



TYNWALD COURT OFFICIAL REPORT

**RECORTYS OIKOIL
BING VEAYN TINVAAL**

PROCEEDINGS DAALTYN

HANSARD

SELECT COMMITTEE OF TYNWALD ON THE KIRK MICHAEL SCHOOL LAND EXCHANGE AGREEMENT

**BING VEAYN TINVAAL MYCHIONE
COARDAIL COONREY THALLOOIN SCOILL SKYLLEY MAAYL**

Douglas, Monday, 2nd December 2013

PP179/13

KMLX, No. 4

*All published Official Reports can be found on the Tynwald website
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*Published by the Office of the Clerk of Tynwald, Legislative Buildings,
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Members Present:

Chairman: Hon. S C Rodan, SHK
Mrs B J Cannell, MHK
Mr J R Turner, MLC

Clerk:
Mr J D C King

Legal Adviser:
Mr R I S Phillips, Clerk of Tynwald

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Select Committee of Tynwald on the Kirk Michael School Land Exchange Agreement

*The Committee sat in public at 2.32 p.m.
in the Legislative Council Chamber,
Legislative Buildings, Douglas*

[MR SPEAKER *in the Chair*]

Procedural

The Chairman (Hon. S C Rodan): Good afternoon everyone and can I welcome you to this sitting of this Select Committee on the Kirk Michael School Land Exchange Agreement.

I am Steve Rodan, Chairman of the Committee. Other Members are Mrs Cannell and Mr Turner, the Clerk to the Committee, Mr King, and our legal adviser, Mr Phillips.

5 Would everyone please turn mobile phones off – not just silent but actually off? When we are speaking I will make sure we do not speak across each other because it affects the *Hansard* recording.

10 Today, we welcome Heritage Homes to give evidence in our second inquiry and can I thank you, Mr Nugent and Mr Kirkpatrick, on behalf of Heritage Homes, for coming to meet the Committee and answering our questions.

Remit of the Committee

The Chairman: This Committee has been underway for quite some time. For the benefit of the public and *Hansard*, I will briefly summarise the history. The Committee was established by a resolution, of 22nd February 2012:

15 ‘That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to investigate the Kirk Michael School Land Exchange Agreement between Heritage Homes, Pinecrest Investments Ltd and the Department of Education and Children; whether by January 2011 access to the land had been secured, as was stated at that time by the Hon.
20 Member for Ayre; the manner in which the negotiations were conducted; and the value for money achieved; and to report with recommendations by May 2012.’

On Thursday, 8th November 2012, we published our Report. On Sunday, 18th November 2012, Mr Charles Lewin sent an e-mail to Mr Alf Cannan MHK, querying the conclusions of our Report. On Monday, 19th November 2012, Mr Cannan circulated Mr Lewin’s e-mail to all
25 Tynwald Members. On Tuesday, 20th November, the Report was debated. Mr Lewin’s e-mail was referred to extensively during the debate. Our Report was not accepted. Instead, it was resolved:

30 ‘That the Report of the Select Committee on the Kirk Michael School Land Exchange Agreement [PP No 0122/12] be not received and: (1) in the light of new evidence received in relation to rights over access routes, that the Committee review all matters pertaining to that evidence; (2) that the Committee seek clarification by way of public hearing of the matters raised from Heritage Homes and associated parties.’

35 So we have been effectively instructed by Tynwald to undertake a review of our original investigation, but taking into account what Mr Lewin has to tell us. Mr Lewin did send us some further e-mails and also has had the opportunity to give oral evidence in public in this particular setting.

Heritage Homes has already made a written submission to us, for which we are grateful, in response to what Mr Lewin has written and said. So today, gentlemen, we will be asking some
40 questions based on that written submission.

**EVIDENCE OF
Mr S Nugent and Mr G Kirkpatrick, Heritage Homes**

Q292. The Chairman: If I could begin. We are meeting, of course, in public and this matter will be recorded and published as part of our Report.

Can I first of all begin by asking what was Mr Lewin's role in Heritage Homes, Mr Nugent? Why was he engaged? When you have answered that, I will go on to put some points to you
45 about what he has to say by way of allegation of dishonesty. But first of all, Mr Lewin, what exactly was his role?

Mr Nugent: If you do not mind, Chairman and Hon. Members, if I could maybe lay a bit of background; maybe just a short statement about the whole affair?

50 Dandara Heritage Homes have been successful builders on this Island for nearly 25 years now and in that time we have continued to succeed where many others have failed or faded away. The only secret to our success is the endless hard work and skill of our people and nothing else. We directly employ hundreds of highly professional and dedicated men and women, and hundreds more indirectly through our many suppliers and professional service providers. We
55 invest huge sums of money in the Isle of Man and nobody has done more in recent times for the regeneration of the Island's capital.

Our job is to make things happen on land designated by the Court of Tynwald as suitable for development. We do not pick the land. Our Government decides, through a long process, with public enquiries and many safeguards, what land goes forward for development.

60 This land at Kirk Michael is one such piece. It is marked in pink on the Government's development plans and it is there for anyone and everyone to try their hand at the business of property development. It is an essential process. Without new homes and places of work, this Island cannot continue to drive.

We have been working very hard to make a development opportunity work on this land at
65 Kirk Michael for over 12 years, in competition with other developers. Instead of making progress on that perfectly legal and proper aspiration, we find ourselves here today for two reasons.

The first of those is to once again pick over the bones of a deal, done openly and honestly, for the benefit of all the parties concerned. For some to ascertain that a different deal could have been done, or should have been done, at the time, is an assertion that can only have been made
70 in ignorance of the 10 years of hard work and perseverance that it took to get to that point.

None of the parties to the deal had any rights or privileges giving them priority over the other. It came down to an agreement between two willing landowners: the Government and the Lewis family; both trying to secure an acceptable outcome to their benefit and with Heritage Homes as the facilitator. It was our job to turn the written agreement into new school facilities
75 and new homes, to generate the income by which everyone could be paid.

The second reason we are here is to answer the malicious accusations of Mr Charles Lewin – also known as Buster – who must be sitting in his cell right now, laughing his head off at the mischief he is causing.

80 In conjunction with this Committee, at least one Member of Tynwald called it right on the night of the Tynwald debate, namely Mr Eddie Lowey, when he recognised Buster's tactics for just what they were. I cannot blame the rest of that Hon. Chamber for being, if you like, taken in by Buster's lies on the night. We, ourselves, were victims to his deceit for far too long.

Maybe to answer your question directly, Mr Lewin came to us through the intercession of a third party, having been fired from Braddan Commissioners and needing a job for a few months
85 until he could get himself sorted out. He was given a position as an administrative clerk on a basic fixed salary and, believe it or not, Mr Chairman, Mr Lewin was not on millions or indeed the promise of millions, as he stated, falsely, to this inquiry.

I can safely say, looking back during that time, that he lied all of the time he was with us. Some of those lies were harmless, like the one where he tried to convince our sales staff that he
90 had four daughters, one of whom had won the Miss France competition.

Other lies, to our great cost, were not harmless. He was suspended, eventually, for gross misconduct when we discovered a massive deceit he was perpetrating on a bogus property deal, which had cost the company thousands of pounds and a great deal of time and effort.

We knew when we confronted him that he would not go quietly and would be a thorn in our side for a long time to come. Two and a half years later, we are still counting the cost. He has
95 hurt and damaged everyone he has come in to contact with, not least himself: the people who have taken him in, the people who have befriended him or employed him; and he has absolutely no concern for the harm he causes – rather, he relishes in it.

I mean is he bad or are there more issues there that should be addressed? I would say in my own unqualified opinion that 'an unprincipled narcissist' describes him perfectly; but I leave this
100 to this honourable inquiry to come to their own conclusions.

Mr Lewin has stated, under the protection of this inquiry, that Heritage Homes, and I personally, withheld knowledge of the Naylor's access rights over the Lhergy Vreck laneway from the Department. This is absolutely not true.
105

The Chairman: Mr Nugent, I want to thank you very much thus far –

Mr Nugent: I am very nearly finished.

110 **Q293. The Chairman:** We shall be coming on, of course, to the specifics that you are starting to talk about. I want to go back. When was Mr Lewin employed, please?

Mr Nugent: I have it here somewhere. April 2007 and he was officially gone by April 2011.

115 **The Chairman:** You have told us that his job was an administrative clerk.

Mr Nugent: That is correct.

120 **Q294. The Chairman:** Can you tell us what he was paid?

Mr Nugent: I am not quite sure whether that is breaching his confidentiality rights that are pre-Freedom of Information or Data Protection or anything else. It was a basic salary: between £20,000 and £30,000 a year.

125 **Q295. The Chairman:** So, what would be a basic salary? I do not think there is any legal impediment to this question is there?

Mr Phillips: Your witness has already told us it is between £20,000 and £30,000. So, I do not know whether that is a satisfactory answer? There is no reason –
130

Q296. The Chairman: Right, that is fine.
He was an administrative clerk. What did that involve?

135 **Mr Nugent:** Initially, he was asked to have a look around the Island to see if there were any
little parcels of land or little opportunities that we might have missed over the years. He was at
that for a while.

Then he was asked to help out in the lettings office. That did not work out at all; we could not
let him near private individuals. He was almost like a 'gofer' then, for a while after that, until he
was dismissed.

140

Q297. The Chairman: Who was he to report to? Who was managing him?

145 **Mr Nugent:** At the lettings department, he was reporting to the Lettings Director, Andy Race,
who... in turn then it would be myself and in turn then the owner of the company, Mr Tynan.

Q298. The Chairman: So was he to report direct to Dan Tynan?

Mr Nugent: Any of the tasks he was doing were three or four levels below Dan Tynan.

150 **The Chairman:** Mr Lewin has told us that he was to report to Dan Tynan.

Mr Nugent: I know.

Q299. The Chairman: So that is not the case?

155

Mr Nugent: That is not the case.

Q300. The Chairman: No. Thank you.

160 Mr Lewin alleges that the alternative access at Lhergy Vreck was not viable and that Heritage
Homes deliberately chose not to tell the truth about this in its negotiations with the Department
of Education and Children. What comment have you to make about such an allegation of
dishonesty on the part of the company?

165 **Mr Nugent:** Okay, he stated that we withheld information from the Department, from
Government, about the Naylor's rights. It is absolutely not true.

We were aware of the rights the Naylor's had on the lane since 2001, when I first started to
discuss the possibility of a development deal with Jim Lewis for the land. Those rights are there
to be clearly seen by *anybody*, both from official inspection of the site and as set out in the title
deeds of the zoned land, available for inspection by all at the General Registry.

170 We handed a copy of those very documents to the Government's legal advisers, as part of
the disclosure and due diligence procedure for the school exchange agreement. The Department
was also in actual knowledge of the Naylor's rights before that agreement was entered into. We
concealed nothing; there was nothing to conceal.

175 **Q301. The Chairman:** The date you quoted... you mentioned 2001 –

Mr Nugent: That is correct.

180 **The Chairman:** – was the date at which the knowledge of the Naylor's rights in this matter, or
their access, was first known to the company?

Mr Nugent: Yes, when we first started to look at that piece of land. The fact that Jim Lewis's house is up a laneway with two or three properties also served by the same laneway... All of those properties have rights over the lane.

185

The Chairman: Thank you.

Mr Nugent: It is obvious.

190

The Chairman: Mrs Cannell.

Q302. Mrs Cannell: Thank you, Mr Speaker.

I would just like to take you back to the beginning of your statement. You made a reference... You said, 'We don't pick the land,' but then you went on to say that Mr Lewin was engaged to go around the Island and have a look at potential development sites that possibly you had missed or overlooked. So, in fact, you did send him out, did you not, on a mission to try and find land that was potentially for development?

195

Mr Nugent: Absolutely, but what we are talking about, as well, is brownfield possibilities – little pieces; a couple of properties that could be put together; back gardens, whatever; pieces here in town. It was something for him to do.

200

Q303. Mrs Cannell: Okay. You also said that he was introduced to the company through a third person.

205

Mr Nugent: Yes.

Q304. Mrs Cannell: Was the company looking for somebody like this at the time? I still remain a little mystified as to why you sought to engage such a character, bearing in mind that you have now said that the company are victims of his deceit.

210

Mr Nugent: Absolutely. If we had even had an inkling of his character at the time, he would never have been engaged with the company.

215

Q305. Mrs Cannell: But presumably, then, you were looking for someone to go out and try to find potential development land, were you not?

Mr Nugent: Not particularly, no.

220

Q306. Mrs Cannell: No, but I just cannot marry up the two comments. You said, 'We do not pick the land.' You went on to say, 'The land is marked in pink, open to anyone to try their hand.' Can you clarify what you mean when you say 'land that is marked in pink?'

Mr Nugent: Yes. All the Government's development plans... residentially zoned land is hatched in pink on those plans. So it is there for everybody to see – what is zoned for development; what is not zoned for development. If you want to try your hand at property development, everybody is at liberty to go out and try to buy a piece of that land and try to put it together and sort out accesses and all the other issues that relate to property development.

225

Q307. Mrs Cannell: Whilst understanding that – that you will go out and try to target and try your hand, as you put it, for land that is zoned for development – nevertheless, Mr Lewin was hired, was he not, to go out and try to find additional land that the company had overlooked?

230

235 **Mr Nugent:** Mr Lewin had a background, I think... and he was a farmer at one stage, or he
certainly had some land. He had been engaged for many years as clerk of Braddan
Commissioners. He knew a lot of people; he knew a lot of farmers. He might have been able to
find a few things or open up a couple of opportunities that we did not know about.

240 **Q308. Mrs Cannell:** Because what you have said, in fact, clarifies what Mr Lewin did, in fact,
tell the Committee in public evidence, that that was why he was engaged. So, so far, in terms of
that, he has not told us any fabrication there.

245 **Mr Nugent:** He was not initially engaged for that purpose but that is one of the jobs that he
ended up with as –

Q309. Mrs Cannell: Can I ask you, did you engage him on a full-time basis or was it just on a
consultancy basis?

250 **Mr Nugent:** No, he was on a salary.

Q310. Mrs Cannell: He was on a salary. So he was gainfully employed on a full-time basis
then?

255 **Mr Nugent:** He was.

Q311. Mrs Cannell: Yes.
Did he, in fact, out of interest, find any sites or brownfield sites that perhaps the company
had overlooked?

260 **Mr Nugent:** He did introduce one seller who was willing to sell on a piece of land that we did
know about but he approached the guy again. We had approached him a few years earlier and
he was not interested. Buster approached him again and a deal did happen.

265 **Q312. Mrs Cannell:** Did you expect him to actually go and approach individuals like this on
behalf of the company to see if a deal could be brokered?

Mr Nugent: That would happen from time to time, yes.

270 **Q313. Mrs Cannell:** Okay, so you gave him that degree of latitude then?

Mr Nugent: It was not so much a degree of latitude. He could talk to people and ask them
were they interested in selling. He was not involved in the negotiations for the land.

275 **Q314. Mrs Cannell:** He was not involved?

Mr Nugent: He could not make a decision.

Q315. Mrs Cannell: He could not make a decision because you did not authorise him?

280 **Mr Nugent:** He was not authorised to make decisions, no.

Q316. Mrs Cannell: Okay, but he would come and he would make a report?

285 **Mr Nugent:** He would report back, correct.

Q317. Mrs Cannell: Okay, right, fine.

You have said that he was paid somewhere in the region of £20,000 to £30,000 and he was engaged by the company for quite a while, wasn't he – 2007 to 2011? (**Mr Nugent:** Correct.) It was not just a six-month short period before you felt you could not (**Mr Nugent:** It wasn't.) tolerate him anymore? No.

In terms of the access – the fact that he is claiming that the access route had not been properly considered, or rather was being purposefully ignored, in terms of the rights of the Naylor's – can you add a little bit more to that, because he went into great detail in *Hansard*, in terms of 'shock, horror' by the representatives of the company... in terms of how can we best get round this and avoid any kind of confrontation with these people?

Mr Nugent: None of that was true.

Q318. Mrs Cannell: None of it?

Mr Nugent: It just never happened.

Q319. Mrs Cannell: He did make allegations that, I think it was you, yourself, (**Mr Nugent:** He did.) Mr Nugent, said this is going to cost us too much money.

Mr Nugent: That is absolutely not true. You have to remember that the Lewises were selling a piece of land that did not have an obvious access. They had their own laneway. All of the properties along Douglas Road are privately-owned and there is the school field at the corner. The Lewises wanted top price for their land, but they did not have an access and they were leaving it to others to solve the access problems.

There were considerable issues in trying to assemble an access to the site. We had been working with the school people initially. That deal fell through when Mrs Craine changed her mind. We were then trying to assemble properties along the road to try to get an access there. But, at no point, did we consider... We spent a lot of money on Westlands, we spent a lot of money with the Cassidys, we had spent a lot of money at Knock e Tholt. At no point did we consider that we were spending our money for nothing; that we could not access the site.

Mrs Cannell: Okay.

Mr Nugent: At the end of the day –

Mrs Cannell: I am happy for the moment. Thank you, Mr Speaker.

The Chairman: Thank you.
Mr Turner.

Q320. Mr Turner: Yes, thank you, Mr Speaker.

Part of my question was actually asked by Mrs Cannell and that was just to do with Mr Lewin's job in going out and securing. You have already confirmed he was not involved directly with negotiations, although he would have been involved in dealing with the landowners, in terms of the introductions. Did I – [*Inaudible*]?

Mr Nugent: Can I just say, specifically on this particular deal, he was not involved at all. He went along to a couple of the meetings and maybe two or three of the meetings with the Cassidys, because he knew Mrs Cassidy and he was facilitating opening the door to negotiations with her. They were particularly difficult negotiations as well. He was present at those because he was known to them.

As far as all of the other negotiations – with the Department, with the Lewises, with everybody else – he had absolutely no involvement whatsoever.

340

Q321. Mr Turner: But in his role of searching round the Isle of Man then, it was predominantly to discover opportunities and just form the introductions, is that right? He was not involved? Because he led us to believe he almost had this open cheque book approach to go out and secure land and it –

345

Mr Nugent: It is complete nonsense. It is complete nonsense. There is a whole land team there. There was a land team there before Buster got there and there is a land team there after he left. He was just ancillary to that for a period.

350

Q322. Mr Turner: So, he was purely investigative of (**Mr Nugent:** Yes.) potential opportunities?

There was no bonus scheme attached to any of those whatsoever?

Mr Nugent: Absolutely not.

355

Mr Turner: Thank you.

Q323. The Chairman: Thank you.

360

We will come back in a moment or two to more specific questions about the Lhergy Vreck lane and the access; but one thing I just want to establish at this stage... Mrs Cannell made reference to evidence from Mr Lewin to the Committee – it would be in early 2008, at any rate when he was employed by you – about identifying a problem with the access.

365

I think you have had the evidence – it was contained in one of the e-mails from Mr Lewin – where he says that he recalls you asking him up to his office and could see, in entering the office, that you were annoyed, which was a sign bad news was coming; and that a problem had been found on the access lane. He claims that you said, that the Naylor's had a right to pass over the road, but that the new junction was not directly following the existing roadway and was passing over a new piece of land, therefore, as the Naylor's' right was site-specific, their agreements would be required to the realignment. Mr Lewin asked, 'Do you want me to go and speak to the Naylor's?' and you said, quite emphatically, no, the word will be out that 'we don't have control of the access', and that once Lewis finds that out he will be doing a deal with Hartford. That is what Mr Lewin told us.

370

Mr Nugent: He did and all I can say is it was a complete and utter pack of lies. He invented the whole story.

375

Q324. The Chairman: A complete fabrication?

Mr Nugent: A complete and utter fabrication.

380

Q325. The Chairman: The meeting in early 2008 –

Mr Nugent: The meeting, the lot.

385

The Chairman: – being summonsed to his office, (**Mr Nugent:** Yes.) the cat being out of the bag over the access (**Mr Nugent:** Yes.) and the consequences? Because this presented as the insuperable problem that the Naylor's had an absolute veto over the access.

We will come on to the extent to which that may or may not be the case, but I just want to establish now that that meeting that he claims took place did not take place.

390 **Mr Nugent:** It did not take place.

Q326. The Chairman: Right. It would be quite helpful, just before we move on, could you supply us a copy of Mr Lewin's letter of appointment? We have talked about what his job was and to whom he may or may not have been accountable. Do you have on file his letter of
395 appointment that you could let us have at some stage?

Mr Nugent: We will have to check.

Q327. The Chairman: Thank you very much.
400 Mr Lewin alleges – this is another aspect of the alternative access – that, in 2011, when Heritage Homes was asked to produce 'irrefutable proof as to the viability of the alternative access' – I think those were Mr Teare's words – the company submitted to the Highways Division an old plan dating from 2009. Not the latest plan dating from 2010 – or should that be 2011? 2010, is what he said. How do you respond to that?

405 **Mr Nugent:** Initially when you are looking at a site, you do up a feasibility plan. That is a live document right through the whole process and revisions to that are usually denoted by letters – A, B, C, D. Sometimes, by the time we get to the end of a job you could be two or three times round the alphabet – A, A1, A2.

410 What he is referring to there is that there was an initial drawing and then there was a revised drawing. The revised drawing, as far as I believe – because I am not totally familiar with that level of detail – showed a precise drawing for the access on the laneway, and it was revision A of that particular plan. It had moved on since the first meetings and that is a perfectly feasible thing to happen. As far as I know, Bryan Hall, the consulting engineer, transport engineer,
415 initiator had done that revision to show a more precise second access in to the site.

Q328. The Chairman: Because what Mr Lewin was saying was that Heritage Homes was running with two plans. They were using one to show to the Department and the Department of Infrastructure, the Highway Authority, but you were actually working to another one.
420 You are saying there were no such things as –

Mr Nugent: Why would we do that?

The Chairman: – two separate plans?
425

Mr Nugent: What could we possibly achieve from doing that?

Q329. The Chairman: So the Department of Infrastructure, when it was asked for its approval, was given the most up-to-date plan? Not the 2009 plan? Not an old discarded plan?
430 The one that was shown – ?

Mr Nugent: Yes, but they are all the same plan –

The Chairman: It is all the same.
435

Mr Nugent: – because they are all showing the site at Kirk Michael.
We do not have a plan with a funny-shaped site at Kirk Michael and another one with a different shaped site at Kirk Michael. They are all showing the same boundaries, the same access points, the same road network, pretty much, inside. The road network will change if it is coming
440 in the laneway; the road network will change if it is coming in from the corner. But they are all the same plan.

The Chairman: Mr Turner.

445 **Q330. Mr Turner:** Yes, just to maybe clarify this a bit, I did, in the evidence session with Mr Lewin, question him a number of times about the plans he was referring to and I suggested that, one of the plans he was not comparing like with like.

I do not know whether you or Mr Kirkpatrick have had time to fully review the *Hansard*, but Mr Lewin was referring to a plan which was to show the gradient from the 30-mile-an-hour zone at Kirk Michael into the location of the alternative access; and the other plan he was referring to was specifically the junction.

450 Would it be fair to say that he was not actually comparing like with like, because the plan he was referring to as being the one you were so-called parading was actually to do with the gradient, nothing to do with the access? That is the question I kept putting to Mr Lewin. There were two different purposes and one was only indicative of the location, is what I am trying to say.

455 **Mr Nugent:** Correct. That is correct.

Q331. Mr Turner: Because the purpose of that plan was to show the gradient of fall and visibility, as opposed to the detailed plan –

Mr Nugent: To the scheme that was behind it, yes.

465 **Mr Turner:** – and it was not comparing apples with apples?

Mr Nugent: Not at all.

Q332. Mrs Cannell: Mr Speaker, if I may?

470 The two different plans, the 2009... basically, you are saying that was the emerging plan – we refer to that as the old plan – and that things were moving and then the later plan was updating the old one; but when you compare the two, there are slight differences, Mr Nugent.

475 **Mr Nugent:** There would be huge differences, I am sure, and the next version will be completely different again. These plans start out at a very basic... and they are continually updated and improved. There are meetings with the planners, we have our own internal meetings, trying to improve the scheme continuously, and when it gets to the site we find more things.

480 **Q333. Mrs Cannell:** But I am not talking about the visibility splays or anything like that; I am talking about the actual route of the alternative access – getting onto the site. The variation of it changed. The boundaries seemed to swell at one point, whereas on the earlier plan they were fairly defined. I just wonder why they were so different because I do not believe the company had done any more land transaction deals since that particular time, other than to acquire sufficient room at the point of access, if you had to use that access route in order to develop the land. That is the point I am making: that the two plans did vary greatly, in terms of where your development boundary was going to be.

490 **Mr Nugent:** I cannot see how the development boundary could change. We either owned Westlands or we did not. We had the option on the Cassidy land. All of these are fixed boundaries. The Lewis land is a fixed boundary. The school land is a fixed boundary. All of this thing is related back to Ordnance Survey maps as well, so –

495 **Q334. The Chairman:** Just to be absolutely sure... in your written evidence to answer this point, you have said that a closer examination of the plan shows, in fact, that the one submitted in March 2011 had had a revision. It was simply a revision of the earlier 2009 plan (**Mr Nugent:** Right.) and, in fact, 2009 and 2011, as dates, both appear in the same document. So, one was just an update and a revision of the other. They were not two separate plans – an earlier one that had been shown in preference. It was the same plan, in essence, is what you have informed us?

500

Mr Nugent: Yes, absolutely.

Q335. The Chairman: That is correct?

505

Mr Nugent: That is correct.

Q336. The Chairman: Okay. Thank you.

510 Mr Lewin made great play of the fact that, in 2012, when the planning inspector made reference to the alternative access, Heritage Homes challenged this by way of press release rather than by way of Petition of Doleance. Can I ask how you respond to this, because the implication is that if it had really been a serious matter it would have warranted a Petition of Doleance?

515 **Mr Nugent:** Yes, I think we have answered that quite comprehensively in writing already, but the bones of it as that it was a correction that we sought from the inspector; because what happened, I believe, at the inquiry – and I was not there myself – is that our Transport Consultant Mr Bryan Hall – probably through a bit of, dare I say it, professional arrogance – answered a specific question about a second access; and because in his world he was dealing simply with the red lined application and appeal inquiry in front of him, when he was asked was there a second access, he said there was not.

520

There was not a second access within that application. There was a second access on the laneway outside of the application but he did not clarify that; and that was seized upon at the time then as an admission by him that there was not a second viable access. We sought to correct that at the time because, if that planning inquiry had failed and we had to go into a second inquiry on the laneway thing, we did not want that as a precedent within the document.

525

That was not grounds for a Petition of Doleance. There was nothing wrong with the full inquiry or the way it was conducted or anything else. You have to have very serious grounds for a Petition of Doleance. They did not exist. We simply wanted to correct the record of the inquiry.

530 **Q337. Mrs Cannell:** Mr Speaker, if I may – but, nevertheless, going forward, you did not want to be hindered, I expect, in going forward perhaps to another planning inquiry, in terms of not having a potential viable alternative access; because at the moment, and then, that is all it was, wasn't it?

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Mr Nugent: Correct.

Q338. Mrs Cannell: Yes, potential viable alternative access.

Mr Nugent: Yes.

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Q339. Mrs Cannell: Yes.

So the idea of the press release was to clarify the position from the company's point of view, but it did not change the inspector's deliberation, did it?

545 **Mr Nugent:** We did write to the inspector, through the Department, and that letter is on the file with all the other evidence.

Q340. Mrs Cannell: But his findings still remain today, as they were then?

550 **Mr Nugent:** Absolutely. It could not be changed after the fact that we... our letter went in after we read the Report, after it had been accepted by Tynwald; but it was just to have that document there.

Q341. Mrs Cannell: Okay, so in going forward then, you say the very reason for making the press release, rather than challenging the decision or the finding of the inspector, was to try to sort of clarify the situation, that you did have a potentially viable alternative access, although it did not feature in reality because it did not form part of that planning permission at the time.

555 Do you expect then that the letter that went from the company to the inspector will be added to the findings of that particular inspector in going forward; and that, in other words, 560 what I am saying is, was the exercise fruitful for you?

Mr Nugent: We do not know yet because we have not had an application on the second access.

565 **Q342. Mrs Cannell:** So you have no idea whether or not your clarification of the point of having potential alternative access to the site has been included as, I suppose, fundamentally part of the overall thing?

Mr Nugent: It will be there in the file.

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Mrs Cannell: It will be there in the file, yes.
Thank you.

The Chairman: Thank you.
Mr Turner.

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Q343. Mr Turner: Yes, it is building up from that, Mr Chairman.

580 The second access then was for a development that was much different from the one that was before the Committee, was it not? In other words, the second access was viable but in the event of a less density development?

Mr Nugent: Yes. The Department of Infrastructure determined that the second access was viable, up to 100 houses.

585 **Q344. Mr Turner:** But the question that was put to Mr Hall was, of course, for the original development, which was higher density, and that is why you say he answered the specific question?

590 **Mr Nugent:** Yes, he would only answer questions on the land pertaining to the inquiry. He did not answer a question that he felt was outside of the inquiry. If he was being asked a question, it had to do with the inquiry in front of him, not land outside of it, and that was a pity on the day – that that happened.

Q345. Mrs Cannell: Mr Speaker, just to follow on from that and to clarify – was your consultant aware that you had potential viable alternative access before he went in to give evidence on the company's behalf?

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Mr Nugent: Well, he was the one who prepared the measurements and everything else which showed that the scheme... or that it could be accessed for 100 houses.

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Q346. Mrs Cannell: So was an enquiry made as to why he did not feel that it was pertinent to mention that at the inquiry?

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Mr Nugent: More than an enquiry made with him, yes.

Q347. Mrs Cannell: Yes, and what was his response?

Mr Nugent: He did write a letter of explanation to the Committee, or to the inquiry, clarifying his points afterwards. **(Mrs Cannell: Okay.)** It was a pity he did not do it on the day.

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Mrs Cannell: Thank you.

Q348. The Chairman: Can I ask, Mr Nugent, do you believe that the Naylor's are in a position to veto the alternative access, as set out in the pages of our Report?

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Mr Nugent: Absolutely not.

The Chairman: Thank you.

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Q349. Mrs Cannell: Can I just follow on from that, thank you, Mr Speaker? If you do not believe that they have the right or the potential right to challenge your, I suppose, inhibiting their access, have you sought legal opinion on that?

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Mr Nugent: I am not saying that they do not have the right to challenge it – not at all. But I mean, up to that point, we were trying to assemble property to gain a second access because, at that time, that the Government turned down the first proposal to go through Douglas Road corner, through the school land, we had to look at other areas where an access could be formed.

We spent a considerable amount of money and time assembling land around the laneway at Lhergy Vreck. We would not have been doing that if we thought that there was no future in it. We always felt that it was possible to get an access in there.

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We had not got to the point where we could sit down with the Naylor's yet. The plans had not been developed enough. A plan was drawn up for the purpose of the other agreement to show that it could be accessed physically, with planning permission – and we would more than likely get planning permission but then there are no certainties in planning permission. We still do not have planning permission 10 years later on what we thought was a very simple access through Douglas Road corner. But we have never sat down with the Naylor's. We have not had planning permission. There is a whole series of steps that have to be gone through before you can say with certainty, one way or the other, what the position is regarding their rights and the access.

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Q350. Mrs Cannell: But you did say the company became aware of their right of access back in 2001.

Mr Nugent: Absolutely, yes, and all of the rest of it followed on from that, in the knowledge that they, and others, had rights of access over that lane. Yes.

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Q351. Mrs Cannell: But you did meet and discuss with the others, didn't you?

Mr Nugent: No.

650 **Q352. Mrs Cannell:** You did not?

Mr Nugent: No.

655 **Q353. Mrs Cannell:** So you have not met and discussed with anybody else about the –

Mr Nugent: Apart from the Lewis family.

Q354. Mrs Cannell: Apart from the Lewis family. Okay. Was there a reason for that or were you waiting until – ?

660 **Mr Nugent:** The access and the drawings and everything else had not got to a point where we could sit down in front of them and show them something.

Q355. Mrs Cannell: So, how would you propose to deal with their concern in going forward?

665 **Mr Nugent:** The first thing, going forward, is that we have to have a new agreement with the Lewis family. Currently, we are out of agreement with the Lewis family. It took us 10 years to get to the position where we went to planning with the last agreement. I hope it is not another 10 years before we are in that position again but you just never know.

670 **Q356. Mrs Cannell:** You have said what the current situation is but, going forward, assuming that you are able to submit a fresh planning application, how do you propose to deal with the Naylor's concern?

675 **Mr Nugent:** The first thing we have to do is to have an agreement with the Lewis family. There is no point in us talking to the Naylor's about a solution for somebody else's land that we have no interest in.

Mrs Cannell: It does not really answer my question but –

680 **Mr Nugent:** But that is the fact of the matter.

Mrs Cannell: Okay.

685 **Q357. The Chairman:** Just to clarify then – the Naylor's rights of way over the land are not in dispute, they were known about since 2001; they have no right of veto, and the reason they have no right of veto over that access is that it is possible to construct alternative ways of ensuring their rights of way are not impeded. Is that correct? By preservation of their rights of way but by variation of the actual route of access.

690 **Mr Nugent:** I think maybe Mr Kirkpatrick might be better qualified to answer that. I mean the word 'veto' does not come in to it and there are so many other issues regarding the rights of access that may –

695 **Q358. The Chairman:** I am basically asking about process. I am not trying to assess the merits of one option against another. I am basically asking: it is potentially capable of being resolved – any difficulty – is it, through legal process?

700 **Mr Nugent:** Legal process is one alternative. I would hope to think that that would be the last alternative but, at this point in time, we have never spoken to the Naylor. The easiest way to sort things out is by mutual agreement and that has not even been addressed.

Q359. The Chairman: Mr Kirkpatrick, do you wish to comment?

705 **Mr Kirkpatrick:** Yes, I can just fill you in on that.

If I could almost paraphrase Donald Rumsfeld, to say that the Naylor rights are a 'known unknown', if I could put it in that way. They are known in the sense that they are contained in a deed of conveyance – a deed of conveyance dated 19th May 1989, made between Pinecrest Investments Ltd and the then owners of the land sold off, Mr and Mrs Creasey. This is a document that is in the Isle of Man Deeds Registry. It is there for public inspection. It is an open document; it is not a secret.

710 The document contained a right of way, which we now describe as the Naylor rights – the Naylor being the partial successors in title to Mr and Mrs Creasey of part of the land that was sold off by Pinecrest Investments Ltd. Let's be clear what that right says:

715 'and in particular together with (1) a right of way for all purposes with or without vehicles all times hereby granted to the Purchasers their lawful visitors and invitees over the private roadway delineated and coloured blue on the plan hereto annexed...'

720 So it is a clear express easement, defined in terms of its purpose and scope, and with a plan showing the extent of the right of way attached there too. It is an express easement.

The document forms part of the title of the Pinecrest land. So, it is not only known to us; it is clearly known to the Lewises. The Lewises created this right of way. So I would just draw to your attention where Mr Lewin talks about the cat being out of the bag, as if we were trying to hide something from the Lewises. That is so ridiculous because they have created this right of way. They knew about it earlier than ourselves.

725 So it is there to be seen. It is also a document that forms what is known as the root of title. It provides evidence of the Pinecrest ownership; and this document was crucial in being handed over to the Department's legal advisers. It was personally delivered by myself, in the abstract of title.

730 It is an important document to be inspected, because this is the same way that I discovered the rights in 2001 because I was inspecting the abstract of title – in a sale off it is crucial, because you need to establish that the person who is selling you the land still owns it, so you are checking the sale off to make sure it has not gone; and, secondly, you are looking at it to see if any rights or covenants or declarations have been contained between the two parcels of land.

735 So it is an open document in there and discoverable; and I would have expected the Department's advocates, in the same way as I did, to have inspected the thing, lifted the original from the Deeds Registry and been crystal clear the Naylor's right is in existence there. So there is no denial. It is a known quantity in that there is an express right of way there.

740 That then begs the question of its impact on the alternative Lhergy Vreck access, and that takes us to the unknown aspect of the Naylor right of way. The courts, generally, will not entertain a consideration as to whether a right has been interfered with in a hypothetical sense. One cannot go to the courts for a declaration, saying, 'Would this interfere with a right of way?', unless you are bringing to them a specific circumstance. The courts have made that quite clear. I have already given written evidence and case citations to confirm that. The only way that that in turn could be achieved is by the prior obtaining of a planning approval, showing what it was exactly that was intended to be done.

745 So, to answer Mrs Cannell's question, in particular, the process of how this would occur is that the planning application would be made and considered; there would be opportunity, naturally, for Mr and Mrs Naylor to express their disapprobation of that application, both in

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terms of the application *per se*, and in terms of their rights of way. Although, as has already been noted in Mr Wright's opinion, rights of way are not directly pertinent to a planning application; they are private rights and they need to be considered separately under civil issues.

755 So, having determined a planning application, and let's say we have chosen a route and planning authority has approved that route and given us a valid planning application, the next step naturally then would be to take a court application for a declaratory judgment to ascertain whether the intended implementation of the rights, granted under the planning approval, will constitute a substantial interference, or otherwise, with the rights that have been granted to the Naylor's in their express easement.

760 I would also just add that I was slightly disturbed at some of the debate in Tynwald on this, where they were talking about hiding things, and mortgages and caveats, as if there was some secretive process and in some way trying to deceive people. That is absurd. The easement is there for all to read. It will have to be noted in the Land Registry as part of the application for first registration. I had to take personal responsibility for that application. It is my name on there, not the company's. There is no hiding of that right of way and I could not hope to hope that anyone would miss it. It is just ludicrous to suggest that. It is there and it has to be dealt with. That is the way the process... in which it will be dealt with.

765 As to whether that particular matter would infringe the rights of way comes down to literally all the circumstances of the situation and to the nature of the planning application that was lodged to satisfy the planning authority that this was a sufficient right of way in itself.

770 **Q360. The Chairman:** So the right of way which exists remains to be tested – the claims as to whether that right is substantially interfered with? It is really a matter potentially for the courts to decide?

775 **Mr Kirkpatrick:** That is right. In the majority of cases – and there are very few and far cases on the Isle of Man – this normally arises where somebody goes ahead and interferes with a right of way, resulting in the party who suffered that interference to bring an action for an injunction to prevent that interference carrying on. That is the normal way it arises. Somebody, say, built a house into a lane or put a gate or put a barrier up or something; that is what prompts the action in the normal course of events.

780 That would be a reckless way for a developer to carry on and certainly something that we would not entertain, whatsoever; and the courts have also made it quite clear that that sort of action is potentially punitive in terms of damages. The conduct of parties is an essential item here; and it is certainly not a way that Heritage Homes would conduct its business. What would happen is that, once the planning application is determined, then, as you say, we would make an application to court, seeking what is called a negative declaration. That is, that our intended action does not constitute such a substantial interference, as would warrant the beneficiary of the right of way being able to instigate an injunction to prevent the intended access.

790 **The Chairman:** Thank you. That is perfectly clear, that explanation.
Mr Turner.

795 **Q361. Mr Turner:** Yes, you may not be able to answer this, it may be something that only your design engineers could answer, but alleged interference we are talking about is the small piece at the very end of the lane. Whereas the lane comes straight down to the road, on the plans that we have been provided with, the alignment of that is taken, approximately one road width, into the Cassidy's' garden.

800 Why was the junction designed that way and not designed to incorporate the lane itself? As I said, it may be that only an engineer can answer that question.

Mr Nugent: Well, I think that –

Q362. Mr Turner: I do not have the answer. Because that would be the obvious... if the lane was aligned to line up with the existing lane, then the rights would not be interfered with. So –

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Mr Nugent: I think the design that you are looking at was for a specific purpose, and it was an initial design which proved that the sight lines could be achieved in order to build 100 houses off that access. It had not been further developed to consider how all the other considerations could be catered for within the scheme.

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Q363. Mr Turner: Because I think – and I am not a traffic engineer – to the layman approach, we are talking about sight lines. The realignment of that junction was so minimal, did it really take into account such essential requirements of the DOT at the time, when really the whole issue of this right of way could have been avoided if the existing sight line was maintained?

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That is why I am intrigued to know why, given that it is potentially such a problem – the dispute with the Naylor's – whether the junction could not have been utilised in its current position, rather than being aligned a whole width further into the Cassidy garden. As I said, it may be an engineering answer.

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Mr Nugent: I am sure it is an engineering answer, but all I can say to you is that we had not got to that point at that time. It could be designed, for planning purposes, as Graham has said, showing a perfectly valid access, with all the necessary sight lines; and that was the drawing that the Department of Infrastructure said was a viable drawing and was a viable working access.

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Q364. Mr Turner: But that was based on diverting the very end of the lane, slightly to one side, wasn't it? Which is where the whole rights of access... because the blue line is definitive, isn't it?

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Mr Nugent: What happens after the access is achieved, after the public road, is just another issue and we had not got to that point. **(Mr Turner: Right.)** There is no point in reading too much into where it aligns with the lane and everything else, once it gets into the site, because we have not gone there.

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Q365. Mr Turner: No, I understand that. What I am getting at is that the perceived interference was because the definitive line was a straight line to the junction, where the proposals were to move the junction off that line on their plan.

All I am asking is why they did not put the indicative plan to incorporate the existing lane? Because it seems like it was creating a lot of extra problems that could have been avoided; and I wanted to know was there any particular reason why it was diverted into the Cassidy's garden and not simply widening of the existing lane?

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Mr Nugent: Yes, I am afraid the Transport Engineer must have guided...

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Mr Turner: Okay, thank you.

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Q366. The Chairman: Just following on from that, if you were to be using the existing lane without altering its routes, whether in order to avoid it being an issue with the Naylor's – and you have said they do not have a right of veto, but for the sake of argument, supposing they did have a right of veto and you had to use the lane existing, without altering the route – how many houses would this access serve, as opposed to the alternative proposal? Are you in a position to tell us?

Mr Nugent: I am afraid that is an impossible question. We have never considered that.

855 **Q367. The Chairman:** You consider it a hypothetical question?

Mr Nugent: Totally, yes.

860 **Q368. The Chairman:** It is not that hypothetical, surely. I mean, here you have got a route, there may be question marks against this original route. You know what you would like to do, but supposing you could not vary the route, I am simply asking how many houses would that serve?

865 **Mr Kirkpatrick:** It is more of an issue of the route, isn't it? It also entails the visibility splay that then comes off that route and what is available in a visibility splay. So that is for the highways engineer to ascertain. We would need to put that question to him.

It is just simply not being considered because we were considering one particular response as to what we were asked to provide. (**The Chairman:** Alright –) All options are open.

870 **Q369. The Chairman:** To answer that question today, you would have had to designed up a plan – (**Mr Nugent:** Design it.) to present to Highways –

Mr Nugent: Bring it to the planners and then discuss how viable it was and how many cars it can take and it is all worked out on how many passengers per hour and all sorts of stuff.

875 **Q370. The Chairman:** Yes, so it was never considered an option worthy of exploring at that point?

880 **Mr Kirkpatrick:** Again, just to emphasise, all the direction was going into the Douglas Road access. Our work on this site was being done to meet a requirement of satisfaction... that the Department of Education were asking us to prove our right of way. They said, 'Please do this with the Department of Highways,' and that is what we did. All the other options were not explored. They are there now to be explored and available.

885 **The Chairman:** Thank you.
Mrs Cannell.

Q371. Mrs Cannell: Thank you, Mr Speaker.

890 Yes, just going back, Mr Kirkpatrick, to what you said before about the Lewises, who created easement, the rights of way for the Naylor, and the fact that you hand-delivered all of this information to the advocate acting on behalf of the Department of Education – who was that that you handed the stuff to?

895 **Mr Kirkpatrick:** It was delivered for the attention of the civil officers there. At that time it was Felicity Kniveton.

Q372. Mrs Cannell: Right, okay. So... because you did put great emphasis on the fact that you would have expected their legal adviser to have given it the same scrutiny that you had.

900 **Mr Kirkpatrick:** Well, I do not want to be disingenuous but it is an important document as part of the title and it is what, from a legal perspective, we would see as our disclosure point. It is the reference of the test of: we are disclosing this to you; it is there for you to read. Just in the same way that nobody handed this to me with a yellow pen, highlighting exactly, 'have a look at this'. I have got a bundle of documents. That is my job. That is my professional role – to go through this and advise my client in some way, as I am duty bound to provide that as part of the title to the Department.

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910 **Q373. Mrs Cannell:** Because, in essence, getting to the nub of the matter, it is being alleged that this potential alternative access was used as a leverage against the Department of Education to force them into accepting a financial deal which might otherwise have been greater had you not had the opportunity to have a potential alternative access.

That is the nub of the issue here and that is where we are coming from as a Committee... is to evaluate the transaction, the negotiations, the deal between yourselves and the Department of Education, in terms of value for the taxpayer. Was it a good deal for Government? The allegation has been made that, no, it was not such a good deal for Government because the potential
915 alternative access was not going to provide what the company wanted.

Mr Nugent: You have to remember that we are not landowners and even if you take the hypothetical situation that, say – as was alleged – the second access was not viable, then Government should have been entitled to a greater amount of money for the first access. That is
920 all very well, if somebody agreed to go ahead with the deal on the first access on that basis. There is no presupposition that the Lewises would accept a lesser deal than they got on the first access.

You have to remember the Government tried to do a deal with the Lewis family, to buy some land for the extension of the school, as a natural course of events anyway for a couple of years, all during this period. They could not do a deal with the family. They could not buy any more
925 land. They would not sell it to them or they could not agree on a price.

People think that, because, if the Government had a situation where it was like a ransom strip, it was the only access in, they were entitled to far more money. They were only entitled to far more money, if somebody was willing to give it to them. The landowner in this case, as I said,
930 we have been dealing with for 10 years. It is all very well in a hypothetical situation and in Never Never Land, but try to do it in reality and it is a completely different matter.

Q374. Mrs Cannell: So are you saying then that the option to purchase the Lewises' land has lapsed now?
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Mr Nugent: It has.

Q375. Mrs Cannell: And you have not made attempts to renew the option?

940 **Mr Nugent:** I am not saying we have not made attempts. At this moment in time, they do not want to talk about it.

Q376. Mrs Cannell: Okay, so without the option or the renewal or a new agreement of option to purchase at some point in the future, then that area is a no-go of the development,
945 isn't it?

Mr Nugent: It is in hiatus at the moment.

Q377. Mrs Cannell: Okay.

950 Mr Kirkpatrick, there was just another question, just out of interest, for the benefit of the Committee. You spoke about the process that would need to be followed, in terms of establishing whether or not the Naylor's had a substantial complaint, in terms of the development, and you said that one would have to acquire planning permission first.

955 Having acquired the planning permission, you – I assume, because you did not clarify this – representing the company, would then apply to the court under a negative declaration, to establish whether or not the rights of access of the Naylor's were substantial enough to prevent the development of the land.

960 You have given us a lot of examples of English law, in terms of precedence in law. Nevertheless, as you are aware, the Isle of Man has different laws and there is a lot of common law, as well. Can I ask you, what would happen in the event that the company got planning permission, the company then sought a negative declaration in the Isle of Man courts to consider whether or not the Naylor's rights were going to be substantially affected, sufficiently enough to prevent the development from going ahead? What would the company do then?

965 **Mr Kirkpatrick:** You are saying that – ?

Q378. Mrs Cannell: Is there a likelihood that that could happen, if the court found it was substantially interfered with? (**Mr Kirkpatrick:** Well –) What would the court do as a way of trying to resolve the problem?

970 **Mr Kirkpatrick:** We are talking about hypotheticals here, aren't we, because we do not know what the nature of the planning application is that we have put in? So we are talking really speculatively and then I am trying to speculate on what the court would decide, in terms of that application. So, really, are you asking what the court's options are in these circumstances?

975 **Q379. Mrs Cannell:** It is a speculative question, given you quoted English law and you have made a lot of examples of the outcomes of similar considerations by the English courts. I just wondered what might happen here in the Isle of Man?

980 **Q380. The Chairman:** I think, in fairness to the witness, he is being asked to speculate on a hypothetical legal position. The process has been described. I would not want us to be in a position of assessing the merits of one side of the argument against another. There is slight danger that we are starting to do that, inasmuch as what if that did not work, what would the next step be? That is possibly... I will leave it to you, Mr Kirkpatrick.

985 **Mr Kirkpatrick:** Well, I would just emphasise that it is a matter for the court. It is not a matter for me. It is not a matter for you. It is not a matter for Mr Nugent or the Naylor's. Ultimately, it would be a matter for the courts to determine that.

990 I have set out, as you say, a lot of English cases. I have also set out some Manx authority for you and I would particularly praise the Manx authority, which I think is ahead of the English by about 30 years, on its consideration.

Those are all possible scenarios and I have set out the likely procedures that would follow from that, but I am left with a hypothetical and it is wrong for me to give a view on something that I do not know the answer to. It is the unknown element of what I said at the outset.

995 **Q381. Mrs Cannell:** If I might, Mr Speaker? My purpose for asking the question is it seems to me a wasted opportunity of communication and prevention before a matter comes to a head in terms of something like this, where someone has a particular right of access which might be affected by a development.

1000 I would have thought that to have to go through the hurdles that a company has to go through in order to achieve planning, is one problem, but then to have to seek a declaration from the Isle of Man courts and whether or not you can proceed seems to be a waste of time, effort and money, when perhaps the problem could have been resolved, or could be resolved, prior to even submitting a formal planning application, by talking to people.

1005 That is all the point I am making.

Mr Nugent: Hopefully it will be, and we get to the point where we can submit another application.

1010 **Mrs Cannell:** Okay.

Q382. The Chairman: Thank you.

Can I ask, why did you purchase Westlands and the other properties to the north of the Lhergy Vreck lane? They were not directly required to facilitate access.

1015 Is there any possibility of using these as an alternative access in the event that... *[Inaudible]*

Mr Nugent: As I said earlier, you have to remember that we are not the only property developers on the Isle of Man. We were in competition with other developers for this site. Our main focus in the beginning was to try to get an access through the school site because even all of the Department of Infrastructure's consultants and everything else had done reports and consultancy reports and everything else, to say that that was the best solution for a possible bypass and to open up this piece of land.

1020 The Knock e Tholt property came up while that was going on. That was an opportunity that just arose. We bought that at the time. We had done a deal with the Cassidys on the side of the lane because, again, that was opportune.

We had not considered buying Westlands at the time. We got a tipoff from somebody on Douglas Road that Hartford Homes had gone in to contract, or were about to go in to contract, with the owners of Westlands to purchase the property for £875,000 – more than double its value – to get a position on that roadway; and when our contract lapsed with the Lewises, if we were trying to use the laneway access, there would be a stalemate there; they would have a position and then they would be in a position to talk to the Lewis family, and *were* talking to the Lewis family. The Lewis family had done a deal with Hartford on Shore Road before, as we had.

1030 So, rather than being left in a case where the two of us were fighting over the same thing, I was able to convince the owner of Westlands to sell it to us instead for £100,000 more than she was receiving from Hartford.

Q383. The Chairman: Thank you. So it was to protect your commercial interests.

Mr Nugent: It was to protect our commercial interests and it had to be done very quickly.

1040 **Q384. The Chairman:** Okay.

Mr Lewin has given a different slant on such events, but essentially, of course, he has told us, in relation to the Lhergy Vreck access, that there is no doubt that the company withheld the actual true position from the Department of Education. He goes on to say that, however, from discussions that he had had with you – yourself and others – it was self-evident, at least, Mr Teare was aware of the position; and also went on to say Mr Bell and Mr Anderson were aware of the true position and they were misled by the company.

What have you to say about that?

1050 **Mr Nugent:** I think that is the greatest lot of tripe I have ever heard. It is nonsense. It is lies. It has no bearing on anything. It is complete lies. It is a complete fabrication.

Q385. The Chairman: Because the bearing of that statement, and the implication, was that Mr Teare, knowing the actual position – that the access was not viable; this is the claim – would take on the access himself. That is what he is alleged to have said to you: the fact that you, allegedly, had no control over the access and Mr Teare was going to deal with this personally, as opposed to officers.

Mr Nugent: It sounds like a slur on Mr Teare and Mr Bell and those honourable gentlemen.
1060 **(The Chairman:** Yes.) I do not know where it came from.

Q386. The Chairman: No. So those sorts of conversations did not take place with Mr Lewin in the way he tells us?

1065 **Mr Nugent:** Absolutely not.

The Chairman: Thank you.
Mr Turner?

1070 **Mr Turner:** Nothing at this stage, Mr Speaker.

Q387. The Chairman: Okay.

Just moving on, we have established Mr Lewin is not right about the viability of the alternative access. You have given us your evidence as to why not.

1075 If he was right, what effect would this have on the value for money represented by the agreement, because Mr Lewis has gone on record publicly referring to sums of £8 million to £10 million as being at stake here? I mean, those were –

1080 **Mr Nugent:** Big numbers.

The Chairman: Big numbers.

Mr Nugent: Juicy numbers.

1085 Yes. As I explained earlier, any deal that was going to be done on either access, at the end of the day, was going to come down to the mutual agreement of everybody concerned and primarily the Lewis family who, at the end of the day, were the people holding the cards because they owned all the land.

1090 If Government wanted extra land, they had to deal with the Lewises. If we wanted to do a swap deal, by swapping the access land for the Government's access land, it had to be swapped with the Lewises' land. So, the fact that people might be entitled to a huge amount of money, could only happen if people were agreed to pay it in the first place.

The numbers that Buster has come up with are completely plucked out of the air. They are a complete fabrication.

1095 **Q388. The Chairman:** Because it is not just of academic interest to the Committee, what the company may or may not make by way of profit. The whole point is that it is potential loss to the public purse if these were the sums at stake, with this particular access; then the company got a bargain and the Department of Education paid through the nose with the ultimate settlement, given what was at stake – multi-millions.

1100 **Mr Nugent:** Yes, but people are confusing... When you say the company, I presume you are talking about Heritage Homes?

1105 **The Chairman:** Presumably.

1110 **Mr Nugent:** Presumably, yes. We are not the landowner. So whatever is paid, or paid outside of our land deal, for an access, for anything else, has to come back out of the land value. It has to be paid by the landowner at the end of the day. If he is expecting top price for a piece of land that does not have an access, the cost of that access has to come back out of the land, to equate to a top price for the land.

So it would not matter to Heritage Homes what deal was done on the school land. We were only going to pay so much – a viable amount – for the development land in the first place. It did not matter. If the Lewises were prepared to pay an extortionate sum to get an access through

1115 the school land and they would take what was left, that would be up to them. That is the way it works.

Q389. The Chairman: So these sums did not really make much sense... *[Inaudible]*

1120 **Mr Nugent:** They make no sense to anybody. They are completely irrelevant and the numbers are just blown out of all proportion to the money involved in the site.

The Chairman: Yes.

1125 **Q390. Mrs Cannell:** Mr Speaker, sorry.
Thinking back to when we cross-examined Mr Lewin, he was talking about the £8 million to £10 million, he was talking about pure profit post-development (**Mr Nugent:** He was.) to the company.

Mr Nugent: He was, yes. Absolute nonsense.

1130 **Q391. Mrs Cannell:** That is what he was making reference to, yes.

Mr Nugent: Yes.

1135 **Q392. The Chairman:** Is Mr Lewin right about the overage clause in the agreement? Perhaps, for the record, just explain to us what the overage clause was; (**Mr Nugent:** Okay.) and if he was right, what effect would this have on the value for money represented by the agreement?

1140 **Mr Nugent:** I think, Mr Lewin probably... His whole thing fell apart probably the most when he started to discuss the overage clause because, as I said earlier, he had no active part in this deal. He did not know what was going on. He does not know any of the detail. He is just guessing.

There is not actually an overage clause. It does not exist. The deal was done on the basis that Government were trying to protect any further development over and above what would have been allowed on the second access. So the second access was good for 100 houses. Mr Teare was quite adamant that any more than 100 houses that were built off the school access, you had to come back to Government. That was another day's work. A new deal had to be hammered out and Government were going to get their pound of flesh out of any additional properties over and above the 100 on the first deal.

1150 An overage clause was mentioned because he was quite determined at the time, I believe – although I was not at those meetings – that some sort of a formula be devised which would set out, at that time, exactly what Government would get.

1155 Instead, there was an overall covenant put on the property that literally nothing can happen for additional development, should the additional land be zoned because there are a lot of question marks here; there are a lot of things that have to happen before any additional value would come in there. But there is a covenant in perpetuity, as far as I know, Graham, on the piece of land, that nothing else can happen on it. Is it a stop clause?

Mr Kirkpatrick: Yes. Could I interject and just explain that?

1160 When Seamus says there is no overage clause, I think what is specifically meant there is there is no specific percentage negotiated as to what should happen, should houses be built on the further piece of land.

1165 What was contained in the clause was a restrictive covenant that prohibited the number of houses on the portion that was being initially purchased, to 100, and placed a line where no road should crossover into the undeveloped land, therefore preventing development.

To enable either of those two features to be varied, it required the parties to speak to one another under a collaboration agreement where they would seek to reach agreement as to what should be paid at the appropriate point in time; because the factors just are not known at the moment, as to what should be applicable at that date when that should be considered.

1170 So the parties, as it were, undertake to one another to talk; and insofar as they cannot reach agreement on those talks, the matter is then referred to an independent surveyor who would make the final arbitration on what that percentage would be, in terms of value for the Government. Then it is dealt with by way of any future sales of houses, the totality of that amount is then divided between those houses and paid on a per sale basis. So, that is what the deal was that was hammered out.

1175

Q393. The Chairman: So, effectively, the access road becoming adopted as a public highway in the future would not in any way affect this protective covenant over the number of houses?

1180 **Mr Kirkpatrick:** None whatsoever. It was specifically referred to in the overage clause, as that situation was not to enable the overage clause to be circumvented; and it specifically states that those roads must not go up to the boundary to actually abut. That is an obvious one to try to circumvent an overage clause – by saying that you have got a public right of way over something.

1185 It was very carefully worded and my opposite number was equally attuned to that and the document is bespoke to avoid that particular eventuality reaching the overage. It is very clearly set out there.

Q394. The Chairman: So the Department was quite farsighted in negotiating this with you to anticipate future events and protecting its financial position?

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1195 **Mr Kirkpatrick:** It was very astute and indeed, to be honest, that was perhaps the hardest part of the negotiations. It came at a late time in negotiations. I think it was raised on 23rd June, in a letter by Mr Teare, that this is what he wanted. It was an astute move and it took a great deal of negotiation. We had a meeting at Hamilton House with all the parties on 25th July, specifically to try to work out this overage/collaboration provision. It took an awful lot of care and attention to finally reach agreement on that between the parties.

1200 **The Chairman:** Yes. Thank you.
Mrs Cannell, any further questions?

Mrs Cannell: No, thank you.

1205 **The Chairman:** Mr Turner?

Q395. Mr Turner: I am just intrigued to know: the Naylor's, were they actual objectors to the planning permission, are you aware?

1210 **Mr Nugent:** I do not actually know.

Mr Turner: No worries. Okay.

Mr Nugent: I am sorry. I cannot answer that.

1215 **The Chairman:** Mr King, any points, please?

Q396. The Clerk: Thanks, Mr Speaker.

1220 Just on the point about the restrictive covenant, you showed the Committee the restrictive covenant itself, which the Committee saw, and thank you for that. The issue of an independent surveyor coming in, in order to adjudicate a collaboration arrangement, is that written in the contract?

Mr Kirkpatrick: It is in the contract, yes.

1225 **Q397. The Clerk:** But not in the draft conveyance attached to the contract?

1230 **Mr Kirkpatrick:** The conveyance contains the restrictive covenant. The contract itself contains the collaboration provision for the discussions and the mechanisms. It is a more appropriate document for it to be in there. Also to bear in mind that the contract is tripartite, with the three parties who are involved. The conveyance is only two parties. So it is the most appropriate place for the collaboration provision to be located.

The Chairman: Thank you.
Mr Phillips?

1235 **Mr Phillips:** No.

The Chairman: There will be no further questions, then.
I would like to thank you very much for coming and answering the Committee's questions and for your earlier written evidence, which we have also considered. It has been very helpful. Thank you very much. (**Mr Nugent and Mr Kirkpatrick:** Thank you.)
The public session is now concluded. Thank you.

The Committee sat in private at 3.54 p.m.