and granted perpetual rights over the gardens and amenity land to the tenants. In any event in that case the applicant was not seeking the transfer of the freehold.

19 In the absence of any definition of 'appurtenances' by the Court of Appeal in Denetower it is necessary to seek guidance elsewhere for that. 'Words and Phrases' considers the historical meaning that originally referred to incorporeal rights attached to the land granted or demised such as rights of way but was not to include lands in addition to that granted or demised. However whilst the meaning is now accepted as to include land it is clearly established "beyond question that, broadly speaking, nothing will pass by the word 'appurtenances' which would not equally pass without the addition of that word". In Denetower reference was made to Trim v Sturminster Rural District Council (1938) 2 KB 508, CA in which it was stated "Certainly no case has been cited to us in which the word 'appurtenance' has even been extended to include land as meaning a corporeal hereditament which does not fall within the curtilage or yard itself, that is, not within the parcel of the demise of the house". The case of Methuen and Campbell takes the matter further and reviews and confirms the propositions laid down in Trim. Buckley L J says at 543 H "for one corporeal heriditament to fall within the curtilage of another the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter". The word "curtilage" is defined in the Concise Oxford English Dictionary as the "area attached to a dwelling" and in the Shorter Oxford English Dictionary as "a small court, yard or piece of ground attached to a dwelling house, and forming one enclosure with it". According to Butterworth the word appurtenances includes "all the incorporeal heriditaments attached to the land granted or demised such as rights-of-way, of piscary , and the like, but it does not include lands in addition to that granted".

Findings as to the law

20 The Act confers on tenants of flats rights with respect to the acquisition by them of their landlord's freehold reversion. Part I of the Act applies to premises if they consist of the whole or part of a building. Determining what are the "appurtenances" is a matter of fact and law. Denetower decided that a building could include its appurtenances. From its consideration of the relevant case law as set out above, the Tribunal finds that for the

purposes of Part I of the Act, an appurtenance of a building - meaning land - must fall within its curtilage. To extend 'appurtenance' to land not within the curtilage of the 'building' (the word used in the Act) has not been established by the authority of case law and would not accord with the definition of appurtenance as accepted by the Court of Appeal in the case of Methuen and Campbell v Walters. It is established law – and not disputed by the parties – that 'appurtenances' include the easements, expressed or implied, demised by the leases.

Findings of the Tribunal on the facts of the case

21 As Buckley L J said in Methuen and Campbell v Walters "it is a mixed question of fact and law but largely depends on the facts". Applying this reasoning to the facts of this case lead the Tribunal to find that the relevant premises for the purposes of the Act are the buildings containing the dwellings and their appurtenances. Appurtenances include appurtenant property within the curtilage – and this comprises the pathway and gardens, the steps from the roadway (including the store underneath the steps), being all the freehold Title Number CL 183133, and also includes the garages and parking bays as demised in the various leases. The Tribunal finds it appropriate that the freehold of all this property should be transferred to the Respondent.

22 The easements that are granted by the leases are 'appurtenances' – meaning appurtenant rights - but are not appurtenant land as they do not fall within the curtilage of the building. In the case of Denetower the Court decided that the roadway and pathway over which the tenants enjoyed rights of way were appurtenances. It suggested it was for a Rent Assessment Committee to consider whether the freehold of the roadway and pathway should be transferred or whether the grant of perpetual rights was more appropriate. It is not disputed by the parties that appurtenances in the case of the Fort include the easements granted by the leases – they are appurtenant rights. In Denetower, given the scale and geography – two small blocks of flats with the access road and pathway between them (arguably within the curtilage of the building) – it may well have been appropriate to consider the transfer of the freehold of the land over which the easements were granted. However the Tribunal considers that the position with the Fort is very different. Much of the land over which rights are granted is some distance away from the building. The Tribunal does not find it is within the curtilage of the building. The roadways, pathways, parking areas and the Green Land also serve property (the freehold dwellings and the Firs in respect of the access) other than the buildings that comprise the premises to which the Act applies; the Tribunal finds that it is appropriate to enlarge those easements into perpetual easements but not to transfer the freehold of the underlying land.

23 The Mound is something of an anomaly. The leases grant only access over it, although the Deeds of Easement and Covenant entered into by most of the owners (freehold and leasehold) refer to the "enjoyment" of it. Under the Mound lie the former ammunition chambers and some garages. The Tribunal does not find it appropriate for the transfer of the freehold of the Mound.

24 The sewerage system falls into two parts. The Macerator is located outside the wall of the Fort but within the Green Land. The Septic Tank and soakaways lie under the Soldiers' Garden and not on Green Land. In those circumstances the Tribunal finds it appropriate for the express and implied rights in respect of the drainage system as a whole and any other services enjoyed with the buildings to be enlarged into perpetual rights but not to transfer the freehold of the land under which those easements are enjoyed.

25 Mr Mathias sought to persuade the Tribunal that it should exercise its discretion in favour of the Respondent – to the extent that the whole of the site of the Fort should be found to be within the definition of appurtenances and that the Applicant should be divested of the freehold of it - because of the attitude and behaviour of Mr Carroll (and Mr Groom). Strong views were expressed by the Respondent on the subject; feelings obviously run high amongst the residents. However establishing the extent of the appurtenances and the entitlement to the transfer of freehold title or grant of perpetual rights is a matter of fact and law and the behaviour of the parties is not relevant to the Tribunal's decision. It was also put to the Tribunal that leaving the freehold vested in the Applicant could result in management problems in the future in view of the bad relations between Mr Carroll and the residents. Whilst the Tribunal acknowledges the legitimacy of these concerns, particularly in the light of the Statutory Listing of the Fort and status as an Ancient Monument, it is open to the residents to make an application to the Tribunal, if they so wish, for the appointment of a manager and take the management out of the hands of the Applicant.

26 Fears were also expressed about the Respondent's development plans at the Fort; however as Mr Prisk, the Respondent's own expert witness, stated in his conclusion at 6.1:

27 "the land the subject of this report is subject to some of the highest degrees of protection available under planning and historic buildings legislation"

28 In his final paragraph at 6.10 he states:

29 "The only realistic conclusion by any reasonable criteria is that under current planning legislation there is no likelihood of planning permission being granted clearly indicated in his evidence, the prospects for any commercial development of this land. Even if it were to be granted there is equally little likelihood of either listed building consent or scheduled monument consent being granted. It should also be noted that any development of this site requires a further Deed of Variation to the Section 52 Agreement on the land. There is no guarantee of such a Deed of Variation being agreed with the local planning authority and if they refused to give one there is no realistic means of appeal"

30 Clearly Cawsand Fort is well protected and the owners can take comfort from their own expert's report.

31 As this matter was referred to the Tribunal from the County Court with the concurrence of both parties to bring to an end a long running dispute that has led to protracted litigation, the Tribunal does not find it appropriate to make any order for costs.

Signed: **Dated: 18th March 2005**

A.L.Strowger, Chairman