

Neutral Citation Number: [2013] EWHC 1378 (Ch)

Case No: HC11C03859

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL
23/05/2013

B e f o r e :

SIR WILLIAM BLACKBURNE

Between:

COSMICHOME LTD	Claimant
- and -	
SOUTHAMPTON CITY COUNCIL	Defendant

**John Furber QC (instructed by Hamlins LLP) for the Claimant
Philip Coppel QC and Katie Helmore (instructed by Southampton City Council)
for the Defendant**

Hearing dates: 29 and 30 April and 1 May 2013

Sir William Blackburne:

Introduction

1. These proceedings are concerned with the enforceability of two covenants contained in a transfer of certain land in Southampton executed in 1989. They raise questions of fact, construction and law, in particular the applicability of section 9(2) of the Perpetuities and Accumulations Act 1964 (“the 1964 Act”).
2. The claimant (“Cosmichome”) is the registered freehold proprietor of land known as the BBC Regional Broadcasting Centre, Havelock Road, Southampton (“the Site”). The BBC, which was the previous owner, acquired the Site from the defendant (“the Council”) by a transfer dated 13 July 1989 (“the Transfer”). The consideration for the Transfer was £1.00.
3. The Site is located in the centre of Southampton. It is opposite the Civic Centre and within the main retail and commercial area of the city. It is a few minutes’ walk from the main railway station. At the time of the transfer, there were various buildings on land adjoining the Site which were owned freehold by the Council. They included the Civic Centre, The Mayflower Theatre and the Gantry Arts Centre.

4. After acquiring the Site, the BBC arranged for the construction on it of a building to be used as a broadcasting centre (“the BBC Building”). The building was completed in approximately 1991. It comprises a purpose-built studio and administration centre for the regional programming of the BBC in both radio and television formats. Its net internal area is approximately 5,442 sq m. Since its completion in 1991, the building has been in continuous occupation and use by the BBC as a broadcasting centre. Adjacent to the BBC Building and on land owned by the Council is a 650-space multi-storey car park which the Council developed (“the Car Park”). The BBC contributed approximately £1 million towards the cost of constructing it. With effect from 9 November 1990, the Council granted the BBC a lease of the lowest two levels for a term of 99 years (“the BBC Car Park Lease”). The lowest two levels of the Car Park provide space for 141 vehicles. The rent was a peppercorn. In the years following 1989, a bus station near the Site has been redeveloped as a covered shopping centre, a new Sea City Museum has been located in the Civic Centre, and an office building with the head office for Skandia has been built nearby.
5. In 2004 the BBC sold the freehold of the Site to Cosmichome, taking a 25-year lease back (“the Lease”). It did so by a transfer and a lease back dated 8 October 2004. It remains in occupation of the Site under the lease. On the same date, the BBC sold and transferred the BBC Car Park Lease to Cosmichome and Cosmichome leased the same back to the BBC for a term of 25 years.

The covenants

6. By the Transfer the BBC (described in the document as “the Purchaser”) entered into the following covenant with the Council (described in the document as either “the Council” or “the Vendor”):
 - “3. The Purchaser for itself and its successors in title hereby covenants with the Council pursuant to Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 and for the benefit and protection of so much of the adjoining or adjacent land of the Council as is capable of being benefited thereby or any part or parts thereof with the intent of binding the Property into whosoever hands the same may come that the Purchaser and the persons deriving title under it will at all times hereafter observe and perform the obligations stipulations and restrictions set out in the Second Schedule hereto”
7. The Second Schedule, entitled “Covenants to be imposed in this Transfer”, set out several covenants including the following:
 - “1. The property is to be solely occupied by the Purchaser (being the BBC or the BBC and any wholly owned subsidiary or other licensed broadcaster to whom the BBC’s franchise is in whole or part devolved by Act of Parliament) for the purpose of a Broadcasting Centre (“the permitted use”) PROVIDED THAT this covenant may be removed by the written Agreement under Seal of the Council (“the Discharge”) and a further covenant that where this restriction is lifted and planning permission granted for any use other than radio television studio with ancillary offices 50% of any resulting enhanced value accruing on the Property shall be paid by the owner for the time being of the property to the Vendor (“the Development Charge”).
 2. In the event that the property or any part becomes surplus to the requirements of the Purchaser and/or it ceases to require the property for the permitted use the Purchaser shall notify the Vendor in writing. The Vendor may thereupon within three months of the date of such written notification serve formal written notice on the Purchaser requesting the Purchaser to convey the freehold interest of the property or the relevant part and the rights appurtenant thereto to the Vendor with vacant possession within 6 months of the

Vendor so demanding. The purchase price shall be the open market value of the property and the buildings thereon or the relevant part free of the restrictive covenants in clause 1 and calculated on the basis of a deemed general permitted use as radio/television studios with ancillary offices (not restricted to sole Purchaser use) with the deemed benefit (or relevant apportioned benefit) of the car park lease hereinafter described at the date upon which the Vendor serves notice the value to be agreed within 3 months of such date or failing agreement between the parties, shall be settled by arbitration provided in the event that the Purchaser conveys the freehold interest in the property or the relevant part and the rights appurtenant thereto to the Vendor the consideration for the surrender of the car park lease or relevant part shall be one pound. For the purposes of this paragraph time shall be of the essence.

3. In the event that the Vendor does not serve notice as aforesaid the Purchaser is free to dispose of the property and the buildings thereon or the relevant part and the rights appurtenant thereto subject to the following restrictions:

- (1) In the event of a sale for use as radio/television studios with ancillary offices (“the general permitted use”) The Vendor shall execute the Discharge and impose a similar obligation on a Purchaser
- (2) In the event of a sale for use other than the general permitted use the Vendor shall in the event of a sale of the whole
 - (i) execute the Discharge
 - (ii) on recovery of the Development Charge remove the restriction on the property relating to the same

and in the event of sale of part

- (i) execute the Discharge in relation to that part only and make available a proportionate part of the car parking
- (ii) on recovery of the Development charge relating to the enhanced value of that part remove the restriction on that part of the Property hereby transferred

Provided that the Vendor’s reasonable legal fees incurred under clauses 3.3(1) and (2) shall be met by the Purchaser.

4. Notwithstanding the provisions of clause 1 the Vendor agrees the Purchaser may lease, sub-let, share-use, or hire out any part of the property provided the total amount of any land so leased or hired as aforesaid shall not exceed 25% of the lettable floor space and provided no legal estate or interest greater than a lease for a term of 20 years is created and any planning permission obtained in connection with the same shall not give rise to the Development Charge.”
8. By paragraph 5, the BBC agreed that it would at its own expense carry out the development of the BBC Building in accordance with a planning permission which had been granted by the Council. The BBC took advantage of paragraph 4 by letting approximately 10.4% of the lettable floor space. Currently, I understand, the first floor, comprising approximately 16.2% of the lettable floor space, has been let. The lettings have not been in connection with what paragraph 3 describes as the general permitted use.

9. I refer to the covenant set out in paragraph 1 of the second schedule as “the restrictive covenant” and to the right conferred by paragraph 2 of that schedule as “the right of pre-emption.”

The claim

10. By its claim form dated 7 November 2011 Cosmichome, which has appeared by John Furber QC, seeks (1) a declaration that the restrictive covenant is not enforceable against it or any successor in title to it and (2) a declaration that the right of pre-emption, in the event of any transfer of the freehold of the property by the BBC, is not enforceable against it or any successor in title to it. The Council, which has appeared by Philip Coppel QC and Katie Helmore, resists the making of those declarations.

The restrictive covenant

11. The restrictive covenant seeks to subject the use of the Site to very narrow limits. It is confined to a broadcasting centre which may only be used by the BBC or by some body exercising the BBC “franchise.” The restriction is not absolute. There are three let-outs. First, under paragraph 4 of the second schedule it is open to the BBC to allow up to 25% of the lettable floor space for a wholly different use (provided the requisite planning permission is obtained). Second, paragraph 1 envisages that the restriction may be lifted and the Site used for some other purpose for which planning permission has been obtained provided a payment is made (the so-called “Development Charge”), calculated by reference to the increase in value which may result from the grant of the permission. Although this escape from the narrow scope of the restriction is subject to the Council’s agreement, which the Council is free to give or withhold as it chooses, the fact that the paragraph explicitly provides for this escape suggests that the Site is not necessarily to be tied to continuing use as a broadcasting centre operating the BBC franchise but that a non-broadcasting use for the whole of the Site is envisaged. Third, if the BBC finds that use of the Site as a broadcasting centre is no longer needed and, after being served with a notice to this effect, the Council does not exercise the right given by the right of pre-emption to re-acquire the Site, the BBC is free to dispose of the Site for whatever it can get for it and for whatever use is permissible in planning terms subject to paying the Development Charge if there is an increase in value as a result of any planning permission which has been obtained for the Site. From all of this it is evident therefore that the operation of the restrictive covenant is linked to (1) the possibility that the Development Charge may be payable, and (2) the operation of the right of pre-emption.

Is the restrictive covenant enforceable against successors in title?

12. This is the issue raised by the first of the declarations which Cosmichome seeks. I start with some uncontroversial matters of law.
13. To be enforceable against successors in title of the original covenantor the burden of a restrictive covenant must, at the time it was imposed, have been intended to benefit, and in fact have been capable of benefiting, the land of the covenantee and must continue to benefit that land at the time that its enforcement is sought. See *Dano Ltd v Earl Cadogan* [2003] EWHC 239 (Ch); [2003] 2 P & CR 10 at [50]. Cosmichome’s contention has been that the restrictive covenant does not satisfy this test and, accordingly, that as a successor in title to the original covenantor it is not bound by the covenant.
14. Where, as here (see clause 3 of the Transfer), the restrictive covenant is (together with the other stipulations set out in the second schedule to the Transfer) expressed to be for the benefit and protection of so much of the adjoining or adjacent land of the covenantee as is capable of being benefited, the court normally starts with the assumption that the restriction is capable of doing

so. In *Marten v Flight Refuelling Ltd* [1962] Ch 116 Wilberforce J put the matter as follows (at 136):

“If an owner of land, on selling part of it, thinks fit to impose a restriction on user, and the restriction was imposed for the purpose of benefiting the Land retained, the court would normally assume that it is capable of doing so. There might, of course, be exceptional cases where the covenant was, on the face of it, taken capriciously or not bona fide, but a covenant taken by the owner of an agricultural estate not to use a sold-off portion for other than agricultural purposes could hardly fall within either of these categories.”

15. The burden on the person who seeks to challenge the assumption that a restriction expressed to benefit the covenantee's retained land does in fact do so was stated thus by Sargant J in *Lord Northbourne v Johnston & Son* [1922] 2 Ch 309 (at 309):

“The practical and usual course is for the vendor to impose covenants the benefit of which will not be attached to any particular parcel of land, but will be enforceable by the vendor for the general benefit of his unsold estate for the time being. Nor do I think that the vendor must on each occasion of enforcement show that the result will in fact be to benefit his remaining estate. Benefit or detriment is often a question of opinion on which there may be the greatest divergence of view, and the greatest difficulty in arriving at a clear conclusion. It is, in my judgement, sufficient for the vendor to say, at any rate in the first instance, that the bargain was that he should be protected against certain acts which were recognized as being likely to prove noxious or detrimental to his building estate treated as a whole. The covenantor, being then, in my judgement, bound at the very least to show that the estate remaining to the covenantee at the date of the action was not intended to be protected by the covenants, or that the breach of the covenants could not possibly hurt such remaining estate, the question arises whether this onus has been discharged...”

16. The importance of respecting the apparent acceptance by the original covenantor and the original covenantee at the time it was entered into that the restriction was intended to and was capable of benefiting the covenantee's land was emphasised by Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (at 808):

“If a restriction is bargained for at the time of sale with the intention of giving the vendor a protection which he desires for the land he retains, and the restriction is expressed to be imposed for the benefit of the estate so that both sides are apparently accepting that the restriction is of value to the retained land, I think that the validity of the restriction should be upheld so long as an estate owner may reasonably take the view that the restriction remains of value to his estate, and that the restriction should not be discarded merely because others may reasonably argue that the restriction is spent...”

17. In considering whether I should grant the first of the two declarations sought by Cosmichome the question is whether it is able to discharge the burden of showing that, despite the wording of clause 3, the restrictive covenant was not intended, at the time it was imposed, to benefit the Council's adjoining or adjacent land or, if it was, that it was incapable of doing so. It was not suggested that circumstances had changed to any material degree since the date of the Transfer.
18. The Council, in its defence, pleaded that the restriction “affected the nature, quality, amenity and value” of its land. This phrase was derived from, even if it did not wholly follow, the formulation by Lord Oliver of Aylmerton in *P & A Swift Investments v Combined English Stores Group Plc* [1989] 1 AC 632, 642, (a case concerned with a covenant in a lease) of a working test for whether, in any given case, a covenant “touches and concerns” (the traditional way of describing what must be shown) the covenantee's land. Whether it does is essentially a matter of evidence, making due allowance for the fact that by the terms of clause 3 the parties

to the Transfer apparently proceeded on the footing that the restriction was capable of benefiting the Council's adjoining and adjacent land.

19. Mr Furber pointed out that the restrictive covenant is unusual in that it restricts not only the use of the property (limited to that of a broadcasting centre) but also the identity of the person who may use the property. He submitted that its commercial purpose is to obtain payment of what is known as "overage", namely payment in the event of a change of use from the narrow use permitted, and to obtain that payment not only from the BBC but also (by extracting an appropriate covenant to secure that this happens) from a successor in title to the BBC. He submitted that a covenant of that kind is not enforceable against a successor in title to the original covenantor. He relied as part of his argument on two passages from the 4th edition (published in March 2013) of *Restrictive Covenants and Freehold Land* by Andrew Francis. The first passage (at p 91), dealing with 'money payment' covenants, states that

"... 'money payment' covenants must be distinguished from restrictive covenants properly so called. Modern authority stresses the distinction between covenants imposed to protect, or preserve amenity and those imposed to protect, or allow recovery of an increase in value. This latter purpose, often described as 'overage' or 'clawback' may be regarded as one lying outside the scope of the benefit of a restrictive covenant. But note that the right to a payment of money, whether on account of an increase in the value of the covenantor's land, or otherwise is not related to the preservation of the value, or the amenity of the covenantee's land. Such a right is more in the nature of a privilege which is designed to enhance the value of the covenantee's pocket rather than his land. However, the fact that a covenant requires the payment of a sum of money will not prevent it from 'touching and concerning' the land as long as it is connected with something to be done on or in relation to the land; e g for the approval of building plans; see the fourth category of covenant referred to in... *P&A Swift Investments v Combined English Stores Group PLC*. But a covenant which is imposed purely to lead to a payment of money (e.g. as a ransom payment) is not one which should be regarded as being capable of benefiting other land and should not be enforceable as a restrictive covenant against successors in title of the original covenantor..."

20. The second passage (at p94), dealing with 'personal covenants' states that

"...the question arises where a restriction on use is limited to 'the purchaser' or some other defined individual and where the defined use of the land (e.g. for a specific purpose, such as only as a theatre, or as a restaurant) is such that the 'personality' of that individual will be important in so far as the nature, or quality of the use takes its 'tone' from the individual and is significant in context; e g a use which requires a high standard in order to maintain the high class nature of the locality. It may be possible to take other obligations in the same document imposing the covenant (e.g. a right of pre-emption) and argue that the context, with that right of pre-emption present, suggests that the covenant is a personal one. Consent provisions may also be material here. Even definitions which include successors in title within the words 'the purchaser' might be held to be inapplicable where the restriction is clearly aimed at a particular individual working within that restriction, and when that individual's role comes to an end on a proposed sale of the burdened land, the covenantee has control over what is to happen next. This latter factor stresses the personal nature of the restriction."

21. Mr Furber submitted that the restrictive covenant in the instant case is intended to secure a payment and is of a personal or quasi-personal nature. He submitted that it is not therefore capable of benefiting the Council's land. The fact that it purports by its terms to be for the benefit and protection of the Council's adjacent land should not blind the court to its substance. He referred to the expert report, given on behalf of Cosmichome, by Mr Duncan Locke FRICS, a Senior Director (at the time of his report) of GVA Grimley Limited (trading as GVA), the well-known firm of property consultants. Although Mr Locke is based in London and works mainly in connection with properties located in Greater London and the south-east, his work

also includes consideration of whether restrictions on use have an impact on property value when compared with nearby properties. He carefully considered each parcel of Council-owned land identified by the Council as intended to benefit from the restrictive covenant and gave as his opinion that a change of use of the Site from a broadcasting centre to offices or any other likely use would not have any impact of the nature, quality or amenity of any of the Council land or reduce its value. He concluded by saying that although there might be civic pride in having the BBC located in the city that pride would exist regardless of the location of the BBC facilities in the city centre.

22. Mr Coppel submitted that the restrictive covenant secures the presence of a well-known public, national broadcaster on a major, centrally-located parcel of land adjacent to the Council's Civic Centre and the Council's other arts-based sites and that it does so for the purpose of its use as a broadcasting centre. He submitted that the immediate and enduring benefit that attends the covenant is a material increase in the likelihood that the Site will remain in the use of the BBC for that defined, well-known, cultural purpose and that, in so doing, it enhances and secures the nature, quality, amenity and value of the Council's other land in that part of the city centre which since the late 1980s has come to be described as its "Cultural Quarter." This area is, he pointed out, characterised by a concentration of predominantly cultural and civic uses on Council-owned land which the BBC reinforces through its presence and the operation there of one of its broadcasting centres.
23. Mr Coppel referred me to the evidence on behalf of the Council given by Mr Clive Rutland FRICS MAE, principal of Rutland Chartered Surveyors, a Southampton-based practice, and until 2012 a longstanding member and latterly vice-chairman of the Planning and Transportation Committee of the local Chamber of Commerce. Mr Rutland described the Council's attempts going back many years to enhance the Cultural Quarter through the implementation of its local plan policies in the buildings it owns and gave as his opinion that the retention of the BBC was and remains important to securing and maintaining the Council's objectives for that area of the city centre.
24. Mr Coppel submitted that it was incorrect to suggest that the purpose of the restrictive covenant was and is to secure an increase in value or extract value for the Site in return for its release, rather than to retain the BBC on the Site and secure its use as a broadcasting centre. He submitted that the Development Charge payment proviso is simply the mechanism for securing that purpose. Drawing on the same passage from Mr Francis's *Restrictive Covenants and Freehold Land* to which Mr Furber had referred, he submitted that Cosmichome had fallen well short of showing that the restrictive covenant did not and does not benefit or secure the nature, quality, amenity or value of the Council's land in the Cultural Quarter. He added that, in any event, the Council's opinions as to such benefit are reasonable.
25. In evaluating these submissions I must first describe the location of the Site in a little more detail. It is part of a triangular island site with the BBC Building taking up the eastern half and the multi-storey Car Park the western half. Lying across a road to the west of this island site is another triangular site comprising the Mayflower Theatre on its western side and (immediately opposite the BBC Building) a vacant area to the east. This latter area is not within the Council's ownership and is intended for development as high-rise residential accommodation for students. The BBC Building is separated from the Civic Centre to the east by a two-lane dual carriageway called Havelock Road. This is part of the city's inner ring road. The Civic Centre site is a rectangular area of land, all Council-owned. The recently opened Sea City Museum is on its western side opposite the BBC Building. That part was previously occupied by a magistrates court and a police station. The Civic Centre (the Council's headquarters) fills the southern part, the Guildhall (for concerts and the like) accounts for the middle section and the city's Central Library and Archives and an arts centre (the Gantry Arts Centre) take up the northern part. A pedestrianised road running north/south divides the Civic Centre and other uses on its eastern side from a narrower rectangular area on its western side. Only the central

section of this further area is Council-owned. The northern half of this central section is public open space and is called Guildhall Square. It fronts the Guildhall. The southern half of it comprises a building which houses various Council offices. The northern section (not owned by the Council) consists of Southampton Solent University's SJM building. This is home to a variety of seminar and teaching rooms, staff offices and lecture theatres. It also contains an IT resource centre and a centre for professional development in broadcasting and multimedia production. Also housed in the building is the University's conference centre and recently refurbished Artisan café which combine dining with art exhibition and performance space. Separated from this parcel of land on its eastern side (so that it is even further away from the BBC Building) and lying across a road, called Above Bar Street, is another roughly rectangular parcel of Council-owned land on most of which there was once a department store. This parcel is to be developed as an arts complex along with restaurant facilities, flats, auditoria, space for the performing arts, a contemporary art gallery and film/media facilities. This multi-million pound project is due to open in 2015. Yet further to the east (across another road) lies West Park. This too is Council-owned. To the north of the Civic Centre and the SJM building, and separated by another road, is the Council-owned Andrews Park. The Civic Centre site and the triangular parcel comprising the BBC Building and the multi-storey Car Park are bordered on their southern side by the main line which leads to the main station to the west. This line lies underground from roughly the point where it passes the south-eastern tip of the BBC Building to a point to the east of the central area of the city. Where it runs below-ground there is a road on the surface, called Civic Centre Road which intersects with Havelock Road. To the south of the railway (before it disappears into the tunnel) is a large parcel of Council-owned land which is devoted to retail stores and warehousing with public parking. The Cultural Quarter, as it has been called, lies in the heart of Southampton and in very close proximity to its main commercial and shopping areas.

26. 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. It is difficult, to put it no higher, to think that if the use of the Site were to change from a broadcasting centre to some other use, permissible under current planning law, this might have a deleterious effect on the nature, quality or amenity of, say, the Mayflower Theatre to the west, or the Sea City Museum on the other side of Havelock Road to the east, much less on the nature, quality or amenity of the Civic Centre, the Guildhall or the Central Library, City Archives and Gantry Arts centre further to the east, let alone current or intended uses of Council-owned land yet further east, or lying to the south (for example the retail, warehousing and public parking area to the south). It is impossible to think that a change of use (or user) could affect in any material way the multi-storey car park immediately next to the BBC Building. Even less likely is the idea that any such change of use or identity of the user could adversely affect the values of any of those areas.
27. If it had been the case that the BBC Building acts as a magnet, drawing members of the public into the Cultural Quarter to enjoy the various facilities available to them in the Council-owned area of the Quarter (for example, in the Mayflower Theatre or the Gantry Arts Centre), it might plausibly be suggested that the restriction impacts favourably on the value and amenity of those other facilities. But that is most certainly not the case. It appears that the BBC Building is not open to the public in the sense that, say, a museum or an arts centre or a public library is. It is strictly for broadcasting use by the BBC's staff and visitors in the ordinary course of the BBC's business there. There was no suggestion that, for example, the Building houses any kind of theatre for use by the public for live or recorded shows or discussion programmes or the like. There was some evidence to suggest that groups might pay a visit to the Building but that, it seems, is strictly by pre-arrangement. Indeed, the very strong impression I had from all of the evidence was that the BBC Building is less of a reason for members of the public to visit the Cultural Quarter than, say, the restaurants or retail stores in the area. This, of course, was the broad thrust of Mr Locke's evidence.

28. What then was there to weigh in the scales on the other side of the argument? This brings me to Mr Rutland's evidence. His instruction was to advise whether the burden of the restrictive covenant was capable of benefiting any land owned by the Council as at 13 July 1989 (the date the covenant was given). The land in question was identified by reference to a plan. Notwithstanding that clear instruction he considered that it was open to him to express an opinion on whether the continuation of that covenant and also the right of pre-emption "provides material benefit to the Council such that they should be retained." But benefit to the Council – unrelated to the identified land – was not the question he was asked and is irrelevant to the issue which arises. Much less was he asked to opine on the benefit to the Council of the pre-emption clause. His report, to which I pay tribute for its thoroughness and breadth of knowledge of the area, ranged more widely in its consideration of the impact of those provisions. It was not confined to the land identified in the Council's defence (that land was the subject of clear particularisation after a request for this information was served) but extended to other Council-owned land. (This departure necessitated a supplementary report from Mr Locke who, unsurprisingly, had focused his attention in his first report on the impact of the restrictive covenant on the land which the Council had identified as the benefited land.) Indeed, Mr Rutland's report extended to land which is not and has not at any material time been owned by the Council (for example, the SJM building). When asked about this, Mr Rutland volunteered that he had interpreted his instructions as giving him "a clean piece of paper" to set out his views and that he had not felt constrained by the Council's defence. He justified his often detailed references to non-Council land as "background."
29. Having launched upon this wider look at the Cultural Quarter, Mr Rutland gave as his opinion in the summary of his conclusions at the end of his report (1) that "the restrictive covenants provide quantifiable value in respect of the building itself, provides direct and indirect benefits in respect of other buildings within the Cultural Quarter within which the Council has an interest and provides unquantifiable benefits (from my perspective) to the City as a whole," (2) that they "allow the Council to exercise a control to the benefit of their other interests in Southampton both as landowner and corporate administrator in excess of that possible through the Planning System" and (3) that as "the expanded Cultural Quarter is likely to require space to expand in the future" there were realistically only two sites where this expansion could occur, with the BBC Building as the one which, with the restrictive covenant in place, was "likely to provide the lowest cost solution." He explained that "under present arrangements" 25% at least of the BBC Building could be available for wider cultural use than if it were to remain occupied by the BBC or some future holder of its franchise and that the remainder could provide "the base for a local or national radio or TV enterprise that would find suitable premises difficult to obtain at a viable level of value." The report then concluded: "As such I am of the opinion that the Restrictive Covenants should be retained in the current form."
30. Mr Furber criticised Mr Rutland's approach to his task, and rightly so. It was of no assistance to the court for opinions to be expressed on what might be of benefit for the BBC Building, or on other unidentified buildings within the Cultural Quarter (within which the Council "has an interest"), let alone for the City as a whole. Nor was it of assistance to the court to know that the covenants (in the plural: Mr Rutland was evidently not confining himself to the restrictive covenant) allow the Council to exercise a control to the benefit of its other interests (unspecified) in Southampton both as a landowner and as a corporate administrator greater than what is possible through the planning system. Nor was it of assistance to the court to be told what alternative cultural uses might, in the interests of an expansion of the Cultural Quarter, be made of the BBC Building itself. Still less was it of assistance to the court to be advised of Mr Rutland's view that the restrictive covenants (again in the plural) should be retained in their current form. Even where Mr Rutland did suggest that the covenants provided "quantifiable value" he did not venture any view on what that value might be and stated, when cross-examined about the matter, that he had not attempted any kind of "mathematical valuation."

31. The reality is that Mr Rutland failed in his report to address the question whether the restrictive covenant (i.e. the restriction on use and user set out in paragraph 1 of the second schedule) provides any real benefit to the identified Council-owned land adjoining or adjacent to the Site. The most he could venture was the (to my mind) unconvincing suggestion that the takings at the Mayflower Theatre might be adversely affected if the restriction were to be lifted; he did not consider that this would be immediate but would only become apparent in the longer term. His real concern seemed to be with the association of the BBC, as a major public institution, with the Cultural Quarter of the city, the fact that its presence in the Quarter added to what he referred to variously as the “cohesiveness” of the area and the “overall offer to the public” in the area and to the “intensity of cultural use” which he felt that the BBC’s presence and use of the BBC Building contributed to the area.
32. I can well understand the wish of the Council to have and retain a national institution as publicly well-known as the BBC as an occupant of one of its city centre sites and, better still, in close proximity to the Civic Centre, Guildhall and various present or intended cultural facilities in the Cultural Quarter. But I am quite unable to see how in any real sense that presence impacts upon either the nature of the Council-owned land in the immediate vicinity, or its quality, amenity, or value. Mr Locke’s evidence was clear that it does not. Mr Rutland’s evidence, in so far as it sought to deal with the issue, failed to indicate in any material way that it does. The fact that the clause introducing the restrictions assumes that it does cannot mask that reality.
33. Mr Coppel submitted that the Council’s opinion that the restrictive covenant secures benefit for its land in the Cultural Quarter is sufficient as it is a reasonable opinion. I heard nothing to that effect from anyone who could be said to represent the Council on such an issue. Even if I had had the benefit of hearing from a person who had been involved with the sale and that person had stated that the restriction was taken for the benefit of the Council’s adjacent land, I would have needed to evaluate that opinion against the other evidence. Not the least of the reasons for this, as Mr Rutland’s own evidence clearly showed, is that it is all too easy to misunderstand what is in issue and, instead, pronounce upon points which are not germane.
34. Sharon Bishop, formerly in the Council’s employment in the management of its commercial properties and currently in the employment with Capita Symonds in a similar capacity, sought to fill this role. Her evidence was mostly directed to research which she had undertaken into the circumstances in which the Site was sold and the various covenants imposed. She was not in any sense speaking from personal involvement. Indeed, as she explained in her witness statement, the Council officers responsible for the negotiations with the BBC at the time of the sale to it of the Site are no longer with the Council or with Capita Symonds. The best she could do was speak to, and report on the views of, Mr Ernest Urquhart who was the Council’s chief executive at the time of the sale. It was questionable whether her evidence on these matters was even admissible. Ms Bishop commented that in her view the restrictive covenant was imposed “in order...to give added value to the adjacent land.” That opinion was certainly inadmissible and, in any event, unjustified by any contemporary documentation that I was shown or by her account of what she was told by the Council’s former chief executive. On the contrary, it is of interest that she reported Mr Urquhart saying that the restrictive covenant was placed on the Site “because they considered they were offering to the BBC the site on beneficial terms in order to keep them located on this site and so continue to act as a magnet for the city and for the cultural quarter and they considered therefore if they lost that benefit then there should be a penalty in the form of an overage clause.” That was precisely Mr Furber’s point. There was no mention in that account of the covenant serving to protect the nature, quality, amenity or value of the Council’s adjacent land. Nor was there in the only document to which my attention was drawn and which might be said to throw light on the Council’s reasons for extracting the restrictive covenant at the time it was entered into. This was a report dated 3 October 1988 to the Council’s Policy and Planning Committee seeking the Committee’s approval of the terms negotiated with the BBC for the sale of the Site. It contains a section dealing with the

conditions subject to which the Site was to be sold. These were that “following completion it [the Site] is occupied by the BBC for the purpose of a Broadcasting Centre” and that “Provision is made for this covenant to be removed by way of a Discharge at the discretion of the Council and on payment to the Council of a sum equal to 50% of the resulting increase in the value of the property.” It referred also to what became the right of pre-emption. Beyond those matters the report is silent on the reasons for the restriction. It does not suggest that it was designed in any way to preserve the value or any other attribute of the Council’s adjacent land.

35. Ms Bishop’s evidence also dealt with a matter with which she was personally involved. This was in late 2009 when a prospective purchaser of the Site from Cosmichome (by then the owner of it) approached the Council to ascertain the price for the removal of what in her witness statement Ms Bishop referred to as “the pre-emption and overage rights.” She was asked to prepare a briefing note to Council Members in relation to the approach and prepare a valuation to assess what “the appropriate payment should be in return for the Council releasing the right...” It appears that she advised a figure of £800,000. There was no attempt to place any kind of value on the loss to the Council’s adjacent land resulting from the lifting of the restriction. That, of course, is because the covenants are not concerned to do so. As Ms Bishop observed: the question was the price for removing the pre-emption and overage rights.
36. In the light of this review of the relevant evidence I conclude that the restrictive covenant cannot be said to have benefited the Council’s adjoining or adjacent land when it was imposed in 1989 and it does not do so now. Moreover, the balance of the evidence strongly suggests that the reason for its imposition was twofold: to seek thereby to maintain the BBC at the Site and to serve as the lever for extracting a payment if and when the BBC should seek to have it removed and go elsewhere. As such it is in the nature of a money payment obligation rather than a restrictive covenant properly so called. It is not intended to protect or preserve the amenity or value of the Council’s adjacent land. It does not bind successors in title to the BBC. I shall therefore grant the first of the two declarations which Cosmichome seeks.

The right of pre-emption

37. Three issues arise. (1) Has the Council lost its right to acquire the freehold by virtue of its failure to serve any notice pursuant to paragraph 2 within three months of the receipt by it of a letter dated 8 July 2004 from the BBC’s solicitors? (2) If it has not, has it lost the right by force of the provisions of section 9(2) of the 1964 Act? (3) If it has not lost the right and the 1964 Act is not an obstacle to its enforcement, is Cosmichome bound by the right of pre-emption in any event? I deal with each issue in turn.

(1) Has the Council lost the right by notice given in July 2004?

38. Mr Furber submitted that paragraph 2 (conferring the right of pre-emption) was to be understood as meaning that the right to require the BBC to sell the Site to it arose if the freehold in it became surplus to the BBC’s requirements or if the BBC ceased to require the freehold in the Site for the use permitted by paragraph 1. He submitted that the word “property” in the first sentence of the paragraph (“In the event that the *property* or any part becomes surplus to the requirements of the Purchaser and /or it ceases to require the *property* for the permitted use...”) was to be understood as a reference to the *freehold* in the property. Written notice of the fact was given to the Council, he submitted, when the BBC’s solicitors wrote to the Council on 8 July 2004 to “advise that the BBC proposes to enter into an agreement for the sale and leaseback of the Broadcasting Centre and the car park, and that the terms for this sale and leaseback...have been provisionally agreed.” The letter ended with a request that the Council reply “as soon as possible, as now that terms have been agreed the BBC would like to move forward with the transaction as a matter of urgency.” The Council, he said, did not seek to exercise the right of pre-emption although a period of three months elapsed before the BBC completed its sale (which was by transfer of the Site and other properties) on 8 October 2004.

In the circumstances, submitted Mr Furber, the right was spent: the Council had had its chance and had chosen not to proceed.

39. I do not accept the submission. As Mr Coppel argued, the word “property” as it appears in the first sentence of paragraph 1 is clearly to be understood as referring to the building subsequently erected on the Site, namely the BBC Building, and not to the nature of the proprietary interest held by the BBC in the Site. This was emphasised, he said, by the reference in the very next sentence of the paragraph to the right in the Council, when served with the notice by the BBC, to require the BBC “to convey the *freehold interest of the property...*” In my judgement Mr Coppel is right.
40. What is more, that the sale and leaseback by the BBC to Cosmichome in 2004 might trigger the operation of the right of pre-emption was expressly disavowed by the BBC when its solicitors wrote their letter dated 8 July 2004 to the Council. After mentioning its intention to enter into a sale and leaseback the letter stated:
- “It is not intended as a part of this transaction that the BBC’s occupation of the premises will be in any way changed. The BBC has no current intention to further sublet or part with possession or occupation of the premises, nor to change the use...”
41. The letter went further. After stating that its purpose was to apply for the Council’s consent to the grant to the BBC of the intended leaseback the letter continued:
- “Turning to the transfer of 13 July 1989, we note that the Second Schedule contains certain pre-emption and other provisions. However, we consider that none of the conditions which might give rise to those provisions (as contained in paragraphs 1, 2, and 3 of the Second Schedule) will arise on this sale and leaseback. ... Counsel has confirmed that in his opinion this sale and leaseback will not trigger any of those provisions. The property will continue to be occupied by the BBC for the purpose of a Broadcasting Centre (paragraph 1) and it has not become surplus to the requirements of the BBC, nor does it cease to require the property for the permitted use (paragraph 2). Although, therefore, the sale and leaseback will not give rise to any of the provisions of paragraphs 1, 2, and 3 of the Second Schedule, we felt it was appropriate to advise the Council of the BBC’s intentions for the property.”
42. Mr Furber’s submission seeks to turn this letter on its head.
43. I am satisfied that the Council did not by its inaction in the face of this letter lose the right to enforce the right of pre-emption. The conditions for its exercise were not triggered by the BBC’s sale and leaseback to Cosmichome. The letter of 8 July 2004 did not and could not constitute notice for the purpose of that right.

(2) Section 9(2) of the 1964 Act

44. The question here is whether section 9(2) is applicable to the right of pre-emption and, if it is, whether the relevant 21 year perpetuity period has expired. If it is applicable and the period has expired the right of pre-emption is void for remoteness and, what is more, is to be treated as void also as between the BBC and Council (as the persons by whom and in whose favour it was made). This is by force of section 10 of the 1964 Act.
45. Sections 9 and 10 are in the following terms:

“9 Options relating to land

- (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—
- (a) the option is exercisable only by the lessee or his successors in title, and
 - (b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

This subsection shall apply in relation to an agreement for a lease as it applies in relation to a lease, and “lessee” shall be construed accordingly.

- (2) In the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities shall be twenty-one years, and section 1 of this Act shall not apply:

Provided that this subsection shall not apply to a right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes.”

10 Avoidance of contractual and other rights in cases of remoteness

Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in contract otherwise for giving effect to it or making restitution for its lack of effect.”

...

15 Short title, interpretation and extent

- (2) In this Act—

“disposition” includes the conferring of a power of appointment and any other disposition of an interest in or right over property, and references to the interest disposed of shall be construed accordingly;

...

- (6) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.”

46. Mr Furber submitted that the right of pre-emption conferred by paragraph 2 was at its inception in July 1989 an option within the meaning of section 9(2) so that it became void with effect from the expiry of the 21-year perpetuity period in July 2010. He further submitted that, even if it was not at its inception an option within the meaning of section 9(2) but only becomes such when it becomes exercisable, it will nevertheless be rendered automatically void when it would otherwise become exercisable at some future date. This, he said, is because the applicable 21-year period is measured by reference to the date when the right is conferred, in this case it is the

date of the transfer in July 1989, and not by reference to when the right becomes exercisable and thereby matures into an option. As the 21-year period, so measured, has expired it follows that the right has ceased to be exercisable. He submitted that this twofold view of the way that section 9(2) is to be understood and applied is supported by the decision in *Taylor v Couch* [2012] EWHC 1213 (Ch).

47. Mr Coppel submitted that section 9(2) has no application to a right of pre-emption for so long as the right has not yet become exercisable. He further submitted that the 21-year period only dates from the time that the right becomes exercisable and thereby matures into an option within the meaning of section 9(2), and that in the events that have happened this has not yet occurred. He submitted that *Taylor v Couch* was wrongly decided, that I am not bound by and that I should not follow it. In short, he submitted, perpetuity poses no threat to the validity of the right.
48. Before considering which side is right three things should be mentioned. The first is that Mr Furber is only concerned with this issue if he is unsuccessful in persuading me that the right ceased to be exercisable in any event as a result of the sale and leaseback in 2004. The second is that, with the passing of Perpetuities and Accumulations Act 2009, the perpetuity rule no longer applies at all to options granted on or after that Act came into force. In other words the true construction of section 9(2) is only live in relation to options conferred by instruments taking effect after 15 July 1964 and before 6 April 2010. See section 15(5) of the 1964 Act and section 1 of the 2009 Act. I mention this to emphasise that there is no underlying policy requirement concerned with the vesting of interests in property at too remote a date which should incline me to favour one construction in preference to another if either is tenable. The third is that, as regards registered land, a right of pre-emption granted on or after 13 October 2003 takes effect as an interest in land from the time of its creation. See section 115 of the Land Registration Act 2002 (which came into force on 13 October 2003). That Act is silent on the proper characterisation of rights of pre-emption granted before that date.
49. Underlying the submissions on both sides was the acceptance, at any rate until much higher authority decides otherwise, that an option to acquire for valuable consideration an interest in land is different from a right of pre-emption in that from its inception the former confers on the grantee an immediate equitable interest in the grantor's land (and not merely when the option is exercised) whereas the latter does not; the latter is for this purpose merely contractual. A right of pre-emption only matures into an option and confers on the grantee an interest in the grantor's land when it becomes exercisable. Both sides accepted that this has been the law since the matter was decided by the majority of the Court of Appeal (Stephenson and Templeman LJ) in *Pritchard v Briggs* [1980] 1 Ch 338. The other member of the court in that case, Goff LJ, went further. He was of the view (at 396F-G) that a right of pre-emption does not confer on the grantee of the right any interest in the grantor's land even when the right has become exercisable.
50. In *Taylor v Couch* the claimant sought to enforce a right of pre-emption conferred by an agreement dated 14 December 1984. Under that agreement the vendors granted the purchaser what it described as an "option" to purchase land, referred to as plots A and B, in certain events. The one relevant to the decision in that case (clause 17(iii)) was to be exercisable if "the vendors offer for sale the said plots A and B." The rights in question were duly protected by registration. It appears that on 6 January 1989 the vendors sold the two plots to the defendant and his sister (since deceased). The claimant, after belatedly discovering that sale, gave notice in August 2009 in purported exercise of the option. By proceedings started in December 2010, he sought to enforce against the defendant the contract of sale which he claimed had arisen as a result of that notice. The questions were whether the right conferred by the agreement of 14 December 1984 amounted to an option within the meaning of section 9(2) and, if it did, whether it was void for remoteness on the ground that it had been granted more than 21 years earlier. Judge Hodge QC, sitting as a judge of this Division and delivering what in the first

sentence of his judgement he emphasised was an extemporary decision, held (1) that the right which the claimant was seeking to enforce was a right of pre-emption (in that at inception it was entirely within the volition of the grantor whether the right would ever become exercisable), (2) that even though it was a right of pre-emption it qualified from inception as an option within the meaning of section 9(2), and (3) that even if that was wrong and it only became an option within the meaning of section 9(2) when the grantor offered to sell the land in question (i.e. on or shortly before 6 January 1989), nevertheless the 21-year period ran from the date of the “disposition” which created the right, namely the agreement dated 14 December 1984. On either approach the 21-year perpetuity period expired on 14 December 2005 with the result that, as he put it (at [56]), “at the date of exercise the “option” was already void for perpetuity.”

51. The judge’s reasons which resulted in those conclusions and which Mr Furber respectfully submitted were sound and invited me to follow were shortly stated in the following passage.

“54. ... First, it seems to me that where section 9(2) refers to “the conferring of an option to acquire...any interest in land”, the draftsman has in mind, not only the conferring of an option in the strict sense, but also the creation of a right of pre-emption. In other words, he is treating a right of pre-emption as a sub-class of an option. It seems to me that that construction follows from the proviso to section 9(2). The proviso makes no sense at all unless the draftsman regarded a right of pre-emption as having fallen within the concept of an option to acquire an interest in land for the purposes of subsection 9 (2). In other words, it seems to me that the draftsman is treating a right of pre-emption as a species of option, and saying that the perpetuity period created by section 9(2) applies to a right of pre-emption as a species of option.
55. If I am wrong in that, however, I reject Mr Gilchrist’s alternative submission as to the way in which you apply section 9(2) at the point when the clause 17 (iii) right is converted from a right of pre-emption into an option by the seller’s offer to sell the land. It seems to me that when section 9 becomes engaged, so that the perpetuity period becomes 21 years, the only sensible way of measuring that period is from the date of the disposition which conferred the right of pre-emption in the first place. I cannot conceive that the draftsman had in mind a period of 21 years that would start to run from the (difficult to define) point in time at which, in the circumstances of the present case, the seller and grantor first made an offer to sell the land. It seems to me that the 1964 Act was seeking to achieve clarity in terms of the running of time for the applicable perpetuity period. Such clarity is to be achieved by having a clearly ascertainable, and definable, start date for that period. That start date, it seems to me, is the date of the disposition which conferred the right in question. It may be that it is only an offer for sale which will start the perpetuity period running; but I see no reason why the length of that perpetuity period should not be capable of being defined, and ascertained, by reference to the earlier date of the disposition which created the right in question. In this case, that date was the date of the 1984 agreement.”
52. A proper evaluation of this issue is best approached, I think, by considering the basis of the rule against perpetuities. Put simply it is a doctrine which, historically at least, was concerned with the law of property: it did not affect contracts which did not create rights of property. How then did it apply to contracts relating to the sale of property?
53. It is trite law that if the purchaser of land is entitled to the equitable remedy of specific performance of his contract he obtains an equitable interest in the land in question and, correspondingly, the land is burdened with, i.e. held subject to, the contract. Explaining this principle and applying it to an option, Sir George Jessel MR in *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562, 580-581 (one of the authorities to which Mr Coppel’s closing submissions referred) put the matter thus: “But if it [the contract] binds the

land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or estate. In the ordinary case of a contract for the purchase there is no doubt about this, and an option for repurchase is not different in its nature.” The Master of the Rolls went on to explain (at 581) that it is the right in the grantee of the option, by doing what the contract requires if he is to exercise the option, to remove from the grantor of the option the land which is subject to the option, which gives the grantee an interest in the land: “A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.”

54. It is the existence of the option which gives the grantee the interest in the land: it is not the case that the interest only arises once the grantee has exercised the option by doing what is required of him to convert it into an unconditional contract of purchase. That was fundamental to the decision in *Gomm*. It was also fundamental to the conclusion of the Court of Appeal in *Pritchard v Briggs* that an option has this immediate effect. The rule against perpetuities impacted on this in so far as the option conferred upon the grantee the right to take the land from the grantor and vest it in himself. If that right was capable of being exercised outside the permitted perpetuity period it was held to be void as tending to perpetuity.
55. It was against that background, so far as presently relevant, that the 1964 Act was enacted. As far as options to acquire an interest in land were concerned, the Act did three things. First, by section 9(2) it subjected them to a single perpetuity period of 21 years. Second, it mitigated the strict effect of the perpetuity rule by applying the wait and see principle set out in section 3. Third, section 10 (which is not confined to options) altered the previous law by avoiding a disposition which creates an interest in property (it therefore includes an option) even as between the original contracting parties where the disposition would fall to be treated as void for remoteness as against a third party. Previously the contract would remain enforceable (so as to give rise to a remedy in damages) as between the original parties.
56. The critical question as regards the application of section 9(2) is to understand what is meant by the phrase “option to acquire for valuable consideration any interest in land”. Does it mean an option as understood in *Gomm* and like decisions? Or does it have an extended meaning and, if it does, what is the nature of that extended meaning? It is at this point that the distinction between an option to acquire land and a right of pre-emption in respect of land comes into prominence. The distinction between the two for present purposes was most clearly articulated by Templeman LJ in *Pritchard v Briggs* (at 418B-D):

“Rights of option and rights of pre-emption share one feature in common; each prescribes circumstances in which the relationship between the owner of the property which is the subject of the right and the holder of the right will become the relationship of vendor and purchaser. In the case of an option, the evolution of the relationship of vendor and purchaser may depend on the fulfilment of certain specified conditions and will depend on the volition of the option holder. If the option applies to land, the grant of the option creates a contingent equitable interest which, if registered as an estate contract, is binding on successors in title of the grantor and takes priority from the date of its registration. In the case of a right of pre-emption, the evolution of the relationship of vendor and purchaser depends on the grantor, of his own volition, choosing to fulfil certain specified conditions and thus converting the pre-emption into an option. The grant of the right of pre-emption creates a mere spes which the grantor of the right may either frustrate by choosing not to fulfil the necessary conditions or may convert into an option and thus into equitable interest by fulfilling the conditions. An equitable interest thus created is protected by prior registration of the right of pre-emption as an estate contract but takes its priority from the date when the right of pre-emption becomes exercisable and the right is converted into an option and the equitable interest is then created. The holder of a right of pre-emption is in much the same position as a beneficiary under a will of a testator who is still

alive, save that the holder of the right of pre-emption must hope for some future positive action by the grantor which will elevate his hope into an interest. It does not seem to me that the property legislation of 1925 was intended to create, or operated to create an equitable interest in land where none existed.”

57. That being the position in law independently of the 1964 Act, the question which arises is whether section 9(2) is to be understood as being confined to options as traditionally understood, namely any “disposition” (the expression used in the subsection) which from its inception gives rise to an interest in land and does not therefore sound only in contract (as does a right of pre-emption until it is converted into an option and thus into an equitable interest in the relevant land as Templeman LJ described in the above passage), or whether it extends further and reaches a right of pre-emption even if, at inception, the right does not give rise to any interest in the land?
58. The only reason for supposing that the subsection may have this wider effect is on account of its proviso making clear that the subsection is not to apply to the specified rights of pre-emption there referred to. The argument, and it has force, is that Parliament must have assumed that rights of pre-emption are within the scope of the subsection and for that reason felt it necessary to exclude certain such rights which it considered should not be caught by the subsection. According to Judge Hodge QC’s judgement in *Taylor v Couch* it is because of the proviso, and only because of the proviso, that he came to the view that section 9(2) extends to rights of pre-emption. This, as I read his judgement (in particular his reference to a right of pre-emption as a “sub-class” of option), is not on the footing that a right of pre-emption gives rise to an interest in land (as I have mentioned, it is common ground given the current state of the law, that, until it is converted into an option, a right of pre-emption does not) but on the footing that, even though it does not have this effect, a right of pre-emption is nevertheless to be treated for the purposes of the subsection as if it did.
59. The difficulty which I have with this conclusion is that, aside from the wording of the proviso, it is not evident what the statutory purpose could have been for extending the scope of the rule against perpetuities to contracts of pre-emption which do not from their inception confer on the grantee of the right any interest in the land to which the right relates. The contrary case is that the proviso is explicable on the basis that Parliament **assumed**, and did so wrongly, that a right of pre-emption did give rise from its creation to an immediate interest in land. In this connection it is to be noted that in *Pritchard v Briggs* Goff LJ considered the impact of various provisions in the 1925 property legislation on the nature of a right of pre-emption. Those provisions included section 9(2) and, in particular, section 186 of the Law of Property Act 1925. Section 186 provided that “All statutory and other rights of pre-emption affecting a legal estate shall be and be deemed always to have been capable of release, and unless released shall remain in force as equitable interests only.” As Goff LJ stated (at 396B), these and certain other provisions which he listed “certainly do proceed on the basis that a right of pre-emption is an interest in land and are not really explicable on any other basis.” Those provisions notwithstanding, he remained of the view (at 396D) that the 1925 legislation did not change the law. In so stating he pointed out (at 398E) that there was a difference between an Act which is passed under what he referred to as a misapprehension as to the law and an amending Act. He quoted (at 398F) from Viscount Simonds in *Kirkness v John Hudson & Co Ltd* [1955] AC 696, 714, to the effect that “the beliefs or assumptions of those who frame Acts of Parliament cannot make the law.” In his view the statutory provisions to which he had referred (including therefore section 9(2)) did not amend the law but were enacted under a misapprehension. From this it followed that they had no effect on the view he had otherwise formed that a right of pre-emption was not to be regarded as creating an interest in land. As the other two members of the court came to the same overall conclusion it must be assumed, even though they made no reference to them, that they were of the same view as Goff LJ on the relevance of these provisions to the nature of a right of pre-emption.

60. In the light of the decision in *Pritchard v Briggs* I am of the view, indeed in the light of the reasoning that underlies that decision I doubt that it is open to me to come to a different view, that Parliament proceeded on a wrong assumption (namely that a right of pre-emption did indeed give rise to an immediate interest in land) and that it would not therefore be right to regard the legislation as amending the law by treating rights of pre-emption exceptionally as if they give rise to an immediate interest in land. Looking at the issue more generally, I can see no reason why, where the right in question sounds at the time of its creation only in contract and may never mature into a right which confers on the grantee an interest in land, Parliament should have wanted to single it out and treat it as if, from the moment of its creation, the right had this added proprietary effect.
61. That brings me to the alternative reason which Judge Hodge QC gave for his conclusion. This was that when a right of pre-emption is converted into an option by the seller's offer to sell the land, thereby engaging section 9(2), the 21-year period is calculated, and can only sensibly be calculated, from the date of the disposition which confers the right of pre-emption. This conclusion was evidently influenced by what he referred to as the need for clarity, in particular the need to have "a clearly ascertainable and definable start date."
62. I regret that I do not feel able to agree with this conclusion either. Once it is accepted, as this alternative approach must do, that a right of pre-emption, so long as it has not matured into an option, is not within section 9(2) but only comes within the purview of the subsection (so that consideration of the perpetuity periods becomes relevant) once it matures into an option when the offer to sell is made, it is difficult to see why the relevant date for the starting of the perpetuity period must nevertheless be taken to be some earlier date. Clarity and the need for ease of application do not seem, with respect, to be a sufficient basis for doing so. On the contrary, the statutory provisions seem to me to point to the date when the option comes into existence (and the interest in the land arises) as being the relevant start date. What the subsection refers to is the disposition which confers the option to acquire the interest in the land. It would seem reasonably clear therefore that the date for measuring the 21-year perpetuity period is the date when the **option** arises rather than the date when the right of pre-emption is conferred. The fact that this may not be ascertainable by recourse to the date of a written instrument is by no means an argument against this view. It is to be noted that the definition of "disposition" in section 15(6) of the 1964 Act provides for the case where the disposition is made "otherwise than by an instrument." In such a case the Act is to apply "as if the disposition had been contained in an instrument taking effect when the disposition is made."
63. As that is the view I take of the way in which the 21-year period is to be measured in the case of a right of pre-emption of the kind which arises in this case, it follows that the period has not yet started to run.
64. For these reasons I conclude that the Council has not lost the right to enforce the right of pre-emption by the application of section 9(2).

(3) Does the right of pre-emption bind Cosmichome in any event?

65. The point here is that Cosmichome was not a party to the contract giving rise to the right of pre-emption. It is axiomatic that a purchaser of land is not bound by any obligations entered into by his vendor in respect of the land if, as here, the obligation is not protected in some way so that it is enforceable against subsequent owners of the land. How then is Cosmichome to be bound by it?
66. Until Mr Coppel's closing submissions, this point appears to have been overlooked by the Council. It does not feature in the Council's defence and was not mentioned in his outline argument. Instead, the need to deal with the point seems only to have dawned as a result of observations by Mr Furber in the course of his opening to the effect that if, as the Council

submitted, the right of pre-emption operated purely personally (i.e. did not give rise to any interest in the Site) it could not have bound Cosmichome when it acquired the Site in 2004. Mr Coppel sought to deal with the difficulty by submitting that, on purchasing the Site, Cosmichome is to be treated as subject to a constructive trust to give effect to the right in the event that it should become exercisable and the Council should seek to exercise it. He submitted that at the time it purchased the Site Cosmichome had knowledge of the existence of the pre-emption right and probably secured a lower price for the Site on account of its existence. He submitted that, having secured that benefit, Cosmichome's conscience was affected in the sense that it took the Site subject to an implied obligation to give effect to the right if and when it should come to be exercised.

67. Mr Furber submitted that it was not open to Mr Coppel to raise such an argument at so late a stage, especially as the issue had not been pleaded, no evidence had been directed to it and he was in no position to deal with it. He said that he would resist any application for an adjournment to deal with the matter. In the event, none was sought.
68. In my judgement Mr Furber is right. The need to protect a third party right or interest over or in respect of land by appropriate entry on the register of title to the land or by some other means which binds the purchaser to give effect to it, failing which the purchaser of the land may safely ignore the right or interest, is fundamental to the system of land registration. This is so even if at the time of the land's disposition to him the purchaser is aware of the right or interest. It is only in rare and clear circumstances that the law is willing to ignore this principle by imposing a constructive trust upon the person who has taken a transfer of the land to give effect to the third party right or interest. In the instant case Mr Thibault was asked what he knew of the right of pre-emption at the time of Cosmichome's purchase. (He was a member of the firm of chartered surveyors advising Cosmichome at the time of its purchase of the Site and other BBC sites.) He said that he was aware of the right but had been given to understand that the BBC (as vendor to Cosmichome) had dealt with the matter and had "removed it" as an issue. He was unclear whether the right's existence had any significant effect on the price which Cosmichome agreed to pay for the Site. These slender materials fall far short of justifying the imposition of any trust on Cosmichome although that is not to say that a closer examination of the issue, if it had been timeously and properly pleaded, might not have yielded a different result. It would not have been right to require Cosmichome to have to deal with the issue at the very late stage that it was raised in these proceedings. I express no view therefore on the ultimate merit of the Council's contention or on whether it may properly be raised in some future action. Still less do I comment on whether, failing any remedy against Cosmichome, the Council has any right which it can enforce against the BBC.

The second declaration

69. Cosmichome has not succeeded in showing either that the Council lost the right to acquire the freehold of the Site by any notice given to it in July 2004 or that it lost that right by force of section 9(2) of the 1964 Act. On the other hand it has asserted, and the Council has not demonstrated to the contrary, that, as a successor in title to the BBC in respect of the Site, it is not bound by the right of pre-emption in any event.