SPC00439

INHERITANCE TAX – Conditional exemption – Works of art – Pre-FA 1998 undertakings to provide "by appointment" viewing – Proposals by Inland Revenue to vary those existing undertakings – Proposed variations require "open access" to and wider publicity of the Owners' works of art – No agreement by Owners – Whether special commissioner should direct proposed variations to take effect – Whether just and reasonable in all the circumstances that special commissioner should so direct – IHTA s.35A as modified by FA 1998 – Directions not given

THE SPECIAL COMMISSIONERS

RE (1) AN APPLICATION TO VARY THE UNDERTAKINGS OF "A"
(2) AN APPLICATION TO VARY THE UNDERTAKINGS OF "B"

Special Commissioner: STEPHEN OLIVER QC

Sitting in private in London on 17 to 21 and 24 to 28 May and 13 to 15 July 2004

Launcelot Henderson QC and Sam Grodzinski, counsel, instructed by the Solicitor of Inland Revenue, for the Applicant

William Massey QC, Tim Eicke and Oliver Connolly, counsel, instructed by Lawrence Graham, Solicitors, for A and B

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DECISION

PART I

Introductory Summary

1. Owner A and Owner B (collectively referred to as “the Owners”) currently have the benefit of conditional exemption for chattels owned by them. Each had made claims, on the occasions when the chattels passed to them, for the transfers to be given the status of “conditionally exempt transfers”. The conditions upon which conditional exemption had been obtained included the undertaking of the Owners to give “by appointment” access to view the chattels. Those conditions were imposed under the conditional exemption regime as it operated before Finance Act 1998 (“the 1998 Act”) came into force. The houses in which most of the chattels are kept are the homes of Owner A and Owner B and their respective families; those houses are not open to the public.

2. The new regime (found in Section 35A of the 1998 Act in its modified form as it applies in relation to existing undertakings, such as those given by the Owners), enables a Special Commissioner to direct that those undertakings are to have effect as if a variation had been agreed. The variation will have included an “extended access requirement” (i.e. not confined to “by appointment” access). Before the Special Commissioner “may” so direct, he has to be satisfied that the Board of Inland Revenue have made a proposal for the undertaking to be varied so as to include an extended access requirement, that six months have passed and that no agreement on the proposal has been reached and “that it is just and reasonable, in all the circumstances, to require the proposed variation to be made”.

3. The Board has made proposals for variations to both Owners. These, Proposal A and Proposal B, are set out more fully in paragraph 15 to 19 below and are collectively referred to as “the Proposals”. Both Proposals include extended access requirements and no agreements have been reached. It follows that if I, as the Special Commissioner, am satisfied that it is just and reasonable in all the circumstances to require those variations to be made, I may make a direction. The undertaking as varied becomes the condition of continued exemption.

4. Accordingly, the basic issues that arise in each case are:

(i) whether it is just and reasonable in all the circumstances to require the proposed variation to be made and

(ii) if so, whether a direction to give effect to the proposed variation should be made.

This is an anonymized version of a decision that has been released to the Inland Revenue and the two Owners.

Conditional Exemption and the Background Circumstances

5. Conditional exemption for heritage property has in one form or another been included in the estate duty, the capital transfer tax and the inheritance tax (IHT) legislation since 1896. The underlying policy of the legislation was stated as follows in page one of the booklet IR88 (issued in 1989):

> "Successive Governments have agreed that wherever possible such property should be conserved in private hands for the benefit of the community. To encourage this a number of fiscal reliefs are available."

6. As to the conditions that have to be satisfied if exemption is to be granted, a trend can be seen over the last 50 years whereby a requirement of public access was first introduced and then by stages extended. In outline, the stages up to 1998 were as follows:

(i) Until 1950 heritage objects were exempt from estate duty while they were enjoyed in kind. The owner was not required to give any undertakings.

(ii) For deaths on or after 29 July 1950, exemption was granted only if an undertaking was given, by such person as the Treasury thought appropriate, that until the objects again passed on the death or were sold they would be kept permanently in the UK, reasonable steps would be taken for their preservation, and

> "reasonable facilities for examining the objects for the purpose of seeing the steps taken for their preservation, or for the purposes of research, will be allowed to any person authorised by the Treasury so to examine them." (Section 48(1) of Finance Act 1950).

(iii) Following the First Report of the Select Committee on Wealth Tax, a new regime was introduced in Finance Act 1976 which is basically the regime still in force today. The relevant undertaking required in the case of heritage objects was that the property would be kept permanently in the UK and

> "reasonable steps would be taken for the preservation of the property and for the securing of reasonable access to the public." (Finance Act 1976 Section 77(2)(b)).

(iv) In 1985 the functions of the Treasury were transferred to the Inland Revenue, and the undertaking required to be given in respect of public access was tightened by replacing the phrase "reasonable steps" with

> "… such steps as are agreed between the Treasury and the person giving the undertaking and are set out in it". (Finance Act 1985 Section 94 and Schedule 26 paragraph 2(3)).

(v) Accordingly, the relevant undertaking in IHT Act 1984 Section 31(2), as amended in 1985, provided that

> "… such steps as are agreed between the Treasury and the person giving the undertaking, and are set out in it, will be given for the preservation of the property and for securing reasonable access to the public."

A significant change in the legislative framework resulting from Section 31 was that the steps, to be taken for the preservation of the property and securing reasonable access to the public, were to be agreed between the owner and the Treasury and would be set out in the undertaking.

7. Section 30 of IHT Act 1984 is the operative provision. This directs that a transfer of value is a conditionally exempt transfer to the extent that the value transferred by it is attributable to property which, following a claim, is designated under section 31 and in respect of which the requisite undertakings have been given. This was the regime in force when the undertakings which the Board now seeks to vary were given.

8. The practice of the Inland Revenue was contained in Chapter 4 of the booklet "IR67" issued by the Board in December 1986. This sets out three ways in which the public access condition for heritage objects could be satisfied. Undertakings (both before and after 1985) were normally drafted and accepted accordingly. The three ways were

(a) by display of the object in a privately-owned house or room opened to the public;

(b) by arranging to lend the object (anonymously if desired) for the purpose of displaying on a long-term loan to a public collection,

whether national, local authority or university, or to a museum, gallery or historic house run by a charitable trust and open to the public; or

(c) by agreement to allow viewing by appointment to the public ("by-appointment viewing"), coupled with the entry of the object on the register of conditionally exempt property held by the National Art Library in the Victoria and Albert Museum ("the V&A List"), and also to lend the object (anonymously if desired) on request to a public collection (as defined in (b) above) for special exhibitions which were properly organised and met adequate security standards (unless this could not be done without physical risk to the object).

9. Paragraph 4.8 of IR67 emphasised that there was no need for the entry on the V&A List to identify the owner or the address at which the object was held, and also permitted owners who were concerned about the security of their objects to arrange for the entry on the V&A List to invite applications in the first instance to an agent. Paragraph 4.9 allowed provision to be made for a reasonable entry charge, including for by–appointment viewing.

10. The conditional exemption regime used to be operated by means of Form 700A issued by the Treasury. The form is in two sections. Section A which contains the formal applications and formal undertaking, and Section B which contains the steps proposed by the applicant for agreement with the Treasury. In terms of the steps to be agreed, Section B distinguished between the case of objects to be on display in a privately-owned house or room opened to the public and the case of objects not on display in that way. The first case was not applicable here. Both owners had chosen not to obtain conditional exemption for their houses (where, with one significant exception, the chattels are now situated) and IHT had, I infer, been paid on the value of the houses. The second case gave the applicant the option of either (i) lending the chattel long term to a public collection or (ii) allowing the chattel to be viewed by appointment and making it available for temporary loans. Each Owner proposed the steps set out under alternative (ii) of Form 700A "View by appointment and availability for temporary loans", under the Heading - "For objects which are not/will not be on display in a privately-owned house or room opened to the public". Also on page 3 of the Form 700A each Owner registered the name of an agent and confirmed that the objects would be available for loan to appropriate public collections for special exhibitions.

11. Following correspondence and designation by the Treasury of the chattels under Section 31, the Inland Revenue accepted each of the claims for conditional exemption on the basis of the undertakings given by the Owners:

- in the case of Owner A the claim was made on 19 March 1996 following the death of the previous owner and conditional exemption

was granted (in respect of all but three of the chattels referred to in Form 700A) by letter of 4 March 1998. The previous owner had been treated by Section 4 of the IHT Act as having made a transfer of value of all the property comprised in the previous owner's estate immediately before death. The deceased's estate included the chattels to which the Proposal A relates.

- in the case of Owner B claims for conditional exemption had been made on 22 April 1992 and 10 January 1994 following the death of the previous owner. Conditional exemption was granted in respect of the chattels to which the claims related (other than certain specified items) in a letter of 14 February 1996. The previous owner had been treated by Section 4 as having made a transfer of value immediately before death. The deceased's estate included the chattels to which the Proposal B relates.

The Conditional Exemption Regime: consequences of breach

12. Section 32(2) of IHT Act provides:-

> "If the Treasury are satisfied that at any time an undertaking given with respect to the property under Section 30 above … has not been observed in a material respect the failure to observe the undertaking is a chargeable event with respect to the property."

The 1998 Amendments

13. Changes to the conditional exemption regime were introduced by the 1998 Act, the most significant of which for present purposes were the following:

(i) A new, and higher, threshold of "pre-eminent" national, scientific, historic or artistic interest applies to any designation of heritage objects on claims made on or after the passing of the Act on 31 July 1998 (Schedule 25, para. 4, inserting new paragraphs (a) and (aa) into Section 31(1)). The previous test referred only to items "which appear to the Treasury to be of national, scientific, historic or artistic interest" and had been interpreted as importing a threshold of "museum quality".

(ii) When a new undertaking is given, the steps taken for securing reasonable access to the public under IHT Act 1984 Section 31(2)(b)

"… must ensure that the access that is secured is not confined to access only where a prior appointment has been made." In other words, by-appointment viewing alone will no longer suffice.

(iii) In addition, the steps agreed in new undertakings may include steps involving the publication of the terms of any undertaking or of any other information relating to the property which would otherwise be confidential: see paragraph 6 which inserts a new sub-section (4FB).

(iv) New undertakings have to be given not only on the making of fresh claims for conditional exemption, but also on a death or disposal after 31 July 1998 in relation to heritage property which has been designated in the past, if the death or disposal is not to trigger a charge to tax on a chargeable event: see paragraph 7, inserting new sub-sections (5)(b) and (5AA) into Section 32. Thus the requirement for undertakings which secure enhanced public access applies not only to designations of items of pre-eminent quality, but also to any continuation (on a subsequent death or disposal) of existing conditional exemption for items designated in the past as being of museum quality.

(v) New undertakings may be varied at any time by agreement, or by direction of a Special Commissioner where he is satisfied that the Board have may a proposal for a variation to the person bound by the undertaking, that no agreement has been reached on the proposal within six months, and that "… it is just unreasonable, in all the circumstances, to require the proposed variation to be made." (see paragraph 8 of Schedule 25 which inserts a new Section 35A). Where the Special Commissioner gives such a direction, it will have effect from a date specified by him (being at least 60 days after the date of the direction) as if the proposed variation had been agreed to by the person bound by the undertaking.

(vi) In relation to existing undertakings, the new Section 35A is applied with specified modifications by paragraph 10 of Schedule 25. By the first modification, the variations that the Board may propose are confined to the inclusion of an "extended access requirement" and/or a "publication requirement" in an undertaking which does not already include such a requirement. The second modification defines a publication requirement by reference to Section 31(4FB), and an extended access requirement as -

> "… a requirement for the taking of steps ensuring that the access to the public that is secured is not confined to access only where a prior appointment has been made."

A further provision directs that in determining whether an existing undertaking already includes an extended access requirement, one is to disregard any provision in

the undertaking for the property to be made available temporarily for special exhibitions. The effect of this is that all existing undertakings which provide for public access in the third way mentioned in paragraph 8(c) above (i.e. in accordance with paragraph 4 of IR67) are eligible for variation.

14. The modified version of Section 35A, as it applies in relation to existing undertakings, reads as follows:

> "(1) An undertaking given under section 30…above…may be varied from time to time by agreement between the Board and the person bound by the undertaking.
>
> (2) Where a Special Commissioner is satisfied that-
>
> (a) the Board have made a proposal to the person bound by such an undertaking for the undertaking to be varied so as to include (where it does not already do so) an extended access requirement or a publication requirement (or both those requirements),
>
> (b) that person has failed to agree to the proposed variation within six months after the date on which the proposal was made, and
>
> (c) it is just and reasonable, in all the circumstances, to require the proposed variation to be made,
>
> the Commissioner may direct that the undertaking is to have effect from a date specified by him as if the proposed variation had been agreed to by the person bound by the undertaking.
>
> (3) The date specified by the Special Commissioner must not be less than sixty days after the date of his direction.
>
> (4) A direction under this section shall not take effect if, before the date specified by the Special Commissioner, a variation different from that to which the direction relates is agreed between the Board and the person bound by the undertaking.
>
> (5) For the purposes of sub-section (2)(a) above –
>
> (a) an extended access requirement is a requirement for the taking of steps ensuring that the access to the public that is secured is not confined to access only where a prior appointment has been made; and

(b) a publication requirement is a requirement for the taking of steps involving the publication of any matter mentioned in paragraph (a) or (b) of section 31(4FB) above.

(6) In determining for the purposes of sub-section (2)(a) above whether an undertaking already includes an extended access requirement, there shall be disregarded so much of the undertaking as includes provision for the property with respect to which the undertaking was given to be made available temporarily for the purposes of special exhibitions."

The Proposed Variations

15. Regarding the undertakings given on the death of the previous owner of the chattels to which Proposal A relates, that Proposal seeks to vary the undertaking given by Owner A and was dated 31 January 2003 and signed by Mr Peter Cushing ("Mr Cushing") on behalf of the Board. Regarding the undertakings given following the death of the previous owner of the chattels to which Proposal B relates, that Proposal seeks to vary the undertakings given by Owner B and was dated 31 March 2003 and was also signed by Mr Cushing on behalf of the Board.

16. Mr Cushing is a senior official and deputy director of the Inland Revenue Capital Taxes Office in Nottingham. From December 2001 onwards he had conduct of the discussions and negotiations with the Owners and their legal advisers which led

up to the making of the proposal. Mr Cushing was duly authorised by the Board to formulate and sign each of the proposals on its behalf.

17. Paragraph 4 of each Proposal seeks to impose an "extended access requirement" in relation to certain items of outstanding artistic and/or historical interest set out in Part 1 of the Schedule ("Part 1 objects"). In Owner A's case there are 49 Part 1 objects. In Owner B's case, there are 51 Part 1 objects.

18. The extended access requirement obliges each owner (in addition to the agreed steps of allowing by appointment viewing of all the conditionally exempt chattels and lending them, on request, to appropriate public collections for special exhibitions) to provide access at his home to each of the Part 1 objects to the public without prior appointment on a minimum number of days per year (15 in Owner A's case and 10 increasing to 20 in 2012 if demand justifies it in Owner B's case) and for a minimum number of four daily tours (in the first year) of up to 25 people each (in Owner A's case) and up to 10 people each (in Owner B's case). Both Owners have the option of providing the access at "another suitable venue". I refer to the above requirement (including the "another suitable venue" option) as "open access". There is also a

proviso permitting the Owner to exhibit any of the Part 1 objects for a minimum of three months at a public gallery or museum in the UK, in which case such chattel will be exonerated from the open access requirement for the year of exhibit and the following two years. I refer to this latter option as "the museum/gallery option."

19. The publicity undertaking in paragraph 5 of each Proposal (i.e. "publication requirement" referred to in section 35A(5)(b)) obliges each owner:-

(i) to allow "reasonable details of the arrangements, including where and when the access without prior appointment is available, to be publicised on the Inland Revenue Capital Taxes website and any other appropriate websites and in any other reasonable manner as the Revenue sees fit";

(ii) to provide a copy of the undertaking to anyone, upon reasonable request;

(iii) to provide details to local tourist information centres of the arrangements for access on public access days and

(iv) to provide images of the listed objects and notification that these are available for loan to the local and national museums specified.

Steps Leading up to the Proposals

20. Mr Cushing and his colleagues at the Inland Revenue Capital Taxes Office carried out preparatory work before producing the Proposals. They looked at the insurance and the security implications of extended access and of the new publication requirement. They considered the concerns of the Owners in these respects. They looked at the implications of the Disability Discrimination Act 1995 and at health and safety issues. They visited other heritage sites in each area to see how many visitors were likely to be attracted were the proposals put into effect. In determining the number of access days in each year, the Inland Revenue chose fewer numbers of days as compared with those required in the case of new claims for conditional exemption and for the requirements applicable to historically associated objects; in those cases the required access days were usually set at 25 days a year. These "discounts" were, Mr Cushing explained, designed to reflect the transitional and quasi-retrospective nature of the powers given by Section 35A. The chattels selected as Part 1 objects, in the cases of both Owner A and Owner B, were those which were adjudged by the Inland Revenue to be of the greatest interest to the public.

21. So far as Owner A's chattels were concerned, the Inland Revenue specifically took into account that the amount of conditional exemption at stake was of the order of £8.3 million. They took into account the fact that Owner A had been admitting tours to the family home ("A House") over the years and the tour requirements in the proposal were to an extent modelled on the arrangements for existing tours. The

Inland Revenue also took into account that a room in A House had on occasions been used for functions to raise funds for charities. The Inland Revenue noted the very small number of applications for access through the existing by appointment viewing arrangements. In determining which items should be included as Part 1 objects, Mr Cushing and his colleagues took advice from experts. They noted that a local Museum and Art Gallery had expressed an interest in exhibiting some of the Part 1 objects.

22. Prior to making Proposal B, the Inland Revenue took into account the fact that payment of somewhere in the region of £25 million was suspended by operation of the conditional exemption regime. They took into account the fact that much of Owner B's estate adjacent to "B House", the family home, had the benefit of conditional exemption; but they recognised that Owner B's claim for conditional exemption for B House had been dropped because of the implications that compulsory opening would have on the privacy of his family. The Inland Revenue noted that very little use had been made of the by appointment viewing arrangements and there had been few loans of chattels to public exhibitions. They took the view that acceptable arrangements could be made to exhibit some sculptures to the public. They took advice on the quality of the chattels designated as Part 1 objects; these were adjudged to be of pre-eminent quality and potentially lendable to museums and art galleries as an alternative to admitting the public to B House itself. In the case of both Owners the Inland Revenue took into account objections and suggestions made in correspondence and in the course of meetings; see paragraph 46 below. They also took into account the fact that the open access days could be arranged so as to fall within the holidays of the families of the Owners. On this basis, it was considered, intrusion into the family lives of the Owners would be minimised.

23. Finally, in formulating the proposals, the Inland Revenue considered Article 1 of the First Protocol to the ECHR (Article 1P) and formed the view that there was no violation of the Owners' rights in those respects. Nor in the Inland Revenue's view did the proposals violate the Owners' rights, under Article 8 of the Convention, to respect for private and family life.

24. I have mentioned the procedures adopted by Mr Cushing and his colleagues and the points taken into account by them because these are relevant to the question of whether the Inland Revenue acted with procedural fairness in presenting the proposals. I mention also the steps summarized in paragraph 46 below. The Owners, it is well established, have legitimate expectations that any decisions affecting their existing rights will be taken in a procedurally fair way. I am satisfied that this has been the case so far as the formulation of the proposals is concerned, and I do not understand this to have been in dispute.

The Function of the Special Commissioner

25. The Special Commissioner is given an administrative function by Section 35(A). He may direct that the varied undertaking is to have effect from a specified date. Before making such a direction, the Special Commissioner must be satisfied (a) that the Board have made a proposal for the undertaking to be varied to include an extended access requirement, a publication requirement or both, (b) that there has been no agreement within six months of the presentation of the proposal and (c) that it is just and reasonable in all circumstances to require the proposed variation to be made. The decision of the Special Commissioner is his and is to be taken on the evidence before him; there is no question of his decision operating as a review of the Board's decision with reference to the facts available to the Board.

26. It is evident from Section 35(A) and from its position in the 1998 Act that the legislature has intervened to secure open access to conditionally exempted chattels, subject to the safeguards set out in sub-section (2) applicable in the case of existing undertakings. Section 35A identifies the respective roles of the Inland Revenue and of the Special Commissioner. The Inland Revenue has the responsibility to respond to the requirements of the 1998 Act and specifically to enforce and manage the open access policy. This it does by making the proposal for the existing undertaking to be varied and by seeking the owner's agreement. In this respect the Inland Revenue is carrying out its purely administrative role of managing the revised conditional exemption regime.

27. The Special Commissioner comes on the scene and his statutory function is engaged only when the Inland Revenue's proposal has been made and six months have passed without agreement. It is not his function to decide whether the policy of open access is just and reasonable; nor is it for him to interfere with the manner in which the Inland Revenue perform their administrative role. His role is to determine whether it is just and reasonable in all the circumstances to require the proposed variation to be made. If he is satisfied on this count, he must give a direction that the proposal is to have effect. Otherwise he must reject the proposal in its totality. There is no scope for directing that a modified proposal is to have effect.

28. Having said that, the expression "just and reasonable in all the circumstances" requires a wide ranging investigation of the "proposed variation" in the light of all the circumstances and all the evidence. The Special Commissioner's decision must necessarily be based on a fair exercise of balancing the competing interests of the Owners on the one hand and of the public, comprising the body of taxpayers generally, on the other. Parliament's policy is a "given", as is the administrative conduct of the Inland Revenue in seeking to implement it: and both are outside the balancing exercise. Due respect must of course must be given to the experience and expertise of the Inland Revenue; nonetheless the Special Commissioner is the sole arbiter of the quite separate just and reasonable exercise.

29. As I read Section 35A a direction will follow so long as I am satisfied that this is the right thing to do, having first determined whether the variations contained in the particular Proposal are just and reasonable.

30. Before leaving this topic I should mention that I have conducted the hearing on an adversarial rather than an inquisitorial basis. The relevant considerations inherent in the decision arise from the factual issues and these seemed best identified and clarified by the familiar adversarial process.

31. I have decided to produce a decision that can be released publicly. For this purpose I have taken steps to anonymize the Owners, their houses and the chattels.

Existing undertakings : Owner A

32. Owner A was born in the 1950s. He, his wife and their several children, live at A House.

33. A House is a Grade 1 listed house set in a large park close to a city.

34. Following the death of the previous owner, conditional exemption was granted, in March 1998, for about 150 items (or pairs or sets of items) which had been valued by Christie's at £20.89 million. Because no IHT was then payable (on the basis that conditional exemption would be granted) the values were not investigated in any detail nor agreed with the Inland Revenue. But if the values are assumed to be correct, the amount of IHT deferred at 40% was £8,356,400. The pictures were valued at £16.85 million and the value of the Part 1 objects is estimated at £15 million.

35. Conditional exemption for A House and its grounds was not claimed on the death of the previous owner. Full liability to IHT on house and grounds was assumed by Owner A and no public access obligations arose so far as they are concerned.

36. The decision whether to claim conditional exemption for the chattels involved Owner A in having to weigh up the benefit of not paying IHT at 40% on the items accepted in principle for exemption as against the obligations he would be undertaking were exemption to be granted. The items for which claims for conditional

exemption were submitted were by no means all that might have qualified. In limiting the number of items for which by appointment viewing arrangements would need to be made, Owner A judged that most of the future applications for access, as well as the practical and administrative burden of handling them, would be manageable and would not, as he saw it, interfere unduly with his family life. In reaching the decision to apply for conditional exemption – a close run decision, as he described it – Owner A considered the options afforded to owners whose houses were not open to the

public and their implications. His initial application for exemption was made on 19 March 1996. Upon receipt of the claims the Inland Revenue sought and obtained opinions from experts about the quality of the objects.

37. Designation of the 150 items was given on 4 March 1998. The relevant conditions for conditional exemption of those items were for the owner (Owner A) to allow viewing of the items by appointment, to allow each item to be entered on the V&A List and to lend the particular object (anonymously if desired) on request to a public collection (national, local authority or university) for special exhibitions which were properly organised and which met adequate security standards.

38. 13 days later, on 17 March 1998, the budget day Press Release announced the proposed changes to the exemption regime.

Existing undertakings : Owner B

39. Owner B is the owner of B House. He was born in the 1960s. B House is the family home of Owner B, his wife and their several children. B House is a Grade 1 listed house set in a large park, also Grade 1 listed. The house and the parkland are at the heart of a substantial estate ("the Estate"). An A-road passes through the northern parts of the Estate. There are a number of important historical sites in the parkland and on the Estate

40. Following the death of the previous owner, an IHT charge arose on B House and the rest of the Estate and the surrounding parkland. Owner B then had to decide whether conditional exemption should be claimed in respect of B House. Following a long correspondence with the Inland Revenue about whether and to what extent public access should be given (on the basis of a minimum of 28 open days each year) Owner B decided not to pursue the claim. Public access to B House and the parkland would in his view have caused undue inconvenience and disturbance to his family whose privacy he wanted to maintain. The effect of withdrawing B House and the surrounding parkland from the claim to conditional exemption was that Owner B became liable to pay IHT on the value of those properties.

41. Regarding the chattels inherited by Owner B from the previous owner he was advised by Christies that nearly 780 of these were eligible to be designated by the Treasury and exempted from IHT. Owner B applied for conditional exemption. On the basis that the chattels would not be on display in a privately owned house or room opened to the public, Owner B was aware from the wording of Form 700A that conditional exemption would be available if he undertook, among other things, to allow the chattels to be entered with full descriptions on the V&A List; he was also aware that his name, and the address where the chattels were kept, would if he wished not be disclosed and that he need only register the name of an agent as the means of contact. He accordingly applied for conditional exemption on Form 700A proposing

the steps set out under the heading "View by Appointment and Availability for Temporary Loan".

Events leading to the Proposals

42. So far as concerned existing undertakings to allow by-appointment viewing, the Press Release announced that extended access and disclosure of information would be secured; about 1000 cases (the number of all existing by-appointment viewing undertakings) would, the Press Release anticipated, be affected by the new rules. The Guidance Notes of January 1999 stated that the law "can take account of factors that are relevant to the assets concerned … We can not consider the owner's personal circumstances". A circular letter from the Inland Revenue of March 1999 was sent to such owners and their agents stating that to retain the exemption they must offer a level of public access that did not require a prior appointment; the letter asked them to make proposals to give open access, taking 25 days as the norm. A further circular letter of May 1999 repeated that in the Inland Revenue's view personal circumstances were not relevant, but proposals were sought from 25 days down to five days. A year later a circular letter (of 28 April 2000) stated that, in the Inland Revenue's view, personal circumstances were relevant: and that not all owners would be required to change their undertakings.

43. In both the present cases, the letter of 28 April 2000 was followed by:

(i) further correspondence with the Owners' agents extending over a period of some three years:

(ii) one or more visits to A House and B House, providing an opportunity for Mr Cushing and other representatives of the Inland Revenue to meet the Owners personally, discuss their concerns and see the objects in their normal setting:

(iii) the obtaining of up-to-date expert advice from curators at the appropriate national and local museums and galleries (*viz* the National Gallery, Tate Britain, the National Portrait Gallery, the Victoria and Albert Museum, the British Museum and other, more local, museums and galleries) in relation to the more interesting items, including most of the Part 1 objects. Curators were asked for their views on the importance of the relevant items and their likely appeal to persons other than students and scholars; whether the items would be likely to qualify for pre-eminent status on a future claim for conditional exemption; which items their institution would be prepared to take on loan; whether any other gallery or public collection would be prepared to exhibit the items; and what public interest there might be if the items were to be exhibited at the Owner's residence:

(iv) communication of the views of the curators to the Owners and/or their agents, with an initial statement of the reasons why enhanced public access was felt to be appropriate and of the form which such access might take:

(v) consideration of the reactions and responses of the Owners and their agents and

(vi) the issue of a draft proposal for consideration and comment before the proposal was finally made.

The Case for the Owners : the Two Grounds

44. The Owners put their case on two separate but related grounds. First, they say that, as a matter of general principle, the Proposals are not just and reasonable in all the circumstances. This is so whether the proposals be directed at the Owners themselves or at other owners who are bound by existing undertakings (i.e. undertakings made before 17 March 1998) and where the proposals directed at those other owners are of a similar nature. All such owners, it is said, have established rights to exemption from IHT so long as they abide by the undertakings and nothing done by Parliament in enacting the 1998 legislation has removed or reduced these. The proposed variation, if put into effect without any compensation for such owners, would so interfere with their rights as owners as to produce substantial injustice; and there would be no public interest to outweigh this unfairness. Applying Human Rights Act 1998 principles, the proposals if implemented would violate all such owners' ECHR rights under Article 8 and under Article 1P taken alone or in conjunction with Article 14.

45. The second ground is based on the particular circumstances of each of Owner A and Owner B. They rely on the points made in their first ground. In addition, they say it would not be just and reasonable to direct that the proposals be implemented having regard to circumstances such as –

- the fact that both Owners have already been giving a significant amount of access for public viewing of the objects;
- serious intrusion into the private lives and safety of their respective families would result;
- increased security risks both to the chattels and to the houses;
- heavy costs in taking security measures to meet these would be incurred;

- additional costs of supervision while the premises were open to the public and the costs of preparing the houses for open access and tours would be involved: there would be costs of moving goods and preparing the houses for open access days;

- additional costs would be imposed as the result of the requirements of the Disability Discrimination Act and health and safety considerations and

- there would be costs and practicalities involved in complying with the museum/gallery option (see paragraph 18 above).

PART II (the First Ground)

Introductory remarks

46. As I have already noted the Owners' first ground is said to apply to all owners who gave existing undertakings and who are now presented with proposals similar to the Proposals applicable to Owner A and Owner B. The first ground is based on the proposition that the existing undertakings had been given as part of an agreement with the Inland Revenue. The Inland Revenue had been aware of all the relevant circumstances relating to the chattels and could at that stage, had it wished, have insisted on more onerous terms of public access. It did not do so. On that basis every such owner had acquired specific vested rights under the agreement and on the basis of the proposals put forward by them in the Forms 700A subject to the obligations to the public contained in the undertakings. Parliament had not, in the 1998 Act, taken away those vested rights. Instead it had conferred a decision-making power on the Special Commissioner to direct that wider access and publicity proposals (presented under Section 35A) should be implemented. In satisfying himself that the proposals are just and reasonable in all the circumstances the Special Commissioner should approach the matter bearing in mind principles of fairness as embodied in (a) the law relating to legitimate expectations, (b) the presumption that a subject's established rights will not be removed by legislation and (c) ECHR principles. In that respect Parliament has distinguished between existing undertakings which can only be varied through the Section 35A (as amended) process on the one hand, and new undertakings where the giving of open access has been made a mandatory condition of conditional exemption on the other.

47. The response of the Inland Revenue, in essence, is this. No owner who has given an existing undertaking will have a legitimate expectation that a reviewing court will protect the effect of which is that his conditional exemption will remain intact notwithstanding subsequent legislation such as the 1998 Act. And, even were an owner to show that in principle he had such an expectation, the overriding public interest underlying the 1998 Act would deprive the owner of the court's protection.

48. I shall approach these issues by first examining whether the owners can sustain their case that they have legitimate expectations of the sort claimed. So far as is relevant I shall, in that connection, ask whether there is an overriding public interest in implementing the proposals and what weight I should give to it. I shall then look at the specific features which, it is said, require me to conclude that the proposals (and proposals of a like nature affecting other owners) can never pass the just and reasonable test in section 35A(2)(c). Those features include –

- the exposure of risk to crime and damage resulting from the open access requirement:
- the "breaking point", i.e. the effect of that requirement on the owners' ability or resolve to keep their collections intact:
- the absence of compensation for the owners:
- the retroactive effect of the 1998 Act and
- the possibility of "double" taxation.

The legitimate expectations analogy

49. Is the Special Commissioner required to uphold the Owners' existing rights to conditional exemption from IHT on the grounds that implementation of the Proposals would amount to a breach of a legitimate expectation thereby violating the "just and reasonable" test? For this purpose I stress that I am concerned only with principles analogous to legitimate expectations. This is because the function of the Special Commissioner is as original decision-maker and is not supervisory. Moreover the Special Commissioner has done nothing that could give rise to any legitimate expectation. A question for consideration is whether the Inland Revenue's departure from the terms of the Form 700A agreements forming the basis of the existing undertakings, being a departure made in pursuance of a changed policy, would amount to an "abuse of power" which cannot be justified on grounds of overriding public interest.

50. I am required to act fairly. The principle of fairness was explained by Simon Brown LJ in *R v Commissioners of Inland Revenue ex parte Unilever Plc* [1996] STC 681 (Court of Appeal) at page 694:

> " "Unfairness amounting to an abuse of power" as envisaged in *R v Commissioners of Inland Revenue ex parte Preston* [1985] AC 835 and the other revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, nor principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse of power."

However a qualification to this, explained by Lord Woolf LCJ in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, at paragraph 69, is that the formulation of the principle in *Preston* "taken by itself would allow no room for a test of overriding public interest". It will be apparent therefore that, in deciding whether the legitimate expectation principles apply by analogy, I have to pursue two overlapping lines of enquiry. The first is whether the expectations of the Owners, following the giving and accepting of the existing undertakings, are such that it would be an abuse of power in the sense of being conspicuously unfair for the decision-maker (whether that be the Inland Revenue or the Special Commissioner) to violate these. The second, which arises if the answer to the first is in the affirmative, is whether, as the Inland Revenue submit and Owners dispute, there is an overriding public interest that would justify such a violation.

51. As regards both these lines of enquiry I would need, at the outset, to be satisfied that the expectations relied upon have been generated by the Inland Revenue, i.e. when they granted the conditional exemptions in the first place and that these were, or would be, subsequently violated by the exercise, by the Inland Revenue or by me as Special Commissioner, of a discretionary power.

52. In the present circumstances the Owners obtained conditional exemption for the Part I objects by virtue of the conditional exemption regime contained in the IHT Act 1984 and on the strength of section 30 of that Act. Agreement to the access conditions, for example to allow by-appointment viewing, between Owner and Inland Revenue fulfilled the statutory requirements. The statutory result was the state or privilege of conditional exemption. The source of the conditional exemption was the Act and not the exercise of a non-statutory power on the part of the Inland Revenue.

53. That last feature distinguishes the present situation from that considered by the Court of Appeal in *Unilever*. There the taxpayer company had, year after year, been submitting estimates of net taxable profits within the statutory time limits claiming relief later and outside the prescribed the statutory time limits. The Inland Revenue had always accepted the claims notwithstanding the fact that they were out of time. The Inland Revenue then changed their practice and refused an out of time claim. The question was whether the Inland Revenue had impliedly represented that the existing practice of allowing out of time claims would be followed in future and whether it would be unfair to allow them to resile from such a practice without notice. The Court of Appeal upheld Unilever's claim for "substantive" tax relief on the ground that it would have been unfair to have allowed the Inland Revenue to resile from their practice without notice. Here, by contrast, the grant of conditional exemption was not the exercise of a discretion. It is true that the Inland Revenue had the function of approving the undertakings, which they did by operation of the Form 700A procedure; but that was an essential part of the machinery for giving effect to section 30 and section 30 was, as noted in paragraph 55 above, the source of the

Owners' conditional exemptions. That (as already mentioned) distinguishes the case of the Owners from that found in *Unilever.*

54. Assume that I am wrong so far. Assume that the grants of conditional exemption did give the Owners legitimate expectations, the question would then arise as to whether the implementation of the Proposals would violate them unjustifiably, i.e. unfairly and without an overriding public interest. The 1998 Act, as I read it, places a duty on the Inland Revenue, as the body responsible for implementing fiscal policy, to give effect to the new requirements for public access etc. They are acting under statute and furthering the statutory policy. Enhanced public access and wider publicity are mandatory requirements of the Act and are moderated only by the "just and reasonable" provisions of section 35A(2)(c). Insofar as the Owners had what they refer to as "established rights" by virtue of their existing undertakings, those are affected and may be diminished by virtue of the 1998 Act. How the Inland Revenue exercise their care and management powers to give effect to the new provisions is up to them, so long as they act fairly and within the bounds of legality. The way they exercise their powers will depend upon the circumstances of the owners, the nature of the chattels, the opportunities afforded by local galleries and so on. The Inland Revenue are not, however, the creators of the new access and publicity policy. It is not their policy that is being changed when they set about implementing section 35A by making enquiries, presenting proposals and seeking to get these agreed within the six-month period. They are as a matter of duty implementing the Act itself, not exercising a new discretion. They are required to exercise judgment but that in not the same as discretion. This is the position whether the Inland Revenue are addressing new claims for conditional exemption or dealing with existing undertakings like the present. The procedure is different, but the statutory policy is the same. The fact that the Inland Revenue are carrying out a statutory duty in the present circumstances, distinguishes these from those found in *Unilever* and *Coughlan*, supra. *Coughlan* was a case involving a successful challenge to a decision of an area health authority. Having assured eight severely disabled patients that they would be entitled to reside in a specific home for life in return for their agreement to vacate a hospital which the authority intended to close, the authority subsequently decided to close the home, to transfer the patients' care to the local authority and to move them elsewhere. Here, unlike the position of the health authority, which was exercising its managerial discretion, the Inland Revenue are doing what Parliament has told them to do.

55. For those reasons I think that the Owners' argument is misconceived. This is not a case where, were I exercising a discretion or a review jurisdiction, I should in principle give effect to the Owners' legitimate expectations. It is not necessary to go on and decide whether, to use Lord Woolf's expression, "the test of overriding public interest" would require me, as a Special Commissioner, to apply the just and reasonable exercise in a way that violated the Owners' "legitimate expectations". For the record the owners placed substantial reliance on the alleged absence of any overriding public interest in improving access to conditionally exempt assets. They

say that this factor calls in question the exercise of the Inland Revenue's decision to make the Proposals in the first place; and, more to the point, the absence of any overriding public interest must be taken into account by me, as Special Commissioner, in deciding whether in all the circumstances it is just and reasonable to make a direction that implements the Proposals.

56. I need say only this. It is clear from a reading of the heritage provisions in the 1998 Act that Parliament has introduced a package of measures designed to secure enhanced public access to conditionally exempt assets. The procedures are different depending upon whether conditional exemption is obtained by reason of existing undertakings or subsequent undertakings. Nonetheless Parliament, and not the Inland Revenue, has determined what the public interest is and how it is to be served. Consequently, whatever force there may be in any particular criticisms to the policy, the Proposals cannot be faulted on the grounds that there is no overriding public interest behind them. The sole exercise, human rights apart (which I shall explore in paragraphs 88-106 below), is to determine whether in all the circumstances the Proposals pass muster as being just and reasonable. I turn now to this aspect of the first ground.

Features relevant to just and reasonable test

57. The Owners accept that the Part 1 objects are all of outstanding artistic and/or historic interest and that most of them satisfy the new pre-eminent quality test. There cannot, I think, be any doubt about this. But that, the Owners say, was the position when the original undertakings were given and were accepted by the Inland Revenue as affording reasonable access. If the existing undertakings afforded reasonable access, a proposal requiring wider access would (so the argument runs) be unreasonable in the context of the "just and reasonable" test. My only comment on this is that Parliament has intervened and, whatever views were taken in the past, has prescribed its own standards of reasonable public access.

58. The next point taken by the Owners is that the Proposals are not justifiable by reference to the present limited uptake by members of the public of by-appointment viewing facilities. The Inland Revenue, Mr Cushing explained in evidence, took the view that under the present arrangements for by-appointment viewing and publicity, the numbers of visitors have not been commensurate with the artistic and historic importance of the conditionally exempt chattels. The Owners challenge this. There are, they say, no statistics to substantiate it. Such statistics as there are are based on visits to properties open to the public being properties in the hands of public bodies such at the National Trust and English Heritage and in the hands of private owners who advertise, market and run their premises on a commercial basis. In those cases access is given on an all-inclusive basis and the general public are attracted by the opportunity to visit the property, the gardens and other attractions; they obtain a total experience taking it for granted that the property will contain beautiful furniture and

works of art. Visitor statistics for those types of properties are, it is said for the Owners, no guide to the likely number of people that would go to an unopened private house of a reluctant owner which had no visitor facilities, no attractions, no pamphlets and nothing other than paintings on its walls. And if there were no commentary, or nothing but the barest indication of who the painter was, the attraction to the public would be very limited. I accept that last point, made by the Owners. I would not be prepared to rely on statistics relating to "commercially" opened properties. In this connection it is relevant to mention the evidence in relation to Aske Hall, the home of the Fourth Marquis of Zetland. The evidence showed that the house and its contents have since 1992 been operated as a business, providing tours of the house and grounds and holding functions. The effect of "open access" for the conditionally exempt chattels agreed in 2002 was to produce six visitors in 2003 on the public "open" days and, so far, four in 2004 on those days. I am not satisfied by the argument for the Inland Revenue that, because Aske Hall is in a remote location, the needs of those with special interest in the paintings will already have been satisfied by the existing tours.

59. Drawing the threads together at this stage, I am not satisfied that the present low level of public take-up of by-appointment viewing facilities demonstrates that open access must in all circumstances be a reasonable requirement.

60. The Owners go on to say that there is nothing wrong in principle with the by-appointment viewing system. There is no compelling case for changing the system by insisting on "open access" either in their particular cases or in comparable cases. The defect in the by-appointment viewing system has been in the way it has been funded and publicised. (That, I am told by Mr Cushing, is now being changed and I infer that the Inland Revenue recognize past underfunding to have been a cause of the defect in that system.) The Owners challenge the claim of the Inland Revenue that the by-appointment viewing arrangements are not well suited to the more generally interested member of the public who has no prior knowledge and may feel intimidated by the appointment arrangements. There is, say the Owners, no independent evidence of this. What is more, the Inland Revenue are, as Mr Cushing explained, now improving the publicity for the by-appointment viewing system and anticipate that this will lead to a considerable increase in numbers.

61. The failure of the by-appointment viewing system to attract more than a handful of by-appointment visitors to the conditionally exempt chattels owned by the two present Owners may, I accept, have been the result of underfunding and lack of initiative on the part of the authorities. Mr Cushing in evidence acknowledged that very few members of the public are aware or have reason to be aware of the rights of access to heritage works of art because of the limited steps taken by the Inland Revenue to publicise these rights. Until now the only steps taken by the Inland Revenue have been the creation of the Inland Revenue Heritage website (accessed until the last few months only through the Inland Revenue website), the placing of

leaflets in connection with the heritage in Inland Revenue enquiry centres and the making of them available to tourist centres. Mr Cushing accepted, and I agree with this, that it is unlikely that it would naturally occur to the ordinary member of the public to enter the Inland Revenue website to inform himself of heritage objects available to be seen. Moreover no advertising of any sort has been carried out until very recently.

62. In this connection I refer to the evidence of the curators at gallery venues local to A House and B House. The curator of one such gallery was completely unaware of the gallery's rights to borrow under existing arrangements and the curator of another had only become aware of it in October 2003 through direct contact with the Capital Taxes Office. It appears that, even among the "professionals", the advantages to the public of conditional exemption are hardly known.

63. Nor am I satisfied that the by-appointment viewing system is, as the Inland Revenue assert, inherently ineffective in its ability to secure reasonable access to the public. Given the admitted absence of adequate publicity up till now, I cannot see that the Inland Revenue has any firmer ground than conjecture to justify the Proposals by reference to a failure of the by-appointment viewing system.

64. In this connection also I accept the argument for the Owners that it is impossible to conclude, from the lack of correlation of the admitted level of "hits" to the Inland Revenue Heritage web-site since 1996 with the increase in the level of by-appointment viewing visits, that it is the nature of the by-appointment viewing system which is failing to deliver reasonable access to the public. The Inland Revenue Heritage website has comprised three parts since 1998 when the large increase in hits came about. The first of these parts concerns the land, buildings and collections site featuring "exempt" land and buildings and their collections, all open to the public. The second part covers the collections featuring the 42 collections open to the public on an open basis and those not accessible on an open basis but where publicity of the collection on the website has been agreed. The third part covers the "Works of Art" containing the descriptions of the items conditionally exempted in their own right and accessible under the "by-appointment" system (excluding those on long-term loan to museums, excluding those which are historically associated, and excluding those in a house open to the public). In the absence of any means of identifying who is making the hits, on which part of the website and out of what interest, artistic, legal, professional or other, it is impossible to conclude that there is a significant number of members of the public who are interested in viewing a conditionally exempt work of art, but who are put off viewing it because of the nature of the "by-appointment" system.

65. There is nothing inherently wrong with the by-appointment viewing system and recently the Inland Revenue has, as I have already noted, begun to take steps to publicise it. They have set up links with the English Heritage web-site and they now

advertise in the National Trust Magazine. A reasonable assumption is that the existing by-appointment viewing obligations of Owners will become considerably more onerous for the Owners. I do not, however, see that as a feature of the Proposals, whether in the form directed at the Owners or in similar form directed at other owners in comparable positions, that necessarily disqualifies them from ranking as just and reasonable.

Greater exposure to crime : public interest considerations

66. The Owners then contend that the Proposals are unreasonable in that they run counter to the public policy to prevent and reduce crime. They point to advice of the police, in letters from two local forces, against the adoption of open access as required by the Proposals. Mr Cushing acknowledged the police advice that the more people who knew about the particular house and its contents, the bigger the risk; the risk could however be contained, he suggested, by restricting the number of open days, confining displays to a few rooms, removing other items and locking other rooms and escorting visitors. The Owners emphasise that the ability of members of the public (under the Proposals) to have access to the house on the open days and without any vetting or other security checks will increase the security risk. The same goes for the publicity requirement, which would permit the Inland Revenue to publish an exact description of the chattels and their location on a single website, and for the requirement to submit a copy of the undertakings to any member of the public who asks for it. I accept that implementation of conditions of the kind found in the Proposals will expose owners to greater security risks than those attendant on existing by-appointment viewing undertakings. This is a negative factor that will weigh against the just and reasonable character of the Proposals.

67. Open access of the sort proposed will, it is argued for the Owners, provide a less rewarding experience on account of the special security requirements needed to meet the fact that the visitors will not have been vetted in advance. I do not regard this point as sufficiently substantial to displace any overriding public interest in making the chattels available for public viewing.

The “Breaking point” consideration

68. It is argued for the Owners that it is unreasonable to force upon owners against their will proposals which such owners, for understandable and not obstructive reasons, themselves find unacceptable. To do so puts at risk the access to the objects currently secured for all members of the public, since when breaking point comes, the owners will breach the terms imposed and pay the tax (probably by selling part of the collection), causing at once the loss of integrity of the collection, and equally fundamentally the loss of the existing public access to the entire collection. If there is a destruction of the heritage by insisting on the proposal, that must in any event be taken into account as a “reasonableness” consideration.

69. Parliament must be taken to have considered the "breaking point" factor when enacting the 1998 Act. There has been no suggestion of a departure from the policy of successive governments that "wherever possible" heritage property "should be conserved in private hands for the benefit of the community": see paragraph 5 above. The 1998 Act changes to the conditional exemption regime are a "blunt instrument." Parliament has, however, recognized that the just and reasonableness "safety valve" may apply to all the circumstances, and the breaking-point consideration is one of these. Even so, the Special Commissioner would, I think, need to be satisfied that breaking point had been or would be reached before giving any substantial weight to it as a consideration. In particular, the evidence provided for Owner A and Owner B does not satisfy me that breaking points have been reached.

Should the absence of compensation be taken into account?

70. Nothing in the 1998 Act requires that compensation should be provided to an owner who has given the existing undertakings but who is affected by proposals of the present nature. The argument for the Owners is that the substantial interference with their rights without compensation would produce a substantial injustice which emphasises the unreasonableness of the Proposals. The Inland Revenue say that compensation, or its absence, is not a factor to be taken into account by the Special Commissioner in exercising his statutory function. In any event, they say, the owner is compensated.

71. It is a fact that the terms of the present Proposals would (if implemented) impose substantial additional obligations, costs and disadvantages on the Owners without any compensation. In paragraphs 76 to 79 I shall itemise those that have been singled out for the Owners.

72. Under option one (access at the Owner's home) the Owners are required to grant open access on specified days without prior appointments, such days to fall between 1 April and 31 October. They are required to notify the Inland Revenue of the open days by 31 October of the previous year. They have to arrange conducted tours of not more than 25 people (in the case of Owner A), and ten people (in the case of Owner B); such tours are to cover the rooms in which the Part 1 objects are on display (minimum of four tours per day in the first year). And they are required to retain all the exempt items in an appropriate room if they are normally located there before the opening. The Owners' obligation, in option two ("the museum/galleries option") is to lend every one of the Part 1 objects to a "public gallery or museum" for a continuous period of at least three months in every 39 months, notifying the Inland Revenue of the arrangements for loaned objects three months in advance of the loan.

73. So far as publicity is concerned, the Owners have (under the Proposals) to allow reasonable details of the arrangements to be publicised on the Inland Revenue

website and on other appropriate websites and in any other reasonable manner as the Inland Revenue think fit. They have to provide a copy of the undertaking to any member of the public upon reasonable request. It will be noted that that undertaking contains a schedule of the Part 1 objects. They have to provide reasonable details to local tourist information centres and have to provide images of the Part 1 objects and notification that these objects are available for loan to certain specified galleries.

74. The Owners' rights are lost or impaired in the sense that they lose the exclusive right to enjoyment for themselves and their family both of their house as a private home and of the chattels contained in the house. They lose the right to require every member of the public who wishes to view the chattels to be identified in advance. They lose the right to use their homes as they please during the open access days. They have no opportunity to exclude any uninvited member of the public from their homes and they lose the right of confidentiality as to the location of the objects.

75. The Owners will in all probability have to incur additional costs and suffer disruption as a result of the open access arrangements.

76. Were the Owners to go for the museums/galleries option, the movement of many of the objects would, I accept, cause risk of damage and involve cost implications in terms of transport, conservation, photography, administration and insurance. A significant part of these would full upon the Owners.

77. The absence of any compensation to the Owner is, I think a consequence of the changes to the conditional exemption regime contained in the 1998 Act. It is not a special feature of the Proposals or the result of any decision taken by the Inland Revenue. Parliament no doubt saw the burdens, financial or otherwise, placed on the owner as a quid pro quo for continuing deferral of IHT. How great the additional burden will be in any particular case will depend entirely on the circumstances of a particular owner and his chattels. The owner with a priceless collection of miniatures or manuscripts, for example, may incur little expense and inconvenience in complying with either a revised open access or a museum/gallery option condition. The owner, like the present Owners, whose home is hung throughout with fragile paintings, will find compliance much more burdensome and expensive. For that reason I do not regard the absence of compensation to be a feature of the 1998 Act regime that necessarily requires me to conclude that implementation of the Proposals, and of like proposals affecting owners in comparable circumstances to those of the Owners, will inevitably and always be unjust and unreasonable. Everything depends on the circumstances of the particular owner; and in the particular circumstances the disproportionately high costs implications of the proposals may be a relevant consideration.

The retroactive effect of the 1998 Act

78. How far if at all should the retroactive effect of the 1998 Act be taken into account in deciding whether it is just and reasonable for a direction under Section 35A be made?

79. The Owners rely on what they see to be the fundamental legal principle that the statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. They refer to *Lauri v Renad* [1892] 3 Ch 402 at 421 and *Yew Ben Tew v Kenderaan Bas Mara* [1983] AC 553 at 558. While Schedule 25 paragraph 10 of the 1998 Act confers power on the Special Commissioner in the event of a proposal by the Inland Revenue to make a direction to vary existing undertakings and this is intended to have some retrospective effect, there is nothing, the Owners say, that prevents the Special Commissioner from having regard to the unfairness that would be caused by interfering with the existing rights to the substantial detriment of the Owner in the consideration of what is just and reasonable. Any interpretation that ignores this unfairness is not required by the language of the statute.

80. The response for the Inland Revenue is that the true principle, identified by the House of Lords in *L'Office Cherifien v Yamashita-Shinnihon Steamship Co* [1994] 1 AC 486, is that the basis of the rule regarding retrospectivity is simply fairness. The question in each case is whether the consequence of reading the statute with the suggested degree of retrospectivity is so unfair that Parliament could not have intended its works to be so construed.

81. I accept that the exercise of the power given in the modified Section 35A to vary the existing undertakings does involve an element of retrospectivity. Nonetheless this was intended by Parliament. The purpose of the section, as I have already observed, is to improve public access to conditionally exempt property which is already subject to existing undertakings. Potential hardship to the owner is a relevant consideration for me to take into account. It is, however, catered for through the statutory safeguard in the modified Section 35A, i.e. the requirement for a direction by an independent Special Commissioner and a requirement that he should be satisfied that it is just and reasonable in all the circumstances for the proposed variation to be made.

82. The Owners argue that the approach to the question of what is just and reasonable should be informed by the presumption that a subject's established rights will not be removed by legislation, whether direct or delegated. The Inland Revenue respond, and I agree with them, that no taxpayer (such as a conditionally exempted Owner who has a contingent liability to pay IHT) can have an established right any more than he can have a legitimate expectation that is immune to the possibility of subsequent statutory alteration. His only legitimate expectation, as Lord Bingham observed in *R v Commissioners of Inland Revenue, ex parte MFK Underwriting Agencies Limited* [1989] 1 WLR 1545, at p1569B, is to "be taxed according to statute". Parliament has nonetheless implicitly recognized that the retroactive effect

of the 1998 legislation could impact unjustly and unreasonably on an owner who has ordered his affairs on the basis of the law as it was when he accepted the terms of Form 700A. That is why section 35A(2)(c) has been enacted.

A possible double tax liability resulting from the sale of a chattel to fund the IHT payable on breach of an undertaking required by the Proposals.

83. The Owners argue that this potential double tax liability is an outcome that should be taken into account in determining the added burden resulting from the implementation of the Proposals. They illustrate this by way of comparison.

84. First take the tax position of an Owner (X) who obtained conditional exemption under the "by-appointment access" regime, then becomes bound by the new conditions contained in the proposals and later breaches one of those conditions; and assume that he has not given any capital gains tax undertaking under Section 258 of the Taxation of Chargeable Gains Act 1992. He has to pay IHT on the current market value of the relevant property at the date of the breach: see Sections 32(2) and 33 of IHT Act. Assuming he subsequently sells that property to fund the IHT liability, he then suffers the following taxes:

(i) IHT at 40% on the current market value of the chattel on the date of the breach and

(ii) capital gains tax at 40% on the gain since the date of his acquisition of that property (i.e. since the date of death of the person in relation to whose death conditional exemption from IHT has been granted).

Compare that with the tax position of an Owner (Y) who decided not to claim conditional exemption on the property in question. That Owner will have borne inheritance tax at 40%. As he would have acquired the asset at its market value at death, there would have been no capital gains tax charge at death and his acquisition cost would have been the market value at the date of death. Thus, any sale shortly after death to fund the IHT liability (and assuming no changes in value since death and prior to that sale) would have resulted in no tax.

85. The Inland Revenue say that the tax analysis of the position on Owner X's sale is wrong. Taxation of Chargeable Gains Act 1992 Section 258(8), they say, allows the capital tax gains arising on the sale to be credited against the IHT payable on the breach. That, I think, gives too generous a construction to subsections (5) and (8) of Section 258. Subsection (8) gives relief by way of credit, for capital gains tax against IHT, where "in pursuance of subsection (5) … a person is treated as having on any occasion sold an asset and inheritance tax becomes chargeable on the same occasion". Subsection (5) applies and a deemed capital gains tax disposal occurs in three circumstances. One is when the sale itself causes the IHT charge under Section 32 of

the IHT Act (i.e. the sale is a chargeable event on account of its being a breach) or where there would be an IHT charge under Section 32 "if an IHT undertaking as well as an undertaking under this section [Section 258] had been given". There is then a market value disposal for capital gains tax purposes. Neither of those two conditions covers Owner X's sale. The third circumstance is where "the board are satisfied that at any time during the period for which any such undertaking was given it has not been observed in a material respect". Owner X will not have given any capital gains tax undertaking for purposes of Section 258; and as a breach of an IHT undertaking will not amount to a chargeable event under Section 258, there would have been no charge under Section 258. Section 258(8) will not therefore have applied.

86. On that basis Owner X in the example will have suffered two tax charges (i.e. IHT on the current market value and capital gains tax on the gain since the earlier death). Strictly this is not double taxation. But Owner X would be worse off than Owner Y who paid the IHT when he inherited the property; this is because Owner Y will not have had to make any realisations to meet a subsequent IHT charge.

87. I am not convinced by the logic of the comparison. The circumstances are different. For example there is no necessary connection between X's sale of the particular asset and the breach of the IHT undertaking given in relation to it. X may have been free to fund the IHT by some means other than by selling it. The best I can say is that the possible impact of the two tax charges at the same time is a consideration; it can happen. But it is not a consideration of any compelling weight, to be taken into account in applying the statutory test of whether it is just and reasonable to make the direction under Section 35A.

The First Ground : Human Rights considerations

88. The case for the Owners is that any decision of the Special Commissioner, to whom alone Parliament has left the decision, directing that the Proposals be implemented would be incompatible with their rights under Article 1P and Article 8, read alone or in conjunction with Article 14. (The Owners stress that section 35A of the 1998 Act in its amended form is not incompatible with those Articles. They have provided me with several examples, admittedly based on unusual circumstances, where a variation may be proposed and resolved in accordance with the section without bringing human rights considerations into play.)

89. Specifically on Article 1P the Owners contend that the effect of the variations contained in the Proposals would be to interfere with their rights of peaceful enjoyment of their Part I objects, of their homes and estates and of their "right to property in relation to the legitimate expectations and/or rights flowing from the original (existing) undertaking". Those interferences, the Owners contend, are not justified as achieving a fair balance between the general interest of the public and the requirement for the protection of the Owners' rights. The Proposals do not, the

Owners say, fall under the Inland Revenue's general tax collecting role. They will significantly and adversely impact upon the Owners' homes and family lives, requiring them to maintain and put in place enhanced security and to invest in the facilities needed to enable open access and enhanced publicity and will expose them and their property to increased risks from criminal activities. There is no compensation for this disproportionate interference and, on the strength of the decision of the Court of Human Rights in *Jahn and Others v Germany* (22 January 2004) which observed (at paragraph 82) that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1P only in exceptional circumstances", there will be an evident violation in the present circumstances. Moreover, the retroactivity of the Proposal and its penal element (i.e. having to pay IHT, on an assumed breach, by reference to the then current value at the then current rate without relief for capital gains tax incurred on the onward sale to realize funds to pay the tax) further underlines the disproportionate nature of the variation contained in the Proposals; this feature is driven home by the evidence that neither Owner would have entered into the existing undertakings had they been aware of the likelihood of the variations contained in the Proposals.

90. Article 1P provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

91. I have to determine the nature of the interference with the Owners' Article 1P rights that would result were the variations in the Proposals to be implemented. This raises the questions of whether the Proposals constitute an interference with the Owners' peaceful enjoyment of their Part 1 objects and the existing undertakings constitute "possessions" enjoyed by the Owners, the "peaceful enjoyment" of which would be interfered with by the variations contained in the Proposals. The next step in the enquiry is to determine whether any such interference would be lawful as being in pursuance of a legitimate aim and having a reasonable relationship of proportionality between the means chosen (i.e. the terms of the Proposal) and that aim.

92. The Inland Revenue accept that the variations contained in the Proposals do interfere with the peaceful enjoyment of the Owners' Part 1 objects in the sense of amounting to a control on the use of the Part 1 objects; the existing undertakings involve some "control of use" but the variations contained in the Proposals admittedly involve a control to a greater degree. The Inland Revenue join issue with the Owners on the latters' contention that they have rights to property in relation to the legitimate expectations and/or rights flowing from the original undertakings. Those, they say, are not possessions in the sense of rights enjoyed as a matter of domestic law. I have already given a decision on this point. Legitimate expectations are expectations and not rights. They will be protected in the appropriate manner by the English Courts, i.e. procedurally or substantively, where it would be so unfair to frustrate them by taking a new and different course as to amount to an abuse of power (unless an overriding public interest prevents this). Here, the limits to the Owners' legitimate expectations are to be treated with procedural fairness (which is not in dispute) and to be taxed according to statute. The Owners cannot however expect to be exempted from the operation of the 1998 Act by reason of the Human Rights Act.

93. Even if I were wrong so far and even if a "substantive" legitimate expectation that the owner in question will remain entitled indefinitely to exemption from IHT could qualify as a "possession" for Article 1P purposes, the Owners do not in the present circumstances have such expectations. The Inland Revenue have never given any unqualified representations, either when accepting the existing undertakings or later, that what constituted the provision of reasonable public access would not in the future be changed by Parliament. Indeed the legislative progress in this area has, since 1950, been to insist on increasing levels of public access. Moreover the initiation of "proceedings" under section 35A cannot amount to an abuse of executive power. The Legislature itself has provided for a mechanism to allow for the variation of existing undertakings and this must have been intended to be effective; and the Act in terms provides for the possibility of variation by the inclusion of an open access requirement whereby access to the public "is not confined to access only where a prior appointment has been made". Finally, and in my view the most important objection to the Owners' argument that the variations contained in the Proposals will violate their Article 1P rights is the fact that the Legislature has given the Special Commissioner the function of determining whether the terms of the Proposal are just and reasonable in all the circumstances. This, as I read it, requires me to recognize the relevant provisions of the Convention and to give effect to them in spirit, though not necessarily in strict conformity with the constraints of Strasbourg jurisprudence.

94. Reverting to the admitted interference that the variations contained in the Proposals, if implemented, will have on the Owners' peaceful enjoyment of their Part I objects, the Inland Revenue say that the Proposals are lawful in that they pursue a legitimate aim. The control of use would be lawful as being "in accordance with the general interest or to secure the payment of taxes …". The Owners retort that the Inland Revenue's tax collection function in relation to these came to an end when the

undertakings were agreed in the first place. I do not accept that. The Owners gave the existing undertakings as to access and publicity in lieu of immediate payment of the IHT There has been no final discharge of the liabilities to tax (unlike "acceptance in lieu"); instead there is a deferment of liability which continues until death or an earlier breach of a condition contained in the existing undertakings. The Inland Revenue's obligation to collect the tax, like the Owners' deferrals of tax, continues; and the position now is that the Owners must, if they are to continue to benefit from the "exemption", allow access to their Part I objects. In conducting its duty to manage these access and publicity arrangements, the Inland Revenue is I think pursuing a legitimate aim of seeing that the public access requirements are fulfilled.

95. That the legislature has not, in enacting the 1998 Act, provided for compensation for the Owner against whom a proposed variation is implemented does not mean that there will be a violation of the Owners' rights over the Part I objects and their houses and estates. The value of those assets is unaffected by the proposed variation and the benefit of conditional exemption continues.

96. Overall the proposed variations cannot be characterized as disproportionate. The legislature evidently intended that open access might be just and reasonable as regards chattels that were the subject of pre-1998 undertakings. There is nothing inherently unlawful about the exercise of the Special Commissioner's power to direct the implementation of proposals that require open access. Whether it is just and reasonable in all the circumstances to make such a direction is something I shall come to in Part III. The application of Human Rights principles to the particular circumstances of an owner affected by a proposed variation may, at that stage, be a relevant consideration.

Article 8 of the Convention

97. Article 8 of the Convention provides that:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

98. The Owners argue that the increased public access without prior appointment would amount to an interference both with their right to respect for a home and to the right to respect for their private and their family lives. The effect of the variations

contained in the Proposals, they say, will be to deprive them of any control over who enters their properties to view the Part I objects. And it will deprive them of the opportunity to vet any visitors. This has a potentially significant impact on the lives they and their families are able to lead on open access days. What is more there is no realistic alternative to providing open access because the chattels in question are so numerous and so fragile that the option of making them all accessible through exhibitions under the museum/gallery option is not realistic. The Proposals should not, therefore, be implemented.

99. (For reasons given in paragraphs 174 to 181 below, I do not think that the museum/gallery option is a realistic alternative, at least for the foreseeable future.)

100. The Owners go on to say that the interference caused by implementation of the variations contained in the Proposals would be neither in pursuance of a legislative aim, nor proportionate. In particular it does not protect the existing rights "of others", namely rights of individual members of the public to by-appointment viewing; the effect, by contrast, is to create new and enlarged open access rights.

101. I cannot accept that implementation of the Proposals would amount to the interference by a public authority (the Inland Revenue or the Special Commissioner) with the exercise of the Owners' rights to respect for their private and family lives and their homes. Such interference as there is comes from the public themselves. The public authority is involved because the Owners have claimed conditional exemption and have voluntarily given the existing undertakings. The effect of the public authority's action in making the proposals and the Special Commissioner's action of directing that they take effect is, in essence, to put the Owners, who have already undertaken to admit an unspecified number of people on an unspecified number of occasions, to an election. They can either commit themselves additionally to open access viewing, which will produce an unknown number of visitors (and having regard to the Aske Hall example, these could be very few) on a predetermined number of days or they can pay the inheritance tax. The Owners' Article 8(1) rights "to respect" remain as they were. Of course it will cost them the suspended inheritance tax if they want to preserve their privacy. They will either pay the tax or fund the cost of an alternative home for their Part I objects. There is, however, no relevant interference by a public authority with the exercise of the Owners' Article 8(1) rights.

Article 14

102. Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

103. Both sides adopt the *Michalak* formulation: see *Michalak v Wandsworth LBC* [2003] 1 WLR 617 at paragraph 20. This identifies as the legal test for any issue as to whether there has been a breach of Article 14, the answer to the following four questions:

(1) Do the facts fall within the ambit of one or more of the substantive Convention provisions?

(2) If so, was there different treatment as respects that right between the complainant on the one hand and the persons put forward for comparison ("the chosen comparators") on the other?

(3) Were the chosen comparators in an analogous situation to the complainant's situation?

(4) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?

There is a considerable degree of overlap between questions (3) and (4). In *R (Carson & Reynolds) v Secretary of State for Work and Pensions* [2003] 3 All ER 577 at paragraph 61, Laws LJ identified a compendious question, namely "Are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X?"

104. The Owners contend that they are in a comparable position to those who obtained a conditional exemption from estate duty under section 40 of Finance Act 1930 as augmented by section 48 of Finance Act 1950. Exemption was given subject to an undertaking to retain in the United Kingdom and preserve the chattels and to provide facilities for examining the objects for the purpose of research to any person authorized by the Treasury.

105. In common with the Inland Revenue I do not consider that the Owners can be compared with those who obtained conditional exemption from estate duty under those provisions. Those with estate duty conditional exemption were never under any requirement to provide reasonable access to the public. Consequently their circumstances are not so similar to the group into which the Owners fall as to call for positive justification for not requiring for latter to provide open access and enhanced publicity. It follows that questions (3) and (4) in the *Michalak* formulation cannot be answered in favour of the Owners.

106. To conclude on the Human Rights arguments, I do not consider that Human Rights considerations require me to conclude that the Proposals, whether as directed at the Owners or similar proposals as might be directed at other owners who are bound by existing undertakings, are inherently unlawful as violating Article 8 and Article 1P taken alone or in conjunction with Article 14.

Conclusion on the First Ground

107. For the reasons given above I do not consider that the Proposals can be faulted as not being just and reasonable on the general ground set out in paragraph 47 above. Everything depends on the circumstances of the particular owner.

PART III (the Second Ground)

Is it just and reasonable in the particular circumstances of each Owner to direct that the Proposals take effect?

Introduction

108. The Inland Revenue ask me to direct that the Proposals shall take effect. Their grounds essentially are these. The undertakings required by the Proposals are all capable of being carried out. The Proposals, if implemented, fulfil Parliament's intention to provide the public with access to the Part I objects. The amounts of tax deferred on the strength of each of the Owners' existing undertakings are so great as to rank as a compelling consideration in determining the justice and reasonableness of the Proposals; and this factor outweighs any increased intrusion, security risk and costs resulting from their implementation.

109. For reasons that will appear later I accept the Owners' argument that the museum/gallery option in the Proposals is not a realistic alternative to giving open access; at the same time I recognize that the undertakings otherwise required by the Proposals are capable of being carried out. Parliament has however tempered its wish for open access and full publicity by demanding a consideration of whether it is just and reasonable in all the circumstances to implement the Proposals. Parliament has not however given any guidance as to how this is to be approached. I have adopted certain principles which I now deal with, but in no particular order of importance.

110. First, the starting point in determining whether the variations contained in any proposal are reasonable must be the position of the owners under their existing undertakings. Are the potential consequences of the proposals likely to be more

onerous and excessive than those of the existing undertakings? The more onerous and excessive they are, as compared with the status quo, the more unreasonable the variations contained in the particular proposal may be.

111. Second, behind the "just and reasonable" proviso is a strong implication that individuals can depend on as much legal certainty and as little violation of their rights to privacy, etc. as is compatible with the benefits sought by the legislature. Thus, where a person has taken a course of action that binds him in law, such as (for example) paying the IHT on his house while at the same time undertaking to provide by-appointment access to his chattels, it will be unreasonable, if not unjust, to make him open his house.

112. Third, Parliament cannot have intended that the implementation of its legislation (which is a "control of use of property" within Article 1P) should lead to significantly greater risk to the safety and security of the households in question and of loss or damage to the possessions found there. To do so could be disproportionate.

113. Fourth, Parliament must have envisaged that individuals affected by open access proposals should not be exposed to disproportionate and unreasonable costs and inconvenience.

114. Fifth, the "just and reasonable" test in section 35A(2)(c) is not a one-way valve that has been installed to relieve the owner. It calls for a consideration of "all the circumstances" which will necessarily include the demands of members of the public. To this end I have attempted to put myself in the position of the reasonable sightseer who is interested in experiencing great works of art.

115. Sixth, the amount of tax conditionally deferred by operation of the pre-1998 Act conditional exemption regime cannot of itself be a determining feature in the just and reasonable equation. If the monetary value of a particular conditionally exempt chattel is a reflection of the public interest in it, then the greater the value the greater the case for insisting on public access. But at the same time the monetary value of a collection of chattels should not of itself be allowed to weigh too heavily. Otherwise, capricious results, based solely on value may follow.

116. Seventh, it is relevant, in deciding whether it is just and reasonable to implement the open access proposals, to ask whether the owner's existing efforts to stimulate public access (by, for example, arranging special interest visits) have for all practical purposes given as much and as good a quality of access in lieu as would realistically be effected by open access.

Owner A : the general picture

117. A House has been in the family for centuries. In the 18th century it was refurbished by a distinguished architect who kept the earlier exterior; the inside was modelled in the Georgian style. It is now the family home of Owner A, his wife and children.

118. The house contains a large number of items of sufficient importance to be recorded on owner A's database. The great majority of the paintings are family portraits. Most of the other paintings came into the family over the generations by gift or inheritance. A few were bought. Several paintings, for example, were bought, the family believes, by an ancestor when on the Grand Tour. The rest of the items of value include rugs, carpets, tapestries, china, furnishings, books, sculptures etc. They are found in almost every room.

119. Generally the chattels in A House are there because they are appropriate to the house or because of some close family connection. The result is that the house is full of fine portraits of Owner A's ancestors and the families into which their forebears were married. There are views of local sights. There are pictures of dogs and horses. There are a few treasures that have no immediate relationship with the family, such as some Dutch paintings.

120. There is no suggestion that any of the paintings or other chattels were bought for their capital appreciation. The chattels for which conditional exemption was obtained were valued by the family's advisers at over £20 million at the time of the relevant death. Their value continues to grow. The evidence of Mr Robin Duthy of Art Market Research shows that certain portraits, which account for a significant number of the Part I objects, have risen by over 150% since the date of that death; Other portraits and Italian Old Masters have increased by over 60%.

121. What has motivated Owner A's ancestors and now himself to keep the collection together at A House is not easy for an outsider to understand. It is evidently a constant and burdensome commitment. The cost of security and insurance is large. The pictures produce no income because A House is not open to the public. Owner A said "they are very beautiful" and "are part of the house in the sense that they are part of the decorative scheme of the house". They were inherited by him and have been in the family for 250-450 years. He said he saw his role as looking after them and handing them on to the next generation. Dr Mandler (to whom I refer in more detail in paragraph 149 below) used the expression "filial piety", seeing these things "as part of the family heritage". Now, Dr Mandler said, there is "more likely to be a genuine aesthetic appreciation of the ensemble, of the way in which a specific object or group of objects fits into a collection which in turn fits into a house which in turn fits into a history." With a few exceptions, the conditionally exempt paintings, the A family and A House complement each other and the interest in one ingredient alone would be small compared with the interest in the whole.

122. Evidence was given by Mr Stewart Kidd MA, MSc, a security and loss prevention consultant, and by Mr Charles Hill, an art crime investigator with experience of art crime investigations for over 15 years.

123. For obvious reasons, I say nothing about the evidence on security matters in this published version of the decision.

124. Since 1998 "by appointment" viewing visitors have ranged from one to five a year. Owner A has made loans to museums and galleries. Special interest groups have visited A House and visited the conditionally exempt chattels. In 1999, 61 individuals visited in such groups: in 2000 the number was 129: in 2001 it was 153 and in 2002 it was 215. In each of these cases the group concerned made an advance appointment to visit A House and members of Owner A's staff accompanied the tour.

125. Following the death of the previous owner, Owner A examined the IHT options open to him as the heir. So far as the house was concerned he and his wife saw it as a private family home for their large family and living-in staff. These made use of "pretty well the entire house most of the time". He did not seek to obtain conditional exemption for the house. He was therefore required to pay IHT on its value. Instead he claimed conditional exemption for the chattels, including the Part I objects, giving an undertaking to allow by appointment viewing and the required publicity. He would not, he said, have applied for conditional exemption had he known that the Inland Revenue would now seek to impose "open access as an additional condition of conditional exemption". Within two weeks of Owner A's obtaining conditional exemption the Government announced the open access proposals following the 1998 budget speech.

126. The tour that I took of A House started at the main entrance opening into a large hall. For reasons of security, I shall not (in this published version of the decision) describe the location of the chattels within A House, but I record that I saw all of the rooms containing the Part I objects and noted their situation within those rooms.

127. My impressions of A House are that it is a family house. There are no facilities for the disabled. Were the public to be admitted and the numerous stealable objects (other than the Part I objects) to be placed out of sight or in some other way concealed, an extensive removal task would have to be undertaken. There is no obvious place to stow them away. Paintings could be removed and transferred to more accessible places. But this would be at the risk of damage to the paintings on panels and to all the frames of the portraits. The great townscapes in the long hall could be moved, but this would leave unsightly marks. Because the children occupy the only downstairs rooms where there are no Part I objects, it would not be practicable to lock the stealable objects away in those rooms on open days. All in all, the reorganization

of the household furnishings and paintings to meet the open access proposals would, on each occasion, take a great deal of time.

Owner B : the general picture

128. B House is the home of Owner B, his wife and children.

129. Aside from the conditionally exempt chattels, including Part I objects, there are numerous items, great and small, of significant value. These are found throughout B House. There are many exempt carpets and smaller rugs; all are delicate. There are many tapestries. Of the Part I objects that are paintings, many are portraits of ancestors. How the others of this valuable collection came into the family was not fully explained. I assume they were inherited from related families or purchased. A painting had been bought in Paris by one of Owner B's forebears, as had the sculptures

130. All the Part I objects were, I infer, acquired either to commemorate the family or, generations back, to decorate the house. Certainly none appears to have been bought for its potential as an investment. Owner B explained his reasons for wanting to hold on to the collection. They had all, he said, been in his family for many generations; they have a significance in terms of family history and their art historical value. Many of them, he said, are very beautiful. His father and grandfather had, he said, been through more difficult times but they had managed to hold on to most of the collection and he felt a certain duty to do the same.

131. Owner B explained the background to his claim for conditional exemption in relation to B House and the B estate. When Owner B inherited them, part of the estate was already designated as land of outstanding scenic and historic interests. Owner B had been happy to accept the public access requirements (regarding that part of the estate) and conditional exemption had been obtained. The Inland Revenue accepted that B House, the family house, would qualify for conditional exemption so long as a public access undertaking in return was given by the owner. The Inland Revenue was informed that, because of the inconvenience and disturbance to the family, no undertaking to open the house, even on a by appointment viewing basis for 28 days a year would be given. Correspondence and negotiations with the Treasury ensued and finally in May 1995 the claim for conditional exemption of IHT on B House was withdrawn. Owner B became immediately liable to pay the tax. He felt this was worth paying in order to maintain his family's privacy.

132. So far as the chattels were concerned the option put to Owner B by the Inland Revenue was set out in Form 700A. He was prepared to accept the conditions, particularly those relating to by appointment viewing, understanding that his name and the address of the chattels would not be disclosed on the V&A list. Owner B had been advised that the conditionally exempt chattels had a combined value of over £62

million at the date of the relevant death in the early 1990; the IHT conditionally exempt was therefore some £25 million.

133. Owner B explained that he had, in the past, received threatening letters. Owner B said that he took these threats seriously and was concerned that, were B House to be open to the public, there would be an increased risk to himself and his family, to the house and to its contents. His concerns had been confirmed by a crime reduction officer with the County Police Force who had written a letter endorsing these.

134. For obvious reasons, I say nothing about the evidence on security matters in this published version of the decision.

135. The collection of sculpture is kept in a separate building.

136. Among the conditionally exempt chattels, though not Part I objects, is a collection of smaller objects. Every room save one is used by the family or has a direct household function. There are private possessions and photographs everywhere. Most of the portraits were in fine frames which could easily be damaged if not moved with professional care. Many of the carpets and rugs were showing signs of wear. Some of the rooms are small.

136. Since 1995 when conditional exemption was given, two to three requests for by appointment viewing have been received through Owner B's agent. Owner B has shown individuals and special interest groups around some of the rooms in the house on pre-arranged tours. On one occasion in 2000, 42 members of a local special interest group and 21 members of another special interest group visited on the same day.

137. Following the 1998 Act changes Owner B, through his solicitor, conducted negotiations with the Inland Revenue over proposals to change the existing undertakings. Owner B's objections to varying the existing undertakings were expressed by him in evidence. He said that at the time he had applied for exemption in 1991 there had been no suggestion that a different agreement could be forced on him. Had there been any suggestion that open access to his home would be required at a later date, he said that he would have considered conditional exemption for the chattels in a different light and would probably have viewed it in the same way as he had in considering exemption of B House itself. He would have considered selling certain of the chattels to pay the bulk of the tax on the rest of the chattels.

138. Owner B stressed that he was concerned about the personal security of his wife and children. B House had always been a family house and had never been open to the public. He added that recent publicised thefts from open houses had increased his concerns as to the personal security of his family. He observed that, whenever he

had shown individuals and special interest groups around the family rooms on prearranged tours, all the visitors had been identified either to him or had been vouched for by the organiser of the tours. Implementation of the proposals on the other hand would, in his view, necessitate a complete review and upgrade of security measures in order to make the house suitable for open access. He personally was concerned that the adoption of the open access proposals would increase the security risk. He understood that the extra expense involved in ensuring that the correct insurance was in place was likely to be significant. Under the by appointment viewing arrangements access was provided via his nominated agent; Owner B saw this as a real safeguard against criminally intentioned members of the public. In this connection he pointed out that he had not produced any publicity material in respect of either the house or the chattels.

139. Owner B was concerned that wear and tear to fittings and soft furnishings would be caused as the result of open access. He mentioned that among the exempt chattels at B House (although not among the Part 1 objects) were 14 exempt runners or carpets and many other items of furniture which could be subjected to wear and tear. He confirmed that there were no normal visitor facilities, such as toilets. Furthermore, as a private house, the requirements as to access for the disabled were limited. If access to the public were extended as envisaged by the Inland Revenue's open access proposals, disability access requirements would, he feared, increase as the result of regulations made under the Disability Discrimination Act 1995.

140. Owner B's wife endorsed Owner B's concerns particularly those relating to the security of the family and the house.

Is it just and reasonable in all the circumstances that the Proposals should take effect as regards each owner?

141 The Inland Revenue's case is that the aim of public access has not been and is not being served by the current arrangements for by-appointment access and loans on request. The evidence shows that little use is made of the by-appointment access arrangements as regards either A House or B House. That the Treasury has been at fault in not promoting and funding the by-appointment access arrangements is beside the point, because by 1998 Parliament plainly did not consider these arrangements to be satisfactory. I have already indicated that I agree that the evident purpose of Parliament was to introduce open access arrangements to chattels that enjoyed conditional exemption as the result of both new undertakings and of existing undertakings (such as those at A House and those at B House). Parliament's intention is a consideration that must, I think, be taken into account and given due weight in determining whether it is just and reasonable in all the circumstances to direct that the Proposals are to take effect.

142. In this connection I agree that the by-appointment viewing system presents hurdles in the way of many individuals wanting to inspect the conditionally exempt chattels. An appointment must be made in advance and, unless the individual is quite specific about his interest, he might find it difficult and embarrassing to explain the fact that he just wanted to see everything of artistic interest. Better publicity for the by appointment viewing system may debatably result in an increase in by appointment viewers; but it will not remove those specific impediments. I heard evidence from Dr Peter Mandler, Reader in Modern History and Fellow of Gonville and Caius College, Cambridge. One of his principal spheres of expertise is the history of country house appreciation and visiting over the last 200 years. His evidence, which I accept, is that more individuals can be expected to see conditionally exempt objects through open access than through the by-appointment viewing system, simply because open access on set open days is what the country house visiting public expect and having to make an appointment in advance can be a deterrent.

143. The Inland Revenue have suggested that increased publicity for the current by-appointment viewing arrangements would not be likely to achieve a sufficiently greater take up. There has, they say, been a 15-fold increase since 1998 in visits to the Inland Revenue heritage website, but no corresponding evidence of any change in the numbers of people making applications to see exempt objects. I refer to paragraph 64 above which sets out the Owners' response and for the reasons given in that paragraph I agree with the Owners that no reliable conclusions can be drawn. Nonetheless I think that the improved publicity for by-appointment viewing arrangements must be given a chance to prove itself. It is a new initiative and I would expect the reasonably interested members of the public to make more and more use of it as time goes by. It has taken the pressure off the need too officiously to enforce the open access regime.

144. I agree with the Inland Revenue that the special interest tours of A House and B House that have taken place have brought in only a relatively small number of viewers. However, whether the conditionally exempt chattels would be seen by more viewers through open access arrangements, I cannot tell on the evidence to date. A fair conclusion, however, is that special-interest tours will be more comprehensive and properly and informatively guided and can be expected to provide a more rewarding and educative experience than open-access viewing could ever be. The evident willingness of both Owners to facilitate special-interest tours is, however, a factor in their favour that I have taken into account when assessing the reasonableness of the variations contained in the Proposals.

Disability Discrimination Act considerations

145. What consideration should be given to the implications to the Owners of the Disability Discrimination Act 1995 ("the DDA 1995") and other legislation in determining whether it is just and reasonable that the proposals should take effect?

146. The Inland Revenue say that the demands of the DDA 1995 are equally applicable whether access is given under the by-appointment access arrangements or under the open access arrangements. Both classes of visitors are, they say, "members of the public". The Owners disagree and argue that only the latter are members of the public in the relevant sense; thus they will be worse off if the proposals are implemented and they may have to install ramps and other means of wheelchair access as well as disabled toilet facilities. I am not able to decide this issue. The matter could go either way if litigated. My reaction is that open access would expose the Owners to a much higher risk of sanctions under the DDA 1995 than would by-appointment access. They would be bound to admit a potentially much larger numbers of visitors than come under the by-appointment viewing system. The more the visitors the more likely the complaints about failings to provide access facilities. I share the opinion of Mr Knox, head curator of the National Trust, who said of the obligations under the DDA 1995 that they are not just a developing area, they are "an industry". He went on to say:

> "I think you just have to look across the Atlantic to America where a lot of this legislation originated from. But also I think we are pretty certain that we will be receiving legal challenges after October 2004, where we have not made reasonable provision and so we are doing what we can."

147. While I appreciate that the DDA 1995 would only require the Owners to take such steps as are reasonable to make adjustments in relation to the premises to overcome barriers to access, we are into uncharted waters or a "grey area" as Mr Kidd, the security and loss prevention consultant, described it. The Owners cannot proceed with confidence one way or the other. If they are perceived to be failing to provide access for the disabled they risk being named and shamed by disability rights groups if not actually sued. I think there are cost implications to the owners here, though not necessarily vast sums of money, in making the properties accessible.

Other costs of preparing the houses for open access

148. The fragile balustrade to the principal staircase at A House is a safety hazard. It could be dealt with by roping off a foot-wide section of the staircase and upper balustrade; alternatively the smaller staircase in a different part of the house could be used.

149. Mr W M Clegg FRICS, an expert witness with long experience of managing stately homes and their contents, said that the cost of providing chrome barrier posts and rope where necessary throughout the two houses could be £47,000 at A House

and £36,000 at B House. The Inland Revenue dispute the need for chrome posts and say that wooden ones would do. In any event they say that the figures put forward by Mr Clegg are excessive. Although the figures seem high to me, I recognize that the costs will mount up and these will include the price of druggets to protect the flimsy carpets in both houses and the costs of conforming with the requirements of the DDA 1995. Clearly the possibility of these sorts of expenditure has to be borne in mind when assessing the reasonableness of the Proposals. This expenditure will include the cost of providing labour on a yearly basis (estimated by Mr Clegg as £12,540 at A House and £6,000 at B House).

Will open access call for additional insurance costs?

150. My conclusion on the evidence is that the insurance costs will not significantly increase as a result of the introduction of open access; but this will be at the expense of additional security precautions required by the insurers. There should therefore be indirect costs implications to take into account here.

Will more security staff be needed as the result of open access?

151. Both houses have security staff now. I am not persuaded that open access will require further specialized security staff to be employed though, as noted above, costs of labour in providing for and enabling open access will be involved.

Will the Proposals, if implemented, expose the Owners and their families to additional security risks?

152. Mr Hill, from his experience in the area of art theft, made a number of points in this connection. He said that we can discount completely the existence of collectors procuring thefts of specific works of art and that the problem of art crime is not as great as is popularly perceived. He admitted, however, that there has been an increase in frequency over the last twenty years. He ascribed art theft in Great Britain to the activities of a handful of Irish traveller families whose operations are divided geographically. It was his view that the activities of these families could be dramatically reduced by one successful round of prosecutions. The police did not appear to him to have been dealing effectively with the problem but, he said, there is a current initiative, prompted by the highly publicized theft at Waddesdon Manor of gold boxes etc. to combat these activities. He was comfortable that while these families are violent towards each other, they are not generally violent to members of the public although they do threaten violence. It was his opinion that were they to target the houses of either Owner A or Owner B, they would leave their wives and children alone because this was part of their "code". Mr Hill admitted that there was a quite different risk presented by petty criminals and that A House might be at greater risk than B House.

153. I recognize, however, that the Owners' apprehension of insecurity surrounding the open access proposals will not go away. I am aware of Mr Hill's opinion that the typical gang of art thieves will leave the Owner's wives and children alone. Nonetheless the owner, whose dealings with the Inland Revenue on conditional exemption involved his paying IHT in order to keep the house for his family to the exclusion of all outsiders other than those coming under by-appointment viewing arrangements, is I think entitled to have his apprehensions recognized. That is the case with both Owners A and B. Both have assumed the heavy family responsibility of looking after the family collection. Seen in this light, I think the Proposals fail to recognize the already burdensome position of the Owners and the security implications tend to the unreasonable side of the equation.

154. Regarding the enhanced publicity requirement the Inland Revenue argue that in reality nothing will have changed as a result of the implementation of the proposals. Relevant information has been on the Inland Revenue's website since at least 1998. Using this the determined thief , armed with back numbers Country Life and/or access to the London Library, should find it a relatively straightforward exercise to obtain information on many of the important objects. Indeed, even in the absence of that printed material, it is possible, using the existing Inland Revenue website and typing in the names "A" or "B" to find a list of all the exempted items at A House and B House.

155. It seems to me that the enhanced publicity requirements entailed in the Proposals will inevitably make it easier for the less sophisticated thief. The desired information is all there on a sheet of paper which can be obtained on demand. This is bound to leave the Owner with a reasonable apprehension for the security of his chattels and, possibly, for the safety of his family.

156. Will anything change in terms of security if the open access proposals are implemented? As things are there is no sure way of checking the credentials of a person coming to the particular house under the by appointment viewing arrangement or even as a member of a special-interest group. But the opportunity of checking a possible visitor's credentials under the existing arrangements does provide the Owner with a measure of protection. The Inland Revenue concede that the open access arrangement, which will not afford the opportunity, will increase the current risk of theft.

157. I regard it as self-evident that open access if implemented would expose both owners to a greater risk of theft, both opportunistic and planned. Both houses are full of stealable things. The Part I objects are, I would have thought, low in the priorities of the determined burglar. The multitudes of small non-exempt objects, of items of furnishings and of rugs, cannot in practice be locked away or removed from sight and the open access visit is an obvious opportunity for the observant criminal to reconnoitre.

158. But, say the Inland Revenue, both houses already have effective security systems. The security staff are good. They have proper alarm systems. They could clear the rooms of portable objects on open access days. They could ensure there was a back-marker to keep an eye on every guided tour. Take the National Trust for example. According to Mr Knox, one guide is generally used for groups of up to ten and two guides for groups of 15-20. All the visitors could be made to assemble at special places in advance, and both A House and B House had suitable venues. I agree that those are all sensible precautions. Nonetheless, for reasons I have already given, I do not think it is practicable or even reasonable to require owners such as Owner A and Owner B, who have paid the inheritance tax on the values of their houses and so obtained exclusive possession of their homes without any public access requirements (subject to by-appointment viewing undertakings), to have to carry out a lengthy clearance and removal operation before each open day. It is too much reasonably to expect of them.

159. To summarize at this stage, I am satisfied that the Proposals if implemented will expose the Owners, their families and their households to additional security risks. These may not be as acute as the Owners and their wives fear. Nonetheless their reasonable apprehensions must be taken into account in assessing the reasonableness of the proposals. I am also satisfied that implementation of the Proposals will entail a greater likelihood of theft and collateral damage of the Owners' possessions generally.

The obligation to provide tours on open access days

160. Referring to the requirement to provide four tours a day, the Owners observed that this could be onerous and place heavy demands on the guides (who could well be themselves) and others involved in marshalling visitors and watching them. If the tours of the two houses that I made are anything to go by, the whole procedure for each could take at least two hours from initial assembly to departure. I agree with the Owners on this point. It is a significant burden. Moreover it is unthinkable that the Owners would want otherwise than to show off the paintings to best advantage. They would need to have a properly trained team of guides. The whole tour procedure would require careful and sensitive supervision and cannot be left to, for example, security guards.

What weight should be placed on the impact of the Proposal, if implemented, on each Owner's family life and enjoyment of his house?

161. Every open access proposal will have a different impact on the family life of the occupant. All depends on the type and the scale of the chattels to which the

proposal relates. For example, had the present proposal directed at Owner B related to the smaller objects and the sculptures, the impact might have been slight and arguably reasonable. The smaller objects could have been exhibited in a safe room either in B House or elsewhere. Admittedly, a view of the sculptures would require the visitors to enter the grounds. And I doubt if the public's demand for access would be great in any of those cases. The open access requirements would, in all probability, be reasonable. They would scarcely impact on the arrangements previously made by the Owner in question to meet his IHT obligations. Owners, such as Owner A and Owner B who had paid the full IHT on the value of the house so as to secure it exclusively for the family (subject only to the requirements of by-appointment viewing), will be left substantially undisturbed by the open access proposals.

162. In both the present circumstances, however, open access to the paintings comprising the Part I objects require the visitor to enter most of the families' living rooms and, in some cases, the family bedrooms. Both houses are relatively large. But both are wholly and exclusively family houses. Many of the conditionally exempt portraits and other paintings have become almost part of the fabric of the two houses. They complement, decorate and characterize large reception and small domestic rooms alike. The families, adults and children alike, live their daily lives in all those rooms.

163. The Inland Revenue accept that some inconvenience and intrusion into the lives of the Owners and their families is inevitable. To ameliorate this, the Inland Revenue suggest that the open access days might be organized to fall during family holidays, or the children might be kept out of the way for their own safety (and, it was observed, the younger ones have carers anyway); alternatively a special gallery might be built to accommodate all or most of the Part I objects.

164. Both owners said they would be reluctant to be away when tours took place. The Inland Revenue suggested that in time both owners will get use to the tours and not feel that they needed to be around. Owner A said that the month of August, when they and the staff took their holidays, was the time for maintenance and rewiring at A House. The Inland Revenue pointed out that the rewiring project should be complete in two or three years time and it was hard to see why this should preclude tours. Moreover the staff holidays could be organized to cope with the open access days. Generally, the Inland Revenue said, the proposed open access days are relatively low, being 15 for Owner A and 10 for Owner B until 2012 when it becomes 20. The response of the Owners was that, even so, the obligation to plan their absences for the following year by October of the previous year is an unreasonable requirement.

165. The impact of the proposals on the family lives of the owners, goes, I think, to both the reasonableness and the justness of the matter. Both owners took decisions to pay IHT on the values of the houses while granting by-appointment access to their conditionally exempt chattels. They could and almost certainly would have taken

different decisions had they been aware that the 1998 Act changes were coming. They are therefore in a less advantageous position than owners who have had the opportunity to decide whether to go for conditional exemption after the Act has come into force. They might, for example, have decided to pay IHT on the paintings at their then values and so preserve their privacy completely; they might have paid IHT on selected paintings while claiming conditional exemption on others to be kept in rooms where public intrusion mattered less. They might have chosen to take conditional exemption for the whole house, accepting the mandatory open days; neither owner indicated that he would have taken that last option, but in both cases they have no opportunity of retrieving the inheritance tax that they have paid on the value of their homes even though under the Proposals they will have to give open access to their houses for 15 or 20 days. My conclusion at this stage is that there is a sufficient element of injustice in the proposals to make this a significant element in the "just and reasonable" equation. The injustice would, of course, be ameliorated were the variations contained in the Proposals to be directed at the smaller and more easily moveable chattels or to the chattels that are already outside the Owners' houses (such as the sculptures).

166. Justice apart, the Proposals are onerous and intrusive. The time required to prepare the house for open access viewing, to remove and store away vulnerable chattels on the viewing route and to lay out druggets and roped barriers will, I expect, subtract from the days when the house is suitable for normal family life. Overall, the Proposals will involve a real disruption to the lives of the families.

Does the museum/gallery option alter the conclusion on the justice and reasonableness of the Proposals?

167. The owners point out that under the Proposals they will be required to provide open access on a specified number of days each year unless they can arrange to lend every one of their Part I objects to a museum, gallery or other exhibition for at least three months every three years. The relevance of this is that unless Owner A can arrange to lend every one of the 49 Part I objects and Owner B to lend the 51 Part I objects to a museum, gallery or other exhibitor, there will be intrusion and risk of much the same nature as if Option 1 were adopted.

168. Is it reasonable to infer that public museums and galleries can provide sufficient exhibition space to enable Owners A or B (or both) to make the museums and galleries option a realistic alternative to open access? If so, the Owners can go for that option and secure for themselves and their families the degree of privacy now available to them under their existing undertakings.

169. The Inland Revenue accept that there are likely to be difficulties in finding alternative display locations for all of the Part I objects in the immediate future. One large painting at B House would be difficult to move and difficult to place in a public

gallery. The paintings on wooden panel at A House and at B House could be damaged through movement to a new location by reason of their susceptibility to climate changes. But, argue the Inland Revenue, purpose-built homes for these could always be constructed close to their present locations. I agree that in theory this could be achieved. Without evidence to the contrary, I can only assume that the building and maintenance costs would be great, particularly if all the Part I objects were to be placed there and exhibited over one three month period every three years. The alternative is a smaller purpose-built museum with a running display rotating all the Part I objects over the three year period. This alternative would, I expect, be expensive; there would be a continuous change-over of paintings from house to museum and back with all the attendant costs and risks of damages. The only practical alternative, therefore, is to make use of the facilities afforded by public galleries.

170. That galleries would welcome some of the paintings with all their own exhibitions was not in doubt. A museum and gallery near A House expressed great enthusiasm about the possibility of exhibiting townscapes at present at A House. Moreover the curator had given thought to issues such as safe transport, invigilation, security and insurance of those and other paintings at A House that might be available for loan; and he considered that they could be contextualized by information given on their historical and social backgrounds in ways that would allow many members of the public to appreciate them. The museums officer for the county where B House is situated expressed interest in various paintings and portraits. The county museums and galleries would, he said, be interested in loans of up to 12 paintings for two to five years; with that time frame the large investment to be made in security, transport and hanging would be worthwhile. The museum's officer had in mind a particular venue for exhibiting the B House paintings. But a sizeable amount of lottery funding would be required for that venue, to be upgraded to the required standards.

171. Recognizing that evidence of the possibilities of publicly exhibiting any significant number of the Part I objects of both owners was slight, the Inland Revenue observed that neither owner had done any serious research for himself. What is more, stress the Inland Revenue, the educational value of making the paintings available to curators for focussed exhibitions demonstrated the public benefit in the museums and galleries option.

172. The Owners responded that the Museums/Galleries option was not an option in any real sense. They would still be exposed to intrusion from open access visitors who came to see the many paintings for which museum and gallery spaces were not available; and their own enjoyment of the paintings placed at the museum and galleries would be impaired. The effect of lending the paintings most wanted by museums and galleries would leave the residue of the collections impaired and of less value to visitors, whether viewing by appointment or coming on open access days. Moreover, it was not in issue that the removal and replacement of paintings could be

risky and expensive. Above all, the current viewing facilities provided by museums and galleries were in such short supply and the future was so uncertain, being dependent on lottery and local authority funding, as to make the museums and galleries option something that could not realistically be considered as an alternative to open access.

173. The museums and galleries option can and may in time become a realistic alternative to open access. Once central and local governments respond to the requirements for secure and suitable exhibition venues, such that the Owners can reasonably expect to find public exhibition spaces for all their conditionally exempted chattels (or at least a sufficiently large number of them to cut down on the serious intrusion that open access would mean), the museums and galleries option will be something that can reasonably be taken into account by owners. At present, however, the public facilities are quite inadequate for this purpose. The local museums and galleries curator had been enthusiastic about taking a few great paintings from A House, but had had to back-pedal once the costs implications were realized. Owner B had the opportunity to lend sculpture to a venue in the county. That had had to be abandoned when the cost implications were revealed. Overall, if the museums and galleries option is to be made to work, it will require close cooperation between owners and public authorities. To ensure that all or most of the Part I objects are publicly displayed in accordance with the rules governing the museums and galleries option, the Owners will have to research the demand with care and continuously manage the lending arrangements.

174. My view is that the museum/gallery option as contained in the Proposals cannot be regarded as a reasonable condition for continued conditional exemption.

Conclusion

175. I now come to the exercise of balancing the competing interests of the Owners on the one hand and the public on the other. Does the public interest in having the right to view the Part I objects on open access days and in having freely available the published lists of such objects and their locations outweigh the impact that these factors will have on the Owners? The decision necessarily requires me to weigh up complex considerations based on unproved assertions presented by both sides. I am however satisfied that it would not be just and reasonable in all the circumstances to require that the Proposals should be put into effect.

176. The taxpaying member of the public on one side of the balance has an interest in seeing that the benefit to the Owner of deferral of IHT is matched by the benefit of the right of members of the public like himself to see the particular object. As a member of the public he can always obtain access on a by-appointment viewing basis. He is at present handicapped by the lack of publicity given to this opportunity. He may be put off it by the procedure for making an appointment and venturing to the

private house where the object is kept. Were the open access opportunity available to him he would, I think, be more inclined to take it than going by-appointment. On the other side of the balance is the Owner who, before the 1998 Act, accepted the by-appointment and special exhibitions option offered by the Inland Revenue as part of the Form 700A procedure. He will have ordered his affairs on that basis and will have paid the IHT on the house where the object is kept. The museum/gallery option is of no benefit to him. The Proposal requires him to admit, without vetting, all visitors who can be accommodated on the four tours of each open access day. He has to accept the security risk to his family and his household. He has to accept the risks of theft and damage. And because of the Inland Revenue's current improvements to the publicity for by-appointment viewing, he should expect an increase in by-appointment viewers all through the year.

177. The accumulated burdens placed on the particular Owner as the result of implementation of these particular Proposals would, I think, so outweigh the benefit to the public as to make it neither just nor reasonable for me to direct that the Proposals take effect. Access to the Part I objects calls for a serious intrusion into the family lives of the Owners. The increased risks of theft and damage to the Owners' possessions occasioned by the Proposals are, I think, beyond what Parliament had in mind when empowering the inclusion of extended access requirements and publication requirements. The retroactive effect of the Proposals is such as to impose on the Owners a state of affairs that they would not have adopted had all the options been open to them when they entered into the existing undertakings. The consequence is that they may now be required to pay the IHT, if they reject or breach the varied conditions, at a possibly greater rate than that applicable when the transfers from the previous owners took place; and they will have to pay the tax on a different and possibly increased value. In the particular circumstances of Owner A and Owner B my conclusion overall is that the disadvantages that would be imposed on them were the Proposals to be enforced are disproportionate to the aim of achieving greater public access to the Part I objects.

178. For those reasons I do not make directions requiring that the variations contained in the Proposals be made.

179. I should like, in conclusion, to pay tribute to the careful and painstaking work carried out by Mr Cushing and his team in the preparation and support of the Proposals. The whole exercise calls for sensitivity and patience and these characteristics have been fully demonstrated by their approach. It will be apparent that, because the Act casts me in the role of decision-maker rather than appellate judge, this written decision focuses more on the broader factors that go into the balancing exercise than on the massive array of details that emerged in the course of evidence for both sides. The same goes for the extensive arguments and authorities (referred to above or listed below) on the legal principles that were cited to me. The full hearing into the matter has enabled me to see the whole landscape. That was an

opportunity not open to the Inland Revenue; the result is that I have had more facts and more considerations available to me than could have been available to the Inland Revenue.

STEPHEN OLIVER QC
SPECIAL COMMISSIONER
Release Date: 27 October 2004

SC 3105/2003
SC 3106/2003

APPENDIX

Authorities cited to in argument and not referred to in Decision:

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