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DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

25 January 1983

Copies to:
EXTERNAL AS IN FINAL PARAGRAPH.
ALSO PS/MR LAMONT
PS/MR BUTCHER
PS/ SECRETARY
MR TREADGOLD
MR DICKSON FCO
MR LANE DOT
MR MALLINSON SEC
MR COULSON SEC
MR CUMMINS REA
(WITH PAPERS)

Rt Hon Sir Michael Havers QC MP
Attorney General
Royal Courts of Justice
Strand
WC2A 2LL

Dear Michael,

EUROPEAN CONVENTION ON HUMAN RIGHTS: NATIONALISATION COMPENSATION CASES

Thank you for your letter of 20 January about the conduct of the hearing next week.

2 Your advice is that we should fight these cases as hard as we can, and I do not disagree. I have been concerned about the way in which aspects of the arguments might rebound upon us, and I have considered the implications as the arguments have developed. I do not doubt that the lines set out in your letter - and particularly perhaps an argument that compensation was adequate within international law requirements if that has to be presented - will provide further ammunition for critics. Nevertheless, so long as we can preserve the distinction that we are arguing about the purely legal question of whether the legislation and what was done under it did or did not involve the UK in a violation of legal obligations under the Convention, we do seem to have some basis for defending the position. I accept that Mr Nicholls, particularly after your own discussion with him, should by now be fully aware of the difficulties and of the need to choose his words with care.

3 I am copying this letter to recipients of your letter, that is to the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs, the Chancellor of the Exchequer, the Secretaries of State for Scotland and Wales and Sir Robert Armstrong.

Yours ever

Patrick

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For information (advance in due course)
Mr Cumming
PS/Nk
PS/Nb
PS/Sec
Mr Treadgold
Mr Dickson
Mr Mallinson Sols
Mr Coulson
Mr Kane Insurance Dept

20 January, 1983

Dear Patrick.

EUROPEAN CONVENTION ON HUMAN RIGHTS: NATIONALISATION AND LEASEHOLD REFORM CASES

As you know, the European Commission of Human Rights will hold a hearing next week on certain aspects of the above proceedings. The cases in question are seven of the nine that have been brought against us by companies or individuals complaining about the Shipbuilding and Aircraft Industries Act 1977 (the other two applicants having not yet completed their written pleadings) and the group of applications brought by the Trustees of the Grosvenor Estates who arecomplaining about the Leasehold Reform Acts 1967 and 1974.

The initial question whether all these cases are admissible at all will be dealt with by the Commission on the basis of the written pleadings, as will also certain peripheral substantive issues such as whether the arbitration procedure established by the 1977 Act satisfied the "fair trial" provisions of Article 6 of the Convention. But the Commission has identified for oral hearing at this stage certain fundamental substantive issues which it regards as common to all these cases and on which it has therefore invited all the applicants to present a single, common argument and the Government to present a single exposition of its own position. In so far as particular cases present special features in relation to these common issues, there will be an opportunity for the applicants concerned and for the Government to deal with them separately at this hearing.

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Each of the eight applicants whose cases are to be considered at the hearing will, we understand, be separately represented there but they have agreed that the common argument on their behalf will be presented by a single team led by Mr. Anthony Lester QC. We for our part are fielding a strong team of Counsel whom I have personally selected, led by Mr. Donald Nicholls QC. Officials from your Department as well as from the Department of the Environment and the Foreign and Commonwealth Office will be there in support.

Because of the importance of this litigation, and not least because of its political sensitivity, I took a close personal interest, as you know, in the drafting of our written pleadings and I have more recently kept closely in touch with the preparation of our oral submissions for next week's hearing. These preparations are almost complete - though the final stage of pulling the speech together must wait until our team assemble in Strasbourg over the weekend - and I have therefore taken the opportunity to have the benefit of a personal discussion with Mr. Nicholls, in particular about the handling of the politically sensitive matters. It is in the light of that that I am now writing to you and to other interested colleagues to report where we stand and, I hope, to reassure you that the points which are of special concern to all of us will be given full weight consistently with our need to fight this case successfully.

First, you will wish to know that it is still our intention to continue to maintain, as our first line of defence in all these cases, that the international law requirement of the payment of prompt, adequate and effective compensation for expropriated property, which in general is attracted by Article 1 of the First Protocol of the Convention, does not operate against a State for the benefit of its own nationals. If we succeed on that, the argument about the proper basis of compensation should not arise at all. But we cannot be confident that this initial line of defence will hold and we must

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therefore be prepared to defend our position on compensation on its own merits.

Secondly, we shall try, in making out our defence on compensation, to avoid justifying the compensation actually paid in particular cases under the 1977 Act (as regards nationalisation) and under either the 1967 Act or the 1974 Act (as regards leasehold reform) as intrinsically "fair" but shall put the emphasis instead on justifying the compensation systems established by the Acts as being ones which a Government could, within its "margin of appreciation", legitimately adopt. This is a distinction which is perhaps of greater importance in relation to the nationalisation cases than in relation to the leasehold reform case but it is not without its value in the latter context also.

I must, however, point out that we may in the end be driven - either by the way in which Mr. Lester puts his case or because we are directly confronted with the problem by members of the Commission - into grappling with the question whether or not it is our contention that the compensation actually received by the applicants met the relevant international law standard, ie was "prompt, adequate and effective". If that happens and if we are not seriously to undermine our chances of success, I see no alternative to our answering the question in this way. We shall say that if, as we have contended, the system in question was itself one which was legitimately selected, the Commission should not concern itself with the results which the system produced in particular cases unless these results were manifestly wrong; and we shall deny (though it will certainly be part of the applicants' submissions) that the results in the instant cases were manifestly wrong. It is in that sense, so we shall argue, that we do assert that the compensation actually paid satisfied the international law requirements of "prompt, adequate and effective". This will be a difficult argument to put across but Mr. Nicholls is well aware of the importance

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to us of maintaining the distinction between that assertion on the one hand and, on the other hand, the assertion that the compensation was fair or adequate in the sense that our colleagues intended when they criticised the measures in question during the passage of the legislation and subsequently. It would be quite wrong for me to try to tie Mr. Nicholls down in advance to any particular formulation - he must be absolutely free to play our hand as his judgment dictates according to the exigencies of the hearing - but I am fully confident that, if the need arises, he will pick his words very carefully so as to respect this important distinction and to spare us any avoidable political embarrassment.

This said, I think that we must expect the applicants to make some play, both through their Counsel during the proceedings and in other ways after the proceedings (despite the rule of confidentiality), with what they will represent as the discrepancy between our present legal case and our former political utterances. So far as the proceedings are concerned, I can assure you that Mr. Nicholls intends to adhere strictly to the line that what he says should in no way be construed as approval (or for that matter disapproval) by the present administration of the legislation in question or what was done under it: his concern and, he will contend, the concern of the Commission is merely the purely legal question of whether the legislation and what was done under it did or did not involve the United Kingdom in a violation of its legal obligations under the Convention.

Finally, I can confirm again that in justifying the measures in question as being "in the public interest" (which is another requirement of Article 1 of the Protocol), we shall be relying on two points, both of which should be helpful to us in the political context. The first is that what is "in the public interest" within the meaning of Article 1 is a matter on which Governments are entitled to a "margin

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of appreciation", so that our assertion that the measures in question did not exceed that margin of appreciation does not entail any expression of approval by us of what our Labour predecessors did. The second is that the phrase "in the public interest" is (like "adequate") a term which has a specialised meaning in international law, and in particular in the Protocol, so that our contention that the measures in question are not impugnable on that score in no way means that we endorse them as being desirable or in the national interest in ordinary parlance.

I am sure that we shall all watch the progress of these cases with keen interest and anxiety. Difficult as they are on both technical and political grounds, I believe that it is very important that we should fight them as hard as we can both because of the huge sums of public money that are directly involved in them and even more because of the potential consequences over a much wider field if we lost them.

I am copying this letter to the Prime Minister, the Secretary of State for the Environment and the Minister for Housing and Construction, the Secretaries of State for Wales and Scotland, the Chancellor of the Exchequer, the Secretary of State for Foreign and Commonwealth Affairs and Sir Robert Armstrong.

Yours ever. Michael.

The Rt Hon Patrick Jenkin MP
Secretary of State for Industry
Department of Industry
Ashdown House
123 Victoria Street
London, SW1