Land Development Seminar

OVERAGE – PITFALLS AND PROTECTION

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1. What is overage? – although the negotiation and drafting of an overage arrangement may be protracted and in some cases out of proportion to the overall transaction it is at heart a simple concept. In Titanic Investments v MacFarlane[1] Mr Justice Robert Walker (as he then was) defined it as

"Overage means simply a deferred payment agreed to be made, in addition to the basic purchase price, the amount of the additional payment (if any) being determined by a formula which depends on unpredictable future events."

In some cases it may be a fixed amount rather than an amount ascertained by the application of a formula. It is distinguished from a simple deferred purchase price in that it is normally contingent on the occurrence of an event, such as the grant of planning permission, which may not happen.

Although starting as a simple concept the greater the uses to which it is put the greater the complexity that can be built on the simple concept and the more numerous the transactions in which it may be employed.

2. Role – overage has come to play an increasingly important role in land transactions. Forty years ago few sales would have included an overage provision but as participants have become more knowledgeable and sophisticated it has become a common requirement. Whereas previously its employment would have focused on transactions relating to development sites now it appears across the board.

It is a means by which owners can be encouraged to sell land to those who are better able to achieve an uplift in the value of the land sold and in particular are better placed to obtain any planning permission which is needed to achieve that uplift. The vendor aware that there is likely to be a substantial future increase in the value of the land would be reluctant to sell without the inducement of a share in that increase.

However, the value of overage is not limited solely to sales. It can be used in all types of situation in which someone with an interest in land or shares in a property owning company needs to be provided with an incentive to be a party to a transaction. For example, HFI Farnborough LLP v Park Garage Group plc[2] was concerned with a dispute over an overage payment due in the event that a landlord exercised a break clause in a lease and then sold the demised premises. The overage entitlement was the incentive for the lessee accepting a break clause in favour of the landlord to be exercised when the landlord wanted to sell with vacant possession. There are, however, limits to the circumstances in which

[1] 27th June 1997
[2] [2012] EWHC 3577 (Ch)

an overage can be imposed. For example, an attempt to include an overage in a section 106 planning agreement was rejected.[3]

3. Legal character – a basic overage entitlement does not create a recognised right or interest in land such as an easement or restrictive covenant. It is simply a contractual right which creates a chose in action.

The difficulties associated with preparing overage arrangements arise from the limited legal character of the overage entitlement. It not being an independent proprietary right or interest means that it does not automatically carry with it defined benefits and burdens. Nearly every overage arrangement has to be tailor made to suit the individual circumstances of the particular case. In doing so an attempt has to be made to cover all possible future eventualities. Clearly the number of such eventualities will increase the longer the overage period as will the difficulty of predicting them. It is really an impossible task in cases involving a long overage period and so inevitably there will be an element of uncertainty. It means that particular care has to be taken when adapting standard precedents.

Separately an overage entitlement by itself will not be enforceable against successors to the covenantor because it is a positive covenant and in consequence the burden will not run with the land even if the overage provisions seek to have that effect (Rhone Trusts v Stephens[4]). In consequence it is necessary to consider how to protect the overage entitlement and to ensure that it is enforceable against successors. To achieve this the contractual overage entitlement has to be linked to a proprietary interest the burden of which will run with the land and be enforceable against a successor (see section 13 below).

4. Drafting - although an important element in many transactions it is a common feature that the conveyancing solicitors will be informed that there is to be an overage entitlement but often consideration of that aspect of the deal will not have progressed further leaving the solicitors to create the skeleton of the overage arrangement and then add the flesh. There is a need to consider whether provision for overage is appropriate in the circumstances of the particular transaction. The costs of negotiation and preparation may be out of proportion to the possible overage benefit that actually be achieved. In some cases there is risk that the overage will become the tail wagging the dog and the resultant frustration may result in the price being renegotiated so as to adjust for the absence of overage or even the deal remaining as originally negotiated but without any overage.

The overage arrangement will not be subject to any special rules of construction but to the general rules of construction applicable to commercial contracts. A convenient summary of the basic principles has been set out by Richard Snowden QC (now Mr. Justice Snowden), sitting as a deputy High Court judge, in US Bank Trustees Ltd v Titan Europe 2007-1 (NHP) Ltd[5] as follows:

[3] McCarthy & Stone Retirement Lifestyles Limited v South Bucks DC App ref App/N0410/A/14/2228247 – decided that overage would be contrary to para. 17 PPG and reg. 122 Community Infrastructure Levy Regulations 2010

[4] [1994] 2 AC 310

[5] [2014] EWHC 1189 (Ch) followed by Arnold J. in Deutsche Trustee Co. v Cheyne Capital (Management) UK LLP [2015] EWHC 2282 (Ch)

"i) The interpretation of a contract is an objective exercise in which the court's task is to ascertain the meaning that the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

ii) This exercise of interpretation was described by Lord Clarke in *Rainy Sky* as a 'unitary' process. The starting point of that process must be the ordinary, natural and grammatical sense of the language used by the parties. The court should not, however, confine itself to a consideration of such language in isolation, but should carry out an iterative process, checking each of the rival meanings of the provision in question against the other provisions of the document and its overall scheme, and investigating their commercial consequences.

iii) If as a consequence of this exercise the court concludes that the language used is unambiguous, then the court must apply it, even though some other result might be thought more commercially reasonable, and even if it gives a result that is commercially disadvantageous to one of the parties. The court's function is to interpret the contract, not to rewrite it.

iv) In cases where the language used is ambiguous, in the sense that it is capable of bearing more than one ordinary and natural meaning, the court is entitled to prefer the interpretation that is most consistent with business common sense having regard to the commercial purpose of the transaction.

v) There may be cases where, even though the language used is unambiguous, it is clear that something must have gone wrong, because the resultant meaning is one that would require the court to attribute to the parties an intention that they plainly could not have had. In such a case, if it is clear both that a mistake has been made in the language used and what a reasonable person would have understood the parties to have meant, the contractual provision must be interpreted in accordance with that meaning."

It has to be borne in mind that these have been made tighter by recent Supreme Court decisions so that it will be harder to overcome defects in drafting by arguing either for an implied term (after Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited[6]) or for what is the commercially sensible construction (Arnold v Britton[7]).

To aid with drafting I have included at the end of this paper a checklist which sets out various topics which need to be considered when preparing an overage regime for a transaction. It is not intended to be exhaustive but may assist.

As a general rule it is preferable to avoid complexity and to keep the provisions as simple as is feasible. The more complex the arrangement the greater the chance that there will be gaps which may lead to future problems. An example of complexity leading to a protracted dispute is the saga of

[6] [2015] UKSC 72
[7] [2015] UKSC 36

Groveholt v Hughes[8] which involved three trials; a number of contested interim hearings; and two visits to the Court of Appeal. At the heart of the dispute were issues over infrastructure costs, a charge to protect the overage entitlement and an obligation to transfer land back if the overage trigger did not occur. Such complexity may be unavoidable but there has to be an appreciation that it can cause uncertainty and lead to expensive and protracted disputes particularly if one of the parties cannot fund legal representation and acts through a litigation friend as in the Groveholt case.

When drafting an overage regime there are a number of points to consider. In the following sections of this paper I will deal with some of the significant points which need to be considered to avoid pitfalls.

5. Overage trigger – a crucial aspect of an overage regime is what will trigger an overage payment. It is self-evident that this has to be got right so as to avoid the expected overage payment not materialising. This can be one of the main reasons for professional negligence claims in respect of overage.

5.1 Multiple or single triggers – it is necessary to decide whether the occurrence of the first trigger event will bring to an end the overage regime in the sense that future such triggers will not give rise to an overage payment. Alternatively will the overage regime run for the whole of a period specified as the overage period so that any occurrence of an overage trigger event will give rise to an overage entitlement.

Provision for a single trigger event means that there has to be a greater focus on ensuring that it will result in the expected overage payment. The risk is that it opens up the prospect to the person liable to pay the overage that if a trigger event can be achieved which results in a small overage payment the burden of the overage can be escaped from with a minimal payment. With an overage arrangement running for the whole of an overage period the risk is much reduced because even if the first overage trigger only results in a small overage payment there will be the expectation of future overage triggers during the overage period. It removes the incentive for the person liable to pay overage to postpone the event which results in a significant uplift in value until after the occurrence which brings about a minimal increase in value.

For example, such a risk arises when overage is payable only once and the size of the overage payment is linked to the amount of the uplift in the value of land resulting from a grant of a planning permission. If the person subject to the overage can make a planning application which obtains a grant of planning permission which triggers the overage entitlement but only results in a small uplift then that person will have escaped from the overage with a payment less than that expected by the person entitled to the overage. Thereafter the payer of overage will then be free to put in a planning permission which achieves a greater uplift in value without the need to pay overage. If that application had been made first there would have been an overage payment which would have met the expectation of the covenantee.

To avoid such an outcome instead of a single trigger the regime could provide for any planning permission granted during a specified overage period to act as a trigger. With multiple triggers being caught it is much less likely that all

[8] See judgment of Richards J. in Groveholt Limited v Hughes [2012] EWHC 686 (Ch)

the planning applications during such a period will be made with a view to minimal uplifts in value. If this is not acceptable then it will be necessary to include obligations which seek to maximise the uplift resulting from the first planning application.

The implications as to whether there are multiple or single triggers in relation to the overage must be explained to the client. In Titanic Investments Limited v MacFarlane Walker J. held that the firm had breached its duty of care to its client by failing to explain that overage would only be payable if additional development land was added as a result of a specific planning application rather than a subsequent separate planning application. An overage payment of around £900,000 was lost because the permission relating to the additional development land arose from a separate planning application.

5.2 Nature of trigger event – in many case the nature of the event or events which will trigger an overage payment will be determined naturally by the character of the land; the expectations of the parties; and the financial position of the covenantor. With vacant land it will probably be the grant of planning permission but if this will pose a financial problem for the covenantor then it may need to be the implementation of the planning permission or even the realisation of the developed units which acts as the trigger. Such later triggers will benefit the payer's cash flow.

In some cases the character of the land is such that a combination of alternative triggers may be appropriate such as both the grant of planning permission and the commencement of developments.

5.3 Who involved with the trigger – it is necessary to ensure that the overage trigger is not too restricted so that it can be easily defeated. An example of such a case is Akasuc Enterprise Limited v Farmar & Shirreff[9]. An overage was agreed as part of a sale. The trigger was the development of the sale land but the problem was that it was development by the purchaser. Three days after the completion of the purchase the purchaser sold the land to Charles Church. As the purchaser did not develop the land it was not liable to pay any overage. The successor, Charles Church, was not subject to the overage obligations and so when it developed the land was not liable to pay overage. Even if the issue as whether the overage trigger was limited by the wording to a development carried out by the purchaser could be overcome by the application of section 79 LPA 1925[10] extending the covenant to one by the purchaser and the purchaser's successors that still left the problem that the burden did not run with the land and did not bind the purchaser's successor.

The overage regime set up in that case could very simply be defeated and in consequence the solicitor acting for the vendor was negligent and liable to pay damages to the client.

With such an overage arrangement there is also the danger that the person liable to make the payment may become insolvent and the contractual right may be valueless even if not defeated by a transfer to a third party. In such circumstances the position can only be recouped if there is a proprietary right or interest which can be pursued against the land rather than the

[9] [2003] EWHC 1275
[10] Para. 84

covenantor. Without express provisions any such argument will face serious hurdles as in Tecof International Limited v Town Castle Limited[11].

6. Planning permission as overage trigger – when the trigger in an overage regime is the grant of planning permission or permissions there are various points to bear in mind.

6.1 Type of planning permission – does the planning permission have to be full planning permission or will outline planning permission be sufficient. If outline planning permission is a trigger then it is necessary to ensure that full planning permission is also expressly covered as a trigger. Should it be extended to approval of reserved matters or to the grant of a Certificate of Lawful Use?

6.2 Type of use authorised – in some cases it will cover any planning permission regardless of the type of use authorised by the planning permission. This will be when there can be a number of triggers during an overage period and not when the regime only allows for a single trigger. In other cases the trigger will be restricted to particular uses authorised by a planning permission. Care needs to be taken in formulating the class of planning use covered particularly if it is a single trigger overage regime.

A class which is drawn too wide may permit a planning application to be made which results in a planning permission causing little uplift in value and effectively defeating the overage. An example of such disputes is Primaplus Limited v Hall Aggregates Limited[12] which concerned a restrictive covenant which provided that if certain types of planning permission were obtained overage would be payable and the restrictive covenant released. A planning permission for use solely as a garden centre or a sports and recreation centre did not act as an overage trigger. Having obtained planning permission for a sports complex including a driving range, fishing lake and a sports hall it was argued that this triggered the overage arrangement but resulted in only a small overage payment and the release of the restrictive covenant. In order not to lose a valuable overage entitlement the vendor successfully argued that the planning permission was within the permitted class which did not trigger an overage payment. The authorisation for a golf shop was held not to take it outside the permitted class as the golf shop was incidental and ancillary to the main use.

The dispute serves to illustrate the importance of clarity regarding the overage trigger particularly when there is a once and for all trigger.

6.3 Person obtaining grant – the danger in limiting the trigger to planning permission obtained by particular persons is that there will be no overage if obtained by a third party. On the other hand if the trigger is a planning permission regardless of who obtains it there is the risk that a planning application may be made by the person entitled to the overage with a view to triggering a payment.

Care needs to be taken as to which planning permissions obtained by whom will trigger overage. This will avoid the type of dispute considered in Micro Design Group Limited v BDW Trading Limited[13]. In that case the seller had applied for planning permission prior to the sale but the grant was around the

[11] [2009] P & C R D58
[12] [2001] NPC 11
[13] [20008] EWCA Civ 448

time of the completion of the sale. Overage was to be payable if the planning position established by that planning permission was improved. Subsequent to completion the seller applied to amend the planning permission which resulted in an increase in accommodation increasing the net sales area by about 1,900 square feet (7%). The seller then applied again after the purchaser had already commenced development and increased the net sales area by another 500 square feet. The seller claimed overage based on the increased net sales area amounting to just over £340,000. The trigger was defined as the grant of Improved Planning Permission which in turn was defined as a permission authorising an increased net sales area. There was no express limitation as to the person who should obtain the improved planning permission. Hodge J. held that improvements obtained by the seller qualified as a trigger. However, the Court of Appeal reversed the decision and decided that commercial sense and the structure of the overage regime dictated that it should only be improvements obtained by the purchaser which triggered an overage payment. Had the decision at first instance been upheld it would have increased the overage payment but in circumstances in which the developer could not really have taken advantage of the amended permission triggering the increase. This still left open the possibility of an issue as to whether the seller had acted on behalf of the purchaser which would constitute a trigger.

6.4 Permitted Development Rights regime – the extension of the PDR regime means that in a wide range of situations it is now possible for changes of use to be authorised without the need to obtain a fresh planning permission. For example, a public house which is not listed or nominated as an Asset of Community Value can change planning use to a residential or retail use. It is now important to bear in mind this new planning regime. It opens up the possibility that a change in use which is intended to give rise to an overage payment may lawfully occur in the absence of an actual planning permission and so not trigger an overage payment. In consequence consideration needs to be given as to whether to extend the scope of the overage trigger to include changes resulting from the operation of the PDR regime and not just actual grants of planning permission.

A similar point can arise in respect of unlawful developments although it is to be expected that the risk of losing overage will be much less than with the PDR regime.

6.5 Ability to implement – it seems unnecessary to state that any planning permission which is obtained and triggers an overage payment should be one that can be implemented otherwise such overage will not be matched by an actual increase in value. However, such an unfortunate situation was the reason for a planning appeal in Johnson v Secretary of State for Communities and Local Government[14]. In that case a combined planning application had resulted in a refusal of part and a planning permission for a house conversion which the appellant said could not be carried out due to varying ground levels notwithstanding that overage was payable. The appeal failed leaving the overage due.

6.6 Planning obligations – the recent Court of Appeal decision in Bristol Rovers (1883) Limited v Sainsburys Supermarkets Limited [2016] EWCA Civ 160

[14] [2007] RWHC 1839 (Admin)

have emphasised that general obligations to show good faith or to exercise reasonable endeavours to achieve the overall objective will not have effect to impose specific obligations if there is a gap in the regime. This case concerned a conditional sale but the point holds good in the context of overage agreements as well. Often these types of agreement will have planning obligations just as in a planning promotion agreement or a conditional sale. The facts of the case highlight the need to review such obligations in order to ensure that such terms will operate effectively not just as regards planning applications and planning appeals but also section 73 planning applications. Specific provisions will avoid the need for reliance on estoppel by convention which doctrine took centre stage in the Bristol Rovers case.

6.7 Community Infrastructure Levy ("CIL") – the grant of planning permissions will probably give rise to CIL charges which will fall due when the development authorised is commenced. The impact of such CIL charges on any overage arrangement will have to be considered.

7. Development as trigger – payment of overage when a planning permission is granted may present the person liable to pay it with a cash flow problem. One way to address this is to move the trigger back to the commencement or carrying out of the development authorised by the planning permission. Such an approach will also be necessary if land is sold with planning permission with a view to being developed.

It will require definitions to be included as to what constitutes the development and the commencement or carrying out of that development. Section 56 TCPA 1990 provides a statutory definition for the planning regime but that might be viewed as operating too soon for the purposes by the person liable to pay the overage.

Account will need to be taken of the CIL liability that will probably fall due when a development commences. How this burden is to be borne in the context of overage will need to be spelt out.

When the development is phased then it is to be expected that the payment of the overage will also be phased in order to secure the cash flow advantage. It will also have implications for CIL.

8. Realisation – from the point of view of addressing cash flow the preferable approach for the person liable to pay the overage is to link the trigger for payment of overage with the realisation of the property or the units produced by the development. In such a case it will be necessary to decide:-

(i) intent to actual sale – normally it will be clear that the trigger is an actual sale rather than just an intent to sell. However, in some circumstances the issue can be a live one such as on the exercise of a break clause in a lease. This was one of the issues in the HFI Farnborough case. It was held by HHJ Behrens that it made commercial sense to limit the exercise of the break clause to when the landlord had a sale.

(ii) what type of disposals will act as a trigger – will it be just sales or leases as well;

(iii) what types of disposal will be disregarded – this will then lead on to what are to be the consequences of the occurrence of a disposal which is to be disregarded.

(iv) what is to happen if a disposal is not at arm's length – this can give rise to two separate issues? First should such a disposal not be an overage trigger so that the overage provisions are not operated by it at all. Second if it is an overage trigger then how is the overage to be calculated in those circumstances. For example, there may have been a sale at an undervalue between connected parties (such as members of the same group). To cope there is a need for an express provision which substitutes open market value for the sale price otherwise there is the risk that the overage payment will be calculated by the low sale price with a resultant overage payment smaller than expected.

In Aberdeen City Council v Stewart Milne Group Limited[15] the Supreme Court had to consider an overage arrangement which provided for three different types of overage trigger – (i) a buy out; (ii) a disposal by way of sale; and (iii) a disposal by way of a lease for more than 25 years. The first and third triggers resulted in an overage determined by reference to open market value. A sale resulted in an overage determined by a percentage of the Profit which was the Gross Sale Proceeds less the Development Costs. However, the actual trigger was an inter-group disposal at a price substantially less than open market value. It was considered by Lord Hope (with whom three other Law Lords agreed) that the reference to the sale price was really a reference to the open market value as the price paid in an arm's length disposal constitutes the open market value. In consequence it made commercial sense when the disposal was not at arm's length to calculate the overage not by reference to the sale price but instead to the open market value. Lord Clarke (with whom three other Law Lords also agreed) considered that such a result should be reached not by construction of the contractual terms but by implication of term necessary to give business efficacy to the agreement.

Interestingly an argument that the disposal between companies in the same group was not a disposal which triggered the operation of the overage provisions was rejected. This indicates that the Courts will be reluctant to construe an overage arrangement which does not expressly restrict its operation to certain types of disposal so as to have that effect. Unless it is possible for the Court to rectify the terms of the arrangement the Court will be left to grapple with the consequences of a disposal which is not for full consideration. It emphasises the point considered in section 12 below that the absence of such express provisions is an unfortunate gap.

It is clearly desirable to have express provisions in the overage arrangement catering for such a possibility rather than relying on the construction of the contract or the implication of terms to remedy the problem particularly bearing in mind the swing of the pendulum in the Supreme Court towards a tougher approach to both construction and implication.

(v) obligation to achieve disposal – the desire to assist the cash flow of the person liable to pay the overage may be used to seek to avoid the overage. Such person may seek defer or avoid the occurrence of the trigger. For example,

[15] [2011] UKSC 56

in Renewal Leeds v Lowry Properties[16] the trigger was the final sale of a completed residential unit. There was no obligation to carry out the development or to sell the completed units. The developer held back the last house so as not to pay overage and if successful could have sterilised the overage arrangement. It was held that though there was no obligation to build once building had started an obligation was implied that all the houses would be sold as soon as reasonably practical as without such an implied term the overage would be "inefficacious, futile or absurd". This is based on the premise that overage is intended to be paid and the Court will not assist developers to avoid it.

9. Overage amount – although an overage amount can be a fixed sum it normally has to be ascertained. Commonly it can be a percentage of a sum arrived at using a figure representing a valuation or profits. In some cases complicated formula may be used. It is an aspect of overage which requires the exercise of considerable care as it is an area which has given rise to a significant number of disputes and protracted litigation. The amounts involved in such disputes may be significant. For example in the Chartbrook Limited v Persimmon Homes Limited the differing constructions of the overage formula meant the parties were £3.7 million apart.

9.1 Property to be valued – it is self-evident that it is important that there is clarity as to exactly what is the subject matter of the valuation. It is not just a question as to what is the overage property (see section 10 below) but also it is necessary to know the precise nature of that property.

For example, in HFI Farnborough LLP v Park Garage Group plc supra two issues arose for resolution by the Court in respect of the valuation required following the exercise of a break clause in any of the leases of the petrol stations. First were the relevant petrol stations to be valued with vacant possession or subject to the existing leases which were being terminated? Second was account to be taken of the existing petroleum licences and petrol supply contracts or were they to be disregarded? Both were extremely important elements in any valuation.

9.2 Valuation – frequently the overage amount will be calculated by reference to the difference between the open market value of the property with and without planning permission. It is important not just to set out what is meant by open market value in such context but also to ensure that the figure arrived at as the open market value of the property without planning permission excludes any element of hope value.

This point has been highlighted by the argument in Walton v Staffordshire CC[17]. The overage amount was 50% of the difference between the open market value of the property with planning permission and whichever is the greater of the open market value of the property assuming the planning permission did not exist or the original purchase price. Planning permission was granted. It was argued on behalf of the person liable to pay the overage that although the actual grant of planning permission was to be disregarded when assessing the open market value of the property without planning permission account should still be taken of the planning application, the planning officer's report and the decision of the planning committee.

[16] [2010] EWHC 2902 Ch (Leeds)
[17] [2013] EWHC 2554 (Ch)

If successful such argument would mean that there would be little difference between the open market values with and without planning permission. It would possibly defeat all overage agreements based on such a method of determining the overage amount. The dispute over the overage amount went to arbitration and the arbitrator took legal advice which rejected the argument as being commercially absurd. All steps in the planning application were to be ignored save for the planning application itself. This would suggest that if the making of the planning application can be taken into account then the possible outcome as opposed to the actual outcome can be taken into account. It would suggest that the formulation does not wholly exclude hope value.

The overage arrangement was contained in a transfer dated 14th February 2000 completing a sale to Walton for £107,000. The claimant agreed in July 2011 to sell the land to Bellway Homes conditionally upon the grant of planning permission. Following the grant of planning permission on 8th March 2011 the sale was completed at a price of £1,242,874 which was the open market value with planning permission. Walton offered an overage payment of £125,000. The arbitrator found that the not only was the actual planning permission to be disregarded but also the planning officer's report recommending the grant and the resolution of the planning committee.

The proceedings in the Chancery Division were not seeking a declaration as to the proper construction but rather the claimant was seeking an order that the interim determination of the arbitrator be set aside on the ground that it contained a manifest error by rejecting the claimant's construction argument. Mr Justice Peter Smith emphasised that he was not required to decide the correct construction of the overage provisions but did say that his "instinctive view at the start"[18] was to view the construction argued for as commercially absurd. In his judgment there was nothing "manifestly wrong" with the legal advice provided to the arbitrator.

When refusing leave to appeal Kitchen J.[19] was more emphatic that the result would be commercially absurd and that the parties would have understood the term "planning permission" to include all steps leading to the grant of the permission.

The decisions are unsatisfactory because the issue in the case was whether the decision of the arbitrator contained a manifest error and not the correct construction of the wording. Further the focus was on whether such a construction of the wording would be commercially absurd and this is an approach to construction which has been subsequently reconsidered by the Supreme Court in a manner which would now be more sympathetic to the claimant's argument.

It is a little unnerving that such an argument should be made and rather than rely on approaches to construction which are in a state of flux and uncertain it is preferable to formulate the valuation provisions in a manner which ensures that hope value is wholly excluded. It is preferable not just to provide that the open market relates to the land without the planning permission but wording is included which excludes any possibility of hope value.

[18] Para. 45
[19] [2014] EWCA Civ 696

9.3 Formula – there have been a number of disputes concerning the correct application of an overage formula. The more complicated the formula the greater the likelihood that there will be a dispute as to its application.[20] In Chartbrook Limited v Persimmon Homes Limited[21] the issue was whether the figure which represented specified costs and incentives should be deducted before or after a percentage figure had been calculated using the rest of the formula. Similar issues arose over a formula in Connolly Limited v Bellway Homes Limited[22] with the judicial construction not resolving the unfairness in that case which was then resolved by a claim in deceit being successful.

The cases on such formula suggest that it is better to use mathematical formulae rather than words. In addition worked examples not only ensure that the manner in which the formula operates is understood but can illustrate how the parties intend the formula to be applied. As with many matters concerning overage simplicity is preferable and less likely to lead to disputes.

9.4 Units – instead of using a valuation or proceeds as the heart of a calculation an alternative is to use the number of a particular type of unit multiplied by a fixed amount. Such a method of determining overage is appropriate to cover the possibility that planning permission may result in a greater or fewer number of units than expected.

When adopting such an approach care has to be taken when defining the units to be taken into account. This point is emphasised by the dispute in Harris v Berkeley (Strategic Land)[23]. This concerned a quite elaborate overage arrangement which provided for "permitted units overage" and "social units overage". This reflected the anticipated mix of units in the proposed development and the different open market values attaching to the units. The dispute focused on the "permitted units overage" which was related to the "maximum aggregate of units of residential accommodation permitted by the Planning Permission or any Subsequent Planning Permission to be constructed on the Property." Units were defined to mean "units of single dwellings of residential accommodation". The overage was calculated by taking the excess of such units over 290 plus any units in respect of which overage has been paid. The planning permission triggering the overage authorised a development for proposed extra care accommodation (Use Class C2) comprising 60 units with associated communal/care facilities together with a general shop and 15 flats. It was accepted that the 15 sheltered flats were units within the scope of the overage provisions.

The dispute was whether the 60 units were also covered by the overage provisions. It was argued by the purchaser that the 60 units were part of a building having the character of a care home or residential institution and so the units were not single dwellings of residential accommodation. Great reliance was placed in support of this argument on the planning permission specifically authorising a use within Use Class C2 which excludes any use within Use Class C3 (dwelling houses).

[20] As for example in George Wimpey UK v VI Components [2005] EWCA Civ 77
[21] [2009] 1 UKHL 38
[22] [2007] EWHC 895
[23] [2014] EWHC 3355 (Ch)

Morgan J. stated that in deciding the issue there were two relevant matters. On is the physical character of what is permitted by the planning permission. From the plans the judge concluded that the physical layouts of the two types of units were "really much the same" with no obvious distinction. As regards the use to which the units could be put the first part of Use Class C2 authorises the provision of residential accommodation and care for people in need of care. The residential accommodation must be provided as part of a composite involving the provision of care. The judge did not consider that the provision of additional facilities such as a shop, a café and a hairdresser affected the outcome. Although the units could definitely not be within Use Class C3 the judge did not regard this as conclusive as the permitted units were not defined by reference to a use within a Planning Use Class but rather by reference to general and wide words such as "residential accommodation" and the contractual terms do not distinguish between the types of residential accommodation coming within the different Planning Use Classes. The judge pointed out at the end of the judgment that he had given effect to the ordinary meaning of the words and that it had not been argued that this produced a nonsensical or uncommercial result.

The outcome in this case indicates that if this method of calculating overage is relied on there is a need to focus on the definitions and to ensure that the client's intentions are reflected. Should the definition be by reference to a particular use falling within a Planning Use Class or part of such a Use Class or alternatively by reference to the character or nature of the unit unqualified by a Planning Use Class? As the Harris v Berkeley (Strategic Land) case illustrates which approach is adopted can make a significant difference in the context of overage.

A similar issue in principle had arisen in Walker v Kenley[24] whereby a sale of a hotel with planning permission for five holiday cottages at the rear included provision for an overage payable if the purchaser obtained planning permission to develop the property as residential flats. The purchaser made a number of planning applications to convert the hotel to flats or to demolish and construct a new block of flats. These were all refused and the planning appeals dismissed. Finally a planning application for 17 holiday apartments was granted. This development was carried out and the vendors claimed overage. It was disputed on the ground that holiday apartments were not within the term "residential flats" and this argument was accepted notwithstanding that each is in the same Planning Use class. The judge paid particular attention when construing the arrangement to the surrounding circumstances at the time of the transaction. It shows how important particular definitions can be and how unexpected issues can arise.

9.5 Deductions – one aspect of overage calculations which requires particular care is allowable deductions. These are an area when mistakes can be made. This point is illustrated by one of the arguments in Stephens v Cannon[25]. Overage was to be one half of any excess over £1 million on the sale of a house to be constructed less one half of the legal and estate agency fees incurred in connection with the sale. Under this agreement the amount of the overage was clear. However, a supplemental agreement was then entered into to enable the

[24] [2008] EWHC 370
[25] [2005] EWCA Civ 222

construction work to be funded by a bank charge. This stated that the overage was to apply to the net proceeds of sale after the bank charge was discharged. Reliance was placed on this to argue that the net proceeds were to be reduced by the amount of the redemption sum before calculating the overage. This was rejected by the Court of Appeal on the ground that clear words would have been needed to achieve such an objective. However, it shows just how careful it is necessary to be.

10. Property - it is important to ensure that the property which is the subject matter of the overage arrangement is clearly set out. It is often the case that land is sold with part only expected to result in the future with a development uplift and in consequence the overage arrangement applying only to that part. There is a need for clarity as to the definition of that part.

10.1 Overage property – this can particularly be a problem where the transaction involves the carrying out of a development. In Virgin Management Limited v De Morgan Group plc[26] the transaction involved a sale and lease back with the vendor refurbishing the existing building as Phase 1 works and subject to obtaining planning permission constructing an extension and new fifth floor as Phase 2 works. In addition to the initial price a further "overage" was to be paid which was to be calculated in two parts based on the capitalised rental value of the property and using different rents (basic and higher rents) for each part. The issue was whether the calculation involving the basic rent applied only to the floor area of the property when sold or also included the floor area of the extension and additional floor. Virgin subsequently entered into a supplemental agreement foregoing the additional payment in return for a contribution towards the construction costs and did not pursue a rectification claim. It did so in reliance on advice from a separate firm of solicitors and a silk which was not disclosed to the solicitor and surveyor acting for Virgin in the transaction. The advice was that the terms of the overage arrangement were unambiguous and the Phase 2 works were only taken into account with regard to the second part of the overage concerned with the higher rent. Following the advice Virgin limited itself to a negligence claim against the transaction solicitor and surveyor. The claim failed in the Court of Appeal on the basis that to exclude the Phase 2 works would not be commercially sensible and wrong on the correct construction of the agreement. It was further held that even if the wording was not unambiguous and clear if it is held to achieve the client's objective the solicitor will not be liable in negligence. The outcome was that Virgin failed to obtain its overage payment and failed to recover damages.

10.2 Car parking rights – it is a simple matter to overlook car parking rights when they are dealt with separately from say a flat lease. The value of such rights may make a significant difference as regards the amount of overage. In Bride Hall Estates Limited v St. George North London[27] it made a difference of just under £300,000. In that case land had been sold with planning permission authorising the construction of a building for a mixed residential/commercial use. On the ground floor the permission authorised use as a wine bar and on the upper floors use as apartments. An overage was agreed to be paid if the sale proceeds exceeded £340 square feet for the residential units. The vendor was to receive 35% of the excess. In calculating the internal floor area of each unit of

[26] 24th January 1996
[27] [2004] EWCA Civ 141

accommodation there was to be excluded common parts and parking. 81 apartments were constructed and 41 parking spaces which were sold to flat owners. The dispute was whether the proceeds in relation to the parking spaces (just over £800,000) were to be taken into account when calculating the overage.

At first instance the judge had looked at the evidence regarding the sales to arrive at his decision. This was rejected by the Court of Appeal as events subsequent to the relevant agreement should not normally be admitted and taken into account. The drafting of the overage arrangement did not indicate plainly how the parking space receipts were to be treated. Carnwath LJ (as he then was) stated that the Court had to do the best it could. The express exclusion of the parking spaces from the determination of the floor space was taken to indicate that it was otherwise to be included. The term "residential units" suggested a bundle of rights as opposed to an area of a building. In consequence the parking space receipts were included.

There was little evidence to bear on the issue. Some reliance was placed on the terms of the planning permission and the planning officer's report with particular reference to parking spaces but it yielded little assistance. The decision serves to illustrate that Courts will seek to arrive at a commercially sensible result but that gaps in drafting can give rise to expensive litigation. Parking spaces and any other valuable rights which are to be within an overage arrangement should be expressly included.

11. Duration – the longer that the overage period runs for the greater the inhibition of the overage land. There has been a tendency for longer overage periods to be sought. This is in part because it is being applied to land which has no immediate expectation of development. For example, with fields in the green belt the prospect of planning permission may lie many years ahead.

Again this is an aspect which needs to be treated with care in order to ensure that the client's instructions are complied with. In Barnet LBC v Barnet FC[28] the intention had been that if the football stadium was sold and the football club moved out of the area then a share of the increase in value would be paid to the Council but if the club relocated within the borough the overage payment would only be due if this occurred during the period of ten years. By mistake someone on behalf of the Council changed this during the course of the negotiations so that the ten year period applied in all circumstances. After execution the mistake was discovered and the Council commenced proceedings for rectification on the ground of either common or unilateral mistake. Neither ground was successful.

12. Other terms – in the HFI Farnborough case there was a common acceptance that the overage agreement was not well drafted and in the course of submissions the Defendant's silk highlighted[29] a number of different circumstances which were not expressly catered for which would be seen by "anyone with any knowledge of overage provisions". The first four points below were on the silk's list and then the remaining three are further points which need to be taken into account when drafting an overage arrangement.

[28] [2004] EWCA Civ 1191
[29] Para. 47

These terms are:

12.1 sale of part – although the sale of part of the overage property was highlighted it is not just a sale of part that can cause complications. The grant of a planning permission relating to part only of the overage property can give rise to complications which are similar in principle. In such circumstances consideration will have to be given as to how this will affect the operation of future overage triggers; how credit will be given for the overage payment due from such a trigger; the service rights that will be treated as existing to allow for only part of the overage property being involved; and what method of apportionment will be applied as regards items such as values, prices or costs.

Although not mentioned there can be similar problems with the converse situation if the overage trigger relates not to a part of the overage property but to an area which is greater than the overage property. If there is such a possibility then it may be necessary to ensure that planning permissions cannot be arranged in such a manner that it causes parts of the land subject to the planning permission which are not comprised in the overage property to have greater value than the overage property. For example such an objective could be achieved by allocating to the overage property a low value planning use. To counter this it may be necessary to provide for the valuation of the whole of the land subject to the planning permission and then apportion the valuation in the proportions that the overage property bears to the non-overage property.

12.2 disposal other than sale – on the assumption that a sale is an overage trigger I would expect this point to be concerned with the provisions needed to ensure that the overage continues after such a disposal and is protected so that it is enforceable against a successor (see section 13 below). An alternative could be to provide that such a disposal is be treated as being a disposal for full value.

12.3 sale of an interest other than a freehold – as part of an overage arrangement there could be a restriction on sales other than those permitted by the terms of the arrangement. This will require thought to be given to which if any disposals will be allowed and which will require the dispone to enter direct covenants with the person entitled to the overage (see section 13.1 below). If the overage trigger includes disposals other than a sale of the freehold or sales of long leases solely at a premium then it will be necessary to provide how the capitalised value of a lease at a rent is to be calculated.

12.4 sale otherwise than at arm's length or in good faith – this raises a similar point to that considered in section 12.3 above. It can be dealt with in a similar fashion to that mentioned in that section. An alternative is to provide that objection may be taken to an actual purchase price and for the person entitled to the overage to seek to substitute the open market value in place of the purchase price.

12.5 restriction on sale or other disposal during overage period –this was not raised in the HFI Farnborough case but is an important one if the overage trigger is not a sale but some other event. In order to protect the overage entitlement should there be a prohibition on sales or other disposal during the overage period? Such a restriction was implied by Morgan J. in Berkeley

Community Villages Limited v Pullen[30] into a planning promotion agreement in order to prevent an attempt to defeat the agreement by a sale shortly before the grant of planning permission for a large residential development on farmland.

12.6 good faith – it is common to have a provision requiring the parties to an overage arrangement to show the utmost good faith to each other. The precise scope of this provision is uncertain but it is worth including as it has bite. It was one of the reasons given by Morgan J. for his decision in the Berkeley Community Villages case. He construed the good faith provision as imposing "a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant."[31] In that case the attempted sale by the land owners was a breach of the good faith obligation.

Even if there is no such express provision an overage arrangement may be sufficient to give rise to an obligation of good faith as in Ross River Limited v Cambridge City FC[32].

12.7 prohibition on seeking to defeat overage – this point also was not raised by the silk in the HFI Farnborough supra but it is common practice to include a general provision seeking to prevent the person subject to the overage from acting in a manner which will or may reduce or avoid an overage payment. Often this is combined with an obligation to show good faith. Obviously there is considerable scope for argument regarding the operation of such a provision and there can be no certainty as to the extent of the protection actually provided to the person entitled to the benefit of the overage. However, it is one of those provisions which it is better to have in than not.

13. Protection of overage entitlement – because the overage entitlement is simply a contractual right it must be combined with a proprietary interest or right if it is to be enforced against a successor to the covenantor. Due to the length of time some overage arrangements run it is crucial to address this point and to make provision for the protection of the overage. In this respect it is important to remember that the triggers for the overage becoming due must not be limited to the covenantor as was the case in Akasuc v Farmar & Shirreff supra. Without protection the overage will only be enforceable against the covenantor and if that covenantor becomes insolvent or dies then the overage entitlement will be lost.

There are a number of methods that can be adopted to protect the overage entitlement.

13.1 Charge – the normal method for securing the payment of a sum will provide the greatest protection. The advantage of a charge is that the insolvency of the covenantor will not undo the security. For example, in Groveholt Limited v Hughes[33] the original developer went into liquidation and the liquidator disclaimed the overage arrangement as an onerous contract. Prior to that the developer had sold the land on and the overage was still protected by the charge but was held not yet to be due as the amount had not been ascertained. It was

[30] [2007] EWHC 1330in
[31] Para. 97
[32] [2007] EWHC 2115 (Ch)
[33] [2005] EWCA Civ 897

further held that when calculating the overage amount the right to deduct expenses continued to subsist notwithstanding the failure by the original developer to fully perform its obligations. In later hearings it was held that these deductions resulted in no overage being payable.

Despite the value of a charge in the context of overage they will rarely be practical. The difficulty posed by using a charge over the land is that those funding the acquisition will require a charge and will not accept another charge or wish to defer priority to the charge securing the overage. In ordinary commercial transactions the purchaser will usually refuse to grant a charge to secure the overage. It is more often come across when dealing with landowners such as the Ministry of Defence although it will be interesting to see whether this will change with the government's new "single estate" policy.

Housebuilders will sometimes secure an overage liability by a charge as was the case in Redrow Homes Limited v Martin Dawn (Leckhampton) Limited [2016] EWHC 934 (Ch). This case illustrates the type of drawback that can arise for the landowner from such a charge securing overage. After a difficult planning application Redrow was eager to obtain the grant of planning permission for a residential development. The only hurdle to the making of the grant was the requirement that a section 106 planning agreement be entered. The terms had been negotiated with Redrow but the chargee was required to execute it for the purpose only of consenting to it and not taking on any liabilities. Clause 5.9 of the charge, inter alia, included an obligation to consent to or join in such an agreement provided that it was only by way of consent. The chargee refused to do so on the ground that Redrow had not complied with its obligations under the overage arrangement. HHJ Hodge (sitting as a judge of the High Court) made a specific performance order that the chargee execute the section 106 planning agreement on a summary judgment application. The judge took account of the obligation in clause 15.9 not being conditional save to the extent of the proviso. Importantly there was no express requirement that the chargee's prior approval be obtained to the terms of the planning agreement. Further the charge would continue to secure the payment of the overage and the judge left open the issue whether it would also secure damages for breach. Apart from the security for the overage entitlement the charge had no other interest in the land.

Concern has been expressed that due to the contingent and unascertained nature of the overage entitlement it cannot be secured by a legal charge. This means that as a precaution if this means of protection is adopted then an equitable charge should be included in the mortgage document as well a legal charge.

13.2 Chain of covenants combined with restriction – this is a conveyancing mechanism which can be used to make the burden of a positive covenant run with land. It is the method most commonly adopted in relation to overage. The covenant to pay overage is backed up by a covenant requiring that on any subsequent disposal a direct covenant is entered between any person acquiring the property or an interest in it and the person entitled to the overage on or before the disposal. In order to ensure that such covenant is complied with a restriction is placed on the registered title of the property which prevents a disposition being registered without a certificate of compliance with the overage provisions by the person entitled to the overage or a solicitor acting on behalf of such person.

In the Akasuc case Mr. Justice Peter Smith considered the various methods by which the overage entitlement could have been protected and preferred this notwithstanding that it runs the risk that there is a potential argument against it based of the Statute of Quia Emptores 1290. He stated that "any developer would conclude that a restriction would probably be a successful way of protecting overage payments" (para. 87). It has to be appreciated that the insolvency of the covenantor will pose a problem.

Peter Smith J. considered separately from a charge an unpaid vendor's lien which is similar in character. The learned judge viewed such a provision favourably but it has a number of drawbacks not least of which is that it is subject to the same objection applicable to a charge. If it is to be used then the certainty of a charge is more attractive. Reliance on an unpaid vendor's lien requires that the overage forms part of the purchase price for the land; it is not excluded by the terms of the sale agreement which includes the overage arrangement; and it is properly protected.

In the event that the person already bound by the overage arrangement requires a release when a new covenant is provided then it would be prudent to require the approval of the person entitled to overage so that account can be taken of the identity and financial standing of the proposed new covenantee.

13.3 Restrictive covenants – this method of protection use to be more often employed than now but it is still come across particularly with older covenants and in cases which have involved public bodies such as local authorities. It limits the use to which land can be put anticipating that if there is to be a change then a payment can be extracted in order to permit such change. Sometimes the restrictive covenant itself will contain a provision for a payment to be made in specified circumstances by which the permitted use of the property is extended or the release of the restrictive covenant is obtained.

However, restrictive covenants have a number of drawbacks which mean that if it is being considered as the method of protection to be employed to protect an overage entitlement careful consideration will need to be given as to whether it will be effective for that purpose and whether it could be overridden.

13.3.1 Benefit retained land – not only must the person entitled to the overage retain land near the overage property but also unless there is a statutory provision which treats this requirement as having been satisfied it will be necessary for the retained land to benefit from the existence of the restrictive covenant. When the primary purpose of a restrictive covenant is to protect a covenant to pay overage this may be a particularly onerous requirement which prevents the restrictive covenant being enforceable against the owner of the land other than the original covenantor.

The decision of Blackburne J. in Cosmichome Limited v Southampton City Council [2013] EWHC 1378 (Ch) illustrates this point very clearly. It concerned restrictive covenants imposed when a site in the centre of Southampton was acquired by the BBC from the City Council on which site it constructed a purpose-built studio and administration centre. The BBC covenanted to be the sole occupier for the purpose of a broadcasting centre. It provided that if planning permission was granted for a use other than as a radio television studio the restrictive covenant would be lifted in return for a payment of one half the enhanced value of the property subject to the ability to let for a term of not

more than 20 years provided that not more than 25% of the lettable floor space is demised. In addition it conferred on the City Council a right or pre-emption if the property became surplus to the requirements of the BBC or the BBC ceased to require the property for the permitted use. If the pre-emption rights is triggered but not exercised then the BBC would be free to sell the property but subject to various restrictions. Some thirteen years after the completion of the studio the BBC sold the site to the Claimant and took a lease back.

The Claimant contended that the restrictive covenants did not bind it as the successor to the BBC. There was no direct covenant between the Claimant and the City Council so reliance had to be placed on the burden of the covenants running with the land as restrictive covenants. This required the relevant covenants to be capable of benefiting and actually benefiting the City Council's retained land not just at the time the covenants were imposed but also when they are enforced. Normally the Court will assume that the covenants do benefit the retained land as that is the purpose of that part of the transaction (Wilberforce J. in Marten v Flight Refuelling Limited [1962] Ch. 116 at page 136). The onus lies on the person challenging the enforcement of the covenants to prove that the restrictive covenants do not benefit the retained land.

The City Council accepted that to be enforceable against successors the restrictive covenants and to benefit the retained land the covenants had to affect the nature, quality, amenity and value of the property (applying the words of Lord Oliver in P & A Swift Investments v Combined English Stores Group plc[34]). Blackburne J. stated that given "the varied nature of the land uses in the immediate vicinity it is hard to suppose that the restrictive covenant, confining the use of the Site effectively to BBC use as a broadcasting centre, can have any material impact on the nature, quality or amenity of the adjoining Council-owned land." (para. 28 and see para.32). The City Council's expert evidence did not focus on the adjoining land owned by it but rather considered the impact on the City Council and the centre of Southampton as a whole. The judge took into account a distinction drawn between proper restrictive covenants and "money payment" covenants.

In consequence the judge concluded that the restrictive covenants were not imposed to protect or preserve the amenity or value of the City Council's adjacent land but to seek to maintain the BBC at the site and to serve as a lever to extract a payment if and when the BBC decided to move. Those restrictive covenants were not, therefore, enforceable against the Claimant as successor to the BBC.

In many cases the person entitled to the overage will not own land in the locality other than the overage property so that there will be no scope for imposing a valid restrictive covenant. However, if the person entitled to the overage retains other land with a restrictive covenant which has only been imposed in order to extract a payment in return for releasing the restrictive covenant there will always be the concern that it will not be enforceable against a successor to the original covenantor.

13.3.2 Registration – to be enforceable against successors the burden of the restrictive covenant must have been protected by registration at HM Land Registry or on the Land Charges Register (as appropriate).

[34] [1989] 1 AC 632 at page 642

13.3.3 Remedies – enforcement of a restrictive covenant by injunction is a matter of discretion and may not be granted particularly if the objective is to secure a payment. An award of damages may not be for an amount that would equal an overage. There is, therefore, no certainty in the event of a breach or proposed breach that the expected overage will be achieved.

13.3.4 Application to modify or revoke – there is a well-known statutory jurisdiction in section 84 LPA 1925 by which restrictive covenants may be revoked or modified. This applies even if the land is still held by the original covenantor. When determining whether it is appropriate to exercise such power the Upper Tribunal (Lands Chamber) has to decide whether the restrictive covenants secure to the person entitled to the covenants "any practical benefits of substantial value or advantage to them" (subs. 1A). No account will be taken of any monetary benefit secured by the restrictive covenant when deciding whether a practical benefit is secured. In Winter v Traditional & Contemporary Contracts Limited[35] the Court of Appeal held[36] that it was too late to turn the clock back and allow such compensation to be determined by reference to the "negotiated share approach" using the Stokes principle. Such compensation is to reflect the impact of the development on the objector's property and not the loss of an opportunity to extract a share of the profit to be made from the development. This applied and followed the decisions in re SJC Construction Company Limited's Application[37] and Stockport MBC v Alwiyah Developments[38]. In consequence if apart from the financial benefit there are no practical benefits then there is a serious risk that the restrictive covenants could be revoked or modified in a manner which defeats the overage entitlement and provides for compensation which is much less than the overage.

13.3.5 Section 237 TCPA 1990 – restrictive covenants may be overridden if the land is required by a local authority for planning purposes. Compensation will be payable but based on compulsory purchase principles.

13.3.6 Competition Act 1989 – large food retailers have been limited in the extent to which restrictive covenants can be imposed to protect the business of their stores by complex provisions of the Groceries Market Investigation (Controlled Land) Order 2010. Such restrictive covenants are also subject to wider challenges as has recently been illustrated in the Competition Appeal Tribunal. Tesco imposed a restrictive covenant when in 1997 it sold part of its property in Deansgate Manchester. The covenant prohibited the sale of food, convenience goods and pharmacy products. In Latif and Waheed v Tesco (1247/5/7/16) proceedings were commenced on 18th March 2016 on the ground that the restrictive covenant was a breach of Chapter 1 of the 1989 Act or alternatively a breach of Chapter 2 or alternatively a breach of the common law restraint of trade doctrine. On 17th March 2016 the proceedings were settled with Tesco releasing the restrictive covenant. When a restrictive covenant affects business use but is seeking to protect the ability to extract a payment the restrictive covenant will be vulnerable to this means of challenge.

[35] [2007] EWCA Civ 1088
[36] Carnwath LJ at para. 28
[37] (1976) RVR 219
[38] (1983) 52 P & CR 278 which was followed in re Bennett and Tamarlin Limited (1987) 54 P & CR 378 and applied by the Lands tribunal in re Withinlee 13th March 2003 LP/7/2001

13.4 Pre-emption right – in the Cosmichome case supra reliance was placed not just on the restrictive covenants but a pre-emption right was also included. This is an additional form of protection which was commonly employed in the past by local authorities (see, for example, University of East London v Barking and Dagenham LBC[39]). The advantage is that if for any reason the restrictive covenants are no longer enforceable it is still possible to fall back on the pre-emption right as occurred in both the Cosmichome case and the University of East London case. However, to ensure that the pre-emption is an effective fall back it must be protected in the appropriate manner. In the University of East London case it had been but not in the Cosmichome case.

Instead of a full pre-emption right the arrangement may seek to provide in addition to an overage an opportunity for exclusive negotiation if the person holding the land wishes to sell (as in Sainsbury's Supermarkets Limited v Oliveview Limited[40]). The risk with such a provision is that it leads to dispute and in particular contested applications seeking to have any supporting restriction removed from the registered title as in the Sainsbury's case.

13.5 Leases – the absence of retained land which can benefit for a restrictive covenant can be overcome by the overage arrangement being part of a lease rather than a freehold transaction. The lessor's reversion will for these purposes be sufficient and no adjoining land will be needed. Further if the overage provisions are not characterised as personal covenants[41] for the purposes of the Landlord and Tenant (Covenants) Act 1995 the burden will run with the leasehold estate in accordance with the provisions of that Act[42]. With leases for a term exceeding forty years section 84 LPA 1925[43] will apply after the expiry of the first 21 years. This confers a measure of protection for such an arrangement.

If this approach is to be adopted then it is necessary to take care not to infringe any statutory provisions applicable to the particular lease (such as those affecting alienation[44] or improvements[45]). Also there are taxing provisions which apply only to leases (including anti-avoidance provisions for income tax[46]) which could affect the fiscal treatment of an overage payment arising in respect of a leasehold estate and so it will be necessary to obtain tax advice to avoid any traps. Unexpected tax bills may result in a claim against the conveyancing solicitors as in Hurlingham Estates Limited v Wilde & Partners.[47]

13.6 Right of re-entry – as a means of protecting an overage entitlement this was a possibility that was considered by Peter Smith J. but not at any length. The advantage is that it is enforceable even if the covenant it is linked to has ceased to be enforceable. If exercised the right forfeits the freehold estate and so is more draconian than a charge. Accordingly the objections of financiers are even greater than with charges. Although I have seen such rights used as a

[39] [2004] EWHC 2710 (Ch)
[40] [2008] AER (D) 51
[41] Section 3(6)(a) 1995 Act and Chesterfield Properties Limited v BHP Great Britain Petroleum Limited [2001] EWCA Civ 1797
[42] See section 3
[43] Section 84(12)
[44] Such as section 144 LPA 1925 which can be expressly excluded
[45] Such as section 19 Landlord and Tenant Act 1927
[46] Section 756 Income Tax Act 2007
[47] [1997] STC 627

means of dividing responsibility between freeholders of a business site I have never seen an overage arrangement which included this type of protective right.

13.7 Ransom strips – a more practical course of action aimed at extracting a payment in the future is to retain land which will be required if there is to be future development. The simplest method is to retain strips of land around a development or between an estate road and the boundary with land which may be developed in the future. Such an approach may be very effective.

Attempts may be made by local authorities to prevent such an approach being adopted. When planning permission is granted conditions may be attached seeking to prevent such ransom strips or alternatively obligations included in the accompanying planning agreement requiring the developer not to have any ransom strips between the boundary of the land subject to the planning permission and any estate roads which may be adopted.

Such an attempt to exercise some control over ransom strips will be welcomed by adjoining landowners but will not provide them with additional rights. Such private landowners will not be entitled to enforce such conditions or obligations against the developer. That is a matter exclusively for the local planning authority. Importantly it is not open to the private landowners to compel the local planning authority to act against the developer. It is a planning matter which is wholly within the discretion of the authority and no private land owner can force the authority to exercise that discretion in such a manner as to provide the landowner with a private benefit.

This point is illustrated by the decision of Fox J. in Perry v Stanborough (Developments) Limited[48] which concerned a planning condition requiring the estate road to be obstructed up to the boundary of the development site. The reason given for this condition was to allow for the future comprehensive development of the area. In addition there was a highway agreement under which the estate road was to be adopted but the attached plan showed the estate road as stopping short of the boundary by three or four feet which was the road which was constructed. Two adjoining landowners had expected the road to run to the boundary so that they would have been able to connect to it once it had been adopted thereby enabling them to developer their land.

They took proceedings against the authority in an attempt to compel the authority to either enforce the condition or to compulsorily acquire the strip of land between the end of the adopted road and the boundary. This was firmly rejected. Evidence was given by the authority's surveyor that the condition was to preclude the construction of a dwelling at the end of the road which would have prevented future development. The intention was not to provide private land owners with access to their development sites at no cost. Rather the acquisition of such access rights was viewed by the authority as a matter for commercial negotiations between the developer and the landowners with no involvement from the public authorities. Fox J. held that the enforcement of planning law was a matter solely for the planning judgment of the authority and did not confer any rights on the private landowners.

14. Obligation to reconvey – an aspect of overage arrangements which receives little consideration is whether in certain circumstances it should be

[48] (1977) 244 EG 551

possible for the person entitled to the overage to be able to require the transfer back of the property. This would operate if it has not been possible to bring about a trigger event.

Such a right must be properly protected if it is to be enforced against successors of the original covenantor. As part of the Groveholt Limited v Hughes saga Richards J. had to decide[49] whether Mr. Hughes could enforce an obligation to re-transfer the Phase 2 portion of the development site against a successor to the original developer (by novation). There were no direct contractual relations between them. The problem faced by Mr. Hughes was that he had not registered the right to a re-transfer. In consequence section 20 LRA 2002 stood in the way of the claim. He attempted to jump over this hurdle by claiming that the successor Groveholt was a constructive trustee due to the terms of the agreement between the original developer and Groveholt. This claim failed because Richards J. held that those terms did not impose on Groveholt a new obligation to re-transfer the land to Mr. Hughes and so it was not obliged to re-transfer the land to Mr. Hughes. Cases such as this and the Cosmichome case serve to emphasise the importance of ensuring that any part of an overage arrangement conferring a contractual right to transfer land is properly protected by the appropriate registration. This may require the individual rights to be identified and then protected. Failure to do so may result in the structure of the arrangement unravelling.

If the inclusion of such a provision is being considered then it would be sensible to consider whether instead of such an overage arrangement a planning promotion agreement might be a preferable alternative.

15. Checklist – each case involving an overage arrangement requires at least that a standard form is adapted but often it is necessary to produce a set of terms for the individual circumstances of the particular case. Attached to this paper is a checklist. It is not a template but a list of points which may need to be considered when preparing an overage agreement.

16. Alternatives to overage – the availability of overage is an immense advantage for a land owner who wants to share in future uplifts in value but no longer wants the responsibilities attached to ownership. It enables such a land owner to have the best of both worlds.

Often in such circumstances the particular land owner will not have the necessary abilities to achieve the uplift. However, the absence of such skills will not by itself mean that an overage arrangement is the only solution. Traditionally land owners have either granted an option or entered a conditional sale. Such an option will only be exercisable following the occurrence of the event, commonly the grant of planning permission, which causes the uplift in value. Alternatively the sale will be conditional on the occurrence of such an event. The advantage to the land owner is that the owner retains control of the land and if the hoped for events do not happen the owner still has the land. In contrast if the land had been sold no overage would have been payable in such circumstances and the land would have gone.

An alternative to such traditional methods of retaining the land unless and until there is an uplift in value is to enter a planning promotion agreement. Such

[49] [2012] EWHC 3351 (Ch)

an agreement confers on the planning promoter the ability to take steps to achieve an uplift in the value of the land by obtaining planning permission and then to receive a payment which is related to the amount by which the value of the land is increased. Not only does this result in a person with the necessary skills applying them for the benefit of the land owner but the land owner retains the land and keeps control over the realisation of the increased value. More elaborate agreements may include an ability for the planning promoter to acquire the property or to require the realisation of the property.

This approach may be more attractive when there is an expectation that the obtaining of planning permission is possible within a reasonable period rather than being a long term speculation. In consequence it is prudent to consider alternatives to an overage arrangements in cases in which the need or desire to sell is not obvious. As part of such consideration it would be sensible to obtain tax advice as to the possible tax outcomes dependent on which approach is adopted.

17. Tax – the fiscal implications of overage need to be considered carefully before entry into the overage arrangement. Mention has already been made of the income tax trap in section 756 ITA 2007. Separately there is the sdlt charge which will arise and is charged on the basis that the overage payment is part of the purchase price. Applications can be made to defer the sdlt charge but time limits have to be complied with. It is preferable to obtain tax advice on this aspect so that all tax risks are covered and time limits known about in advance.