

DATED

10th August

2016

- (1) **BATTMAN BROS. LIMITED**
- (2) **MCCARTHY & STONE RETIREMENT LIFESTYLES LIMITED**
- TO**
- HAVANT BOROUGH COUNCIL**

**Planning obligation by Unilateral Undertaking under section 106 of
the Town and Country Planning Act 1990 relating to the Land at 38 to
44 London Road, Purbrook PO7 5LJ**

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Ref: RBA.MCC.33.1676

THIS DEED is made the 10th day of August 2016

BY

- (1) **BATTMAN BROS LIMITED** : incorporated and registered in England and Wales with company number 00448693) whose registered office is at 6 Burrill Avenue, Cosham, Portsmouth PO6 2JW
("Owner")
- (2) **MCCARTHY & STONE RETIREMENT LIFESTYLES LIMITED** : incorporated and registered in England and Wales with company number 06622231 whose registered office is at 4th Floor, 100 Holdenhurst Road, Bournemouth, BH8 8AQ
("Developer")

TO

HAVANT COUNCIL **BOROUGH** : of Public Service Plaza, Civic Centre Road, Havant PO9 2AX
("Council")

BACKGROUND

- (1) The Council is the local planning authority for the purposes of Section 106 of the Act for the area within which the Land is located and the local planning authority by whom the planning obligations in this Deed are enforceable.
- (2) The Owner is the freehold owner with title absolute of the Land which is registered at the Land Registry under title number SH18885 subject to the Leases and shown for the purposes of identification edged red on Plan 1.
- (3) By virtue of an Agreement ("The Option Agreement") dated 14 February 2015 made between the Owner (1) and Southern Land (Hampshire) Limited (2) the Owner granted to Southern Land (Hampshire) Limited an option to purchase the Land.
- (4) By virtue of an Assignment dated 29 May 2016 made between Southern Land (Hampshire) Limited (1) and the Developer (2) the benefit and burden of the Option Agreement was assigned to the Developer.
- (5) The Owner and the Developer have agreed to enter into this Deed in favour of the Council in order to secure the planning obligations contained in this Deed.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

In this Deed:

- 1.1 the following words and expressions shall have the following meanings unless otherwise stated:

General Definitions

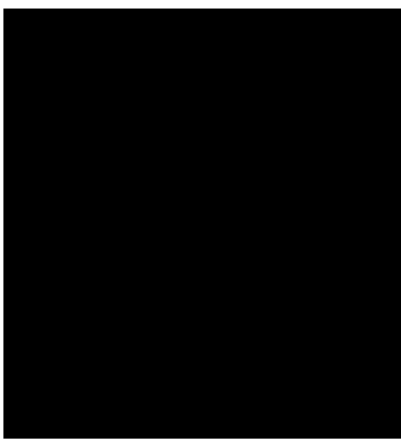
- “Act”** : means the Town and Country Planning Act 1990 (as amended).
- “Affordable Housing”** : means subsidised housing that will be available to persons who cannot afford to buy or rent housing generally available on the open market within the definition of affordable housing contained in Annex 2 of the NPPF or any subsequent replacement or modification thereof
- “Affordable Housing Contribution”** : means the sum of ninety five thousand pounds (£95,000) Index Linked to be applied towards Affordable Housing in Purbrook.
- “Appeal”** : means the appeal against the refusal of the Planning Application submitted to the Secretary of State and allocated reference number APP/X1735/W/16/3145929.
- “Commencement of Development”** : means the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development begins to be carried out pursuant to the Planning Permission granted in respect of the Planning Application other than (for the purposes of this Deed and for no other purpose) operations consisting of: demolition work; site clearance; archaeological investigations; investigations for the purpose of assessing ground conditions; remedial work in respect of any contamination or other adverse ground conditions; diversion and laying of services; erection of any temporary means of enclosure; fences or hoardings around the Land; temporary access construction works; the temporary display of site notices or advertisements and Commence Development and Commenced Development shall be construed accordingly.
- “Decision Letter”** : means a letter issued by either the Secretary of State or an Inspector determining the Appeal.

- “Deed”** : means this document, including the schedules.
- “Development”** : means the development of the Land in the form of redevelopment to form 42 No. retirement apartments for older persons including communal facilities, parking provision and associated landscaping; and 2 No. commercial/retail units.
- “Dwelling”** : means any dwelling (including a house flat or maisonette) constructed pursuant to the Planning Permission.
- “Index Linked”** : means in the case of any sum expressed in this Agreement to be Index Linked to the RPI and, to be increased or decreased in line with the following formula:
- $$C = \text{£Y} \times (B / A)$$
- Where:
- A is the figure for the RPI that applied the month immediately preceding the date of this Agreement.
- B is the figure of the RPI that applied for the month preceding the date of payment of a contribution pursuant to the provisions of this Agreement.
- £Y is the contribution payable pursuant to this Agreement.
- “Inspector”** : means a planning inspector appointed by the Secretary of State to consider the Appeal under delegated powers.
- “Interest”** : means interest at the rate of 4% above the Bank of England base rate applicable at the Specified Date which shall be calculated on a day to day basis.
- “Land”** : means the land at 38 to 44 London Road, Purbrook PO7 5LJ and shown for the purposes of identification edged red on Plan 1.
- “Leases”** : means both:

- the lease of that part of the Land shown edged yellow and numbered 4 on Plan 2 dated 20 June 2007 and made between the Owner and SIG Trading Limited and registered at the Land Registry with title number SH24207; and
- the lease of that part of the Land shown edged yellow and numbered 3 on Plan 2 dated 7 March 2007 and made between the Owner and Nicholas Craig and registered at the Land Registry with title number SH23441.

“Occupation” and “Occupied”	: means occupation for the purposes permitted by the Planning Permission but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing and Occupy shall be construed accordingly.
“Planning Application”	: means the application for full permission submitted to the Council for the Development and allocated reference number APP/15/00896.
“Planning Permission”	: means any planning permission for the Development subject to conditions to be granted by the Secretary of State or an appointed Inspector pursuant to the Appeal.
“Plan 1”	: means the plan attached to this Deed and labelled “Plan 1”.
“Plan 2”	: means the plan attached to this Deed and labelled “Plan 2”.
“RPI”	: means the Retail Prices Index published by the Office for National Statistics (or any amendment/comparable replacement thereof).
“Specified Date”	: means the date upon which an obligation arising under this Deed is due to be performed.
“Working Day”	: means any day from Monday to Friday (inclusive) that is not Christmas Day, Good

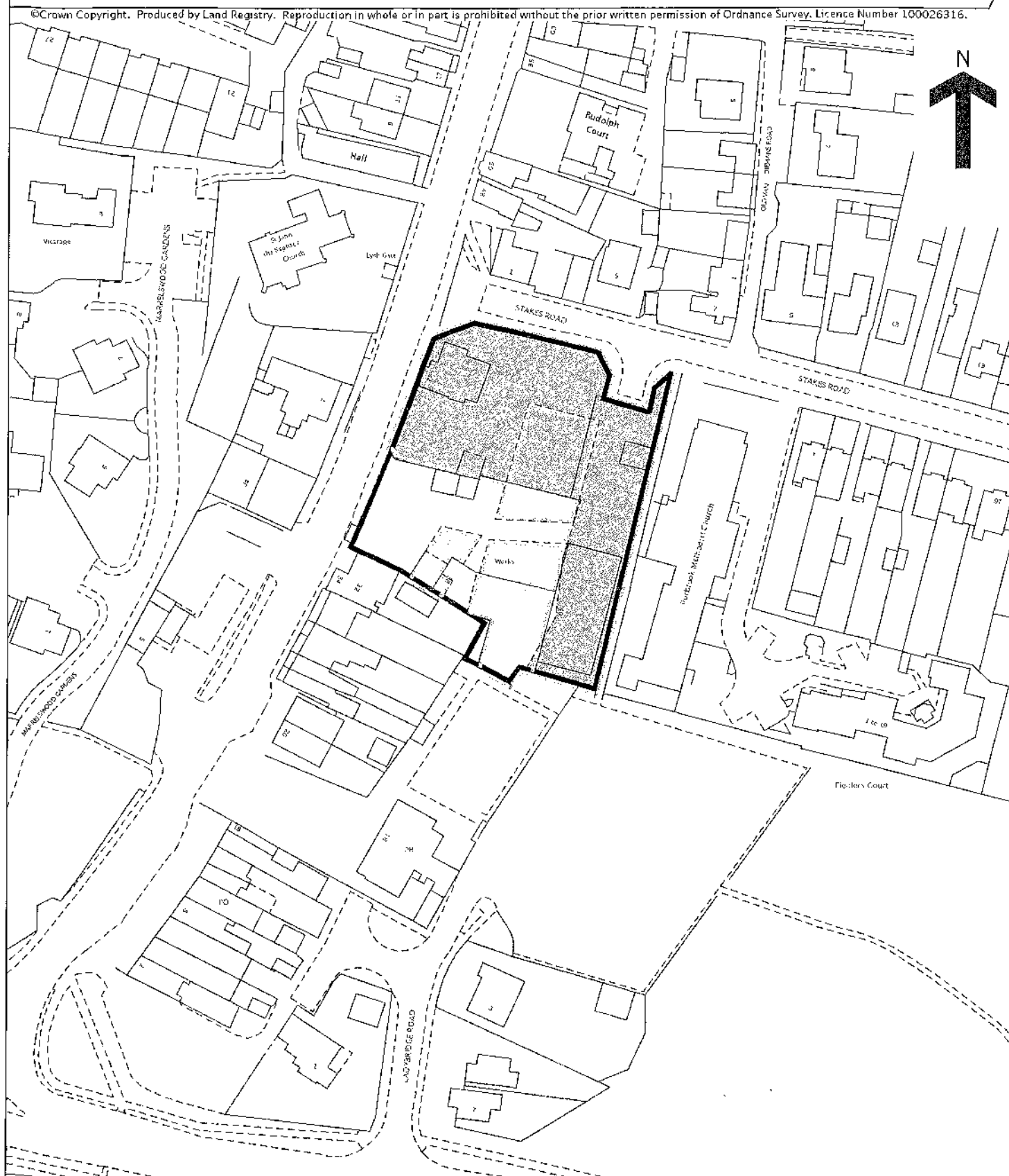
Plan 1



Project title		Location Plan	
McCarthy & Stone Proposed Retirement Living, 38-44 London Road, Purbrook, Hampshire		Drawing date July 2015	Drawing number SE-2168-03-AC-001



Plan 2



Friday or a statutory Bank Holiday.

2. CONSTRUCTION OF THIS DEED

- 2.1 Where in this Deed reference is made to any clause, paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule or recital in this Deed.
- 2.2 Clause headings shall not affect the interpretation of this Deed.
- 2.3 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 2.4 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeable in that manner.
- 2.5 Wherever there is more than one person named as a party and where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and severally unless there is an express provision otherwise.
- 2.6 An obligation in this Deed on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 2.7 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it.
- 2.8 References to any party to this Deed shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Council the successors to their respective statutory functions.
- 2.9 The headings and contents list are for reference only and shall not affect construction.

3. THE PLANNING OBLIGATIONS

- 3.1 This Deed constitutes a planning obligation for the purposes of section 106 of the Act, section 111 of the Local Government Act 1972, section 1 of the Localism Act 2011 and any other enabling powers.
- 3.2 The obligations set out in Schedule 1 of this Deed constitute planning obligations for the purpose of section 106 of the Act and the planning obligations are to be discharged by the Owner and are enforceable against them and any person deriving title from them (subject to clause 5.1 and 5.2).
- 3.3 This Deed shall come into effect upon the grant of the Planning Permission with the exception of the obligation to pay the Council's Legal Fee which is payable prior to completion of this deed and the obligations contained in

clause 4 and within Schedule 1 which shall not come into effect until the Commencement of Development and clause 11 which shall come into effect on the date of this Deed.

4. OWNER'S COVENANTS TO THE COUNCIL

Subject to clause 4.3 and 5, the Owner covenants with the Council:

- 4.1 to observe and perform the covenants and obligations on their part contained within Schedule 1; and
- 4.2 not to Commence Development until the Leases have been surrendered or otherwise terminated and evidence of the same has been supplied to the Council.
- 4.3 The Owner shall not be liable for any breach of the obligations contained in clauses 4.1 and 4.2 after it has parted with its interest in the Land.

5. ENFORCEABILITY

The obligations imposed on the Owner at clause 4 is conditional upon the following:

- 5.1 The Council not seeking to enforce any breach of a covenant, restriction or obligation contained in this Deed against any person after such person has parted with its interest in the Land except in respect of any breach subsisting prior to parting with such interest and neither the reservation of any rights or the inclusion of any covenants or restrictions over the Land in any transfer of the Land will constitute the retention of an interest for the purposes of this clause
- 5.2 The Council not seeking to enforce any provision of this Deed against
 - 5.2.1 the owner-occupier, tenant or mortgagee of a Dwelling or the retail/commercial units to be constructed pursuant to the Planning Permission; or
 - 5.2.2 a statutory undertaker (within the meaning of section 262 of the Act) who acquires any interest in the Land.
- 5.3 The Council repaying upon the written request of the paying party any portion of the Affordable Housing Contribution which remains unspent after 10 years from receipt including accrued interest.
- 5.4 The obligations in this Deed ceasing to have effect if prior to the Commencement of Development the Planning Permission:
 - 5.4.1 expires;
 - 5.4.2 is varied or revoked other than at the request of the Owner; or

5.4.3 is quashed or otherwise withdrawn

6. DEVELOPER'S CONSENT

The Developer consents to the completion of this Deed and declares that its interest in the Land shall be bound by the terms of this Deed PROVIDED THAT the Developer shall not be personally liable for any breach of the obligations unless or until the Developer becomes the owner of the Land.

7. FUTURE PERMISSIONS

Nothing in this Deed shall prohibit or limit the right to develop any part of the Land in accordance with any planning permission (other than the Planning Permission or modification, variation or amendment thereof) granted after the date of the Planning Permission.

8. COMPLIANCE WITH REGULATION 122

If the Decision Letter concludes that any of the planning obligations set out in this Deed are incompatible with any one of the tests for planning obligations set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 and/or paragraph 204 of the National Planning Policy Framework and accordingly attaches little or no weight to that obligation in determining the Appeal then the relevant obligation(s) shall from the date of the Decision Letter immediately cease to have effect and the Owner shall be under no obligation to comply with it/them.

9. MISCELLANEOUS

9.1 Nothing contained or implied in this Deed shall prejudice or affect the rights, discretions, powers, duties and obligations of the Council under all statutes, by-laws, statutory instruments, orders and regulations in the exercise of their functions as a local authority.

9.2 This Deed is enforceable by the Council.

9.3 The Owner hereby consents to the registration of this Deed as a Local Land Charge.

9.4 If any provision in this Deed shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions hereof shall not in any way be deemed thereby to be affected or impaired.

10. CHANGE OF OWNERSHIP

The Owner covenants to give the Council written notice within 10 days of any change in ownership of any of its interests in the Land occurring before all the obligations under this Deed have been discharged, such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Land or unit of occupation.

purchased by reference to a plan save for the transfer of any individual Dwelling.

11. LEGAL CHALLENGE

11.1 Where the Planning Permission is the subject of any judicial review proceedings or other legal challenge:

11.1.1. until such time as such proceedings or challenge including any appeal have finally been resolved the terms and provisions of this Deed will remain without operative effect notwithstanding the grant of the Planning Permission unless the Planning Permission has been Commenced;

11.1.2. if following the conclusion of such proceedings or challenge the Planning Permission is quashed then this Deed will cease to have any further effect as from the date upon which the Planning Permission is quashed

11.1.3. Wherever in this Deed reference is made to a date on which "legal proceedings or challenge in relation to the Planning Permission are concluded" (or cognate expressions are used), the following provisions have application:

11.1.3.1 Proceedings by way of judicial review are concluded:

- (a) when permission to apply for judicial review has been refused and no further application may be made; or
- (b) when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
- (c) when any appeal is finally determined.

11.1.3.2 Proceedings under section 288 of the Act or in respect of any other legal challenge are concluded:

- (a) when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
- (b) when any appeal is finally determined.

12. NOTICES

12.1 Any notice or other communication to be given under this deed must be in writing and must be:

12.1.1. delivered by hand; or

- 12.1.2. sent by pre-paid first class post or other next working day delivery service.
- 12.2 Any notice or other communication to be given under this deed must be sent to the relevant party as follows:
- 12.2.1. to the Council at Public Service Plaza, Civic Centre Road, Havant, PO9 2AX marked for the attention of Rachael McMurray;
- 12.2.2. to the Owner at Colman House, 2-4 Landport Terrace, Portsmouth PO1 2RG marked for the attention of Jane Futrille;
- or as otherwise specified by the relevant party by notice in writing to each other party.
- 12.3 Any notice or other communication given in accordance with clause 0 and clause 0 will be deemed to have been received:
- 12.3.1. if delivered by hand, on signature of a delivery receipt or at the time the notice or document is left at the address provided that if delivery occurs before 9.00 am on a Working Day, the notice will be deemed to have been received at 9.00 am on that day, and if delivery occurs after 5.00 pm on a Working Day, or on a day which is not a Working Day, the notice will be deemed to have been received at 9.00 am on the next Working Day; or
- 12.3.2. if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second Working Day after posting.
- 12.4 A notice or other communication given under this deed shall not be validly given if sent by e-mail.
- 12.5 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

13. THIRD PARTY RIGHTS

No provisions of this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999.

14. SEVERANCE

Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid, illegal or unenforceable, then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed.

15. VAT

All consideration given in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable.

16. JURISDICTION

This Deed is governed by and interpreted in accordance with the law of England and the parties submit to the non-exclusive jurisdiction of the courts of England.

17. DELIVERY

The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

IN WITNESS whereof the parties hereto have executed this Deed as a deed on the day and the year first before written.

SCHEDULE 1 – COVENANTS BY THE OWNER

The Owner covenants with the Council as follows –

1. AFFORDABLE HOUSING CONTRIBUTION

- 1.1 Prior to the first Occupation of a Dwelling to pay the Affordable Housing Contribution to the council.
- 1.2 Not to Occupy any Dwelling until the whole of the Affordable Housing Contribution has been paid.

2. THE LEGAL FEE

- 2.1 To pay on completion of this deed and whether or not Planning Permission is granted the sum of £665.00 in respect of the Council's legal costs ("the Legal Fee") in relation to preparation approval and completion of this deed

EXECUTED as a deed by **BATTMAN**)
BROS. LIMITED acting by one director)
in the presence of)

.....)
)

[Redacted Signature]

Witness Name:

Witness Address:

Witness Occupation:

Jane Futrille
Associate Solicitor
Warner Goodman LLP
Colman House
2-4 Landport Terrace
Portsmouth, Hants PO1 2RG

EXECUTED as a deed by **MCCARTHY**)
& STONE RETIREMENT LIFESTYLES)
LIMITED acting by one director in the)
presence of)

.....)
)

[Redacted Signature]

Witness Name: MARK BENHAM

Witness Address: C/O LESTER ADRIDGE, BOURNEMOUTH

Witness Occupation: SOLICITOR