Neutral Citation Number: [2017] EWHC 1708 (Ch)
Case Number: HC-2017-000370

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Fetter Lane,
LONDON EC4A 1NL
19th May 2017

B e f o r e :

MR JEREMY COUSINS QC,
Sitting As A Deputy Judge Of The Chancery Division

Between:

(1) SUSAN MICHELE DOBERMAN
(2) ROBERT HARVEY GILBERT **Claimants**

- and –

(1) MR ARTHUR THOMAS WATSON & MRS KAREN WATSON
(2) MISS JULIE APEDAILE
(3) MISS LINDA ANNE BOWLES
(4) MR MICHAEL JAMES WILDE & MRS GILLIAN WILDE
(5) MR MICHAEL DAVID CONNELLY & MRS KATHERYN SARAH CONNELLY
(6) MR PAUL COLVILLE SEWELL & MRS ETHEL JANE SEWELL
(7) MISS KATHERINE JILL DODD, MR ANDREW JOHN ROBERTSON, & MISS CYNTHIA JAMIESON DUFF
(8) W H KING
(9) A HUTCHINGS
(10) MR JOHN HARDING SPOOR
(11) MISS BARBARA COULSON
(12) MR ROBERT NEWALL MCMILLAN **Defendants**

Mr James McCreath (instructed by Messrs IBB Solicitors, of Capital Court, 30, Windsor Street, Uxbridge, MIDDLESEX UB8 1AB) for the Claimants
Mr James Ballance (instructed by Messrs TT Law Limited, of Cobalt 3.1, Silver Fox Way, Newcastle upon Tyne NE27 0QJ) for the First, Eighth, and Twelfth Defendants

Hearing date: 6th April 2017

HTML VERSION OF JUDGMENT

MR JEREMY COUSINS QC:

1. The present proceedings were commenced by the Claimants, in the Chancery Division, Newcastle upon Tyne District Registry, with the issue of a Part 8 claim form on 24th July 2015. The First, Eighth and Twelfth Defendants ("the Defendants") are the only defendants to have taken part in these proceedings. In light of their case as to cause of action and issue estoppel, and abuse of process, District Judge Loomba, by an order dated 11th May 2016, directed that the matter should proceed by way of the hearing of a deemed application by the Defendants for the striking out of the claim, or for summary judgment in their favour. (It was later ordered that the case be transferred to the Chancery Division in London.) It is that deemed application which came before me on 6th April 2017. In the course of the hearing, and in light of points raised in argument, I gave directions for both parties to file further written submissions, which I have received on 24th April 2017, and have since considered.

BACKGROUND

2. The Claimants are the freehold proprietors of land ("the Land") on the south side of Centurion Way, Heddon-on-the-Wall, Newcastle upon Tyne; their title is registered at HM Land Registry under Title No. ND152497. On 3rd November 1954, the Land had been conveyed by Mr Thomas Shield to Mr Vernon Wilson, and was subject to the following covenant ("the Covenant") set out at clause 2 of the conveyance:

> "The Purchaser with intent to bind all persons in whom the property hereby conveyed shall for the time being be vested and to benefit and protect the Vendor's building estate at Heddon Banks Farm Heddon- on-the-Wall aforesaid hereby covenants with the Vendor that the Purchaser and the persons deriving title under him will at all times hereafter observe and perform the covenants and conditions set out in the First Schedule hereto …
>
> [The First Schedule] 2. Not to erect on the piece of land hereby conveyed any buildings whatsoever other than one private dwellinghouse with proper offices and outbuildings (including at the purchaser's option a private garage) …"

3. The above-mentioned covenant is registered as a charge against the title to the Land. A dwelling house has been constructed upon the Land, but the Claimants wish to construct at least one further dwelling house upon it. With this in mind, by a claim form issued on 24th July 2015, they seek a declaration, pursuant to s84(2) of the Law of Property Act 1925 ("the 1925 Act") that the land is no longer affected by the Covenant. The grounds of the application are set out in the claim form; it is asserted that the Covenant was a personal covenant whose benefit and burden was not transmitted to the successors in title of the parties thereto, that its benefit was not assigned to Mr Shield's successors in title, that the benefit of the Covenant was not annexed to the Land, and that the 1954 conveyance was not part of a scheme of development. The application before me is not concerned with the merits of any of these grounds of the Claimants' case; it is based upon the fact that on 29th March 1978, Mr Donald Gilbert, the Claimants' predecessor in title ("Mr Gilbert"), made an application ("the 1978 Application") to the Lands Tribunal for the discharge or modification of the Covenant under s84(1) of the 1925 Act, which, at the material time, was in these terms:

> "(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify

> any such restriction on being satisfied - ... (*aa*) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; ...
>
> (1A) Subsection (1) (*aa*) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, either - (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or (b) is contrary to the public interest; and that money will be an adequate compensation for the lossor disadvantage (if any) which any such person will suffer from the discharge or modification.
>
> (1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

4. It is convenient to explain, at this stage, that in the course of nearly the century since this provision was originally enacted, it has undergone several amendments as to the body responsible for discharging the functions described in s84(1). In its original form, the section vested the relevant jurisdiction under s84(1) (but not, I stress, s84(2) to which I shall come later) in "the Authority", which was defined by s84(10), to mean such one or more of the Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919, as might be selected by the Reference Committee under that Act. The function of the Authority was transferred to the Lands Tribunal, by s1(3) of the Lands Tribunal Act 1949, and the jurisdiction under s84(1) of the 1925 Act was specifically vested in the Lands Tribunal under s1(4) of the 1949 Act. The President of the Lands Tribunal had to have been the holder of a judicial office, or otherwise be legally qualified, and the members of the Lands Tribunal had to be legally qualified, or persons experienced in the valuation of land. A decision of the Lands Tribunal was final, subject to right of appeal on a point of law. The functions of the Lands Tribunal were transferred to the Upper Tribunal in 2009 by the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009. When the events material to this case occurred, the relevant functions under s84(1) were performed by the Lands Tribunal. Given that its functions, for material purposes, were identical to those currently exercised by the Upper Tribunal, I shall, in this judgment, for convenience, often refer simply to the Tribunal when referring to the body exercising the powers conferred by s84(1), unless I consider it necessary to use a fuller title for ease of comprehension.

5. The 1978 Application was made on the pleaded premise that the Land "is subject to restriction … [imposed by the Covenant]", and sought an order that such restriction should be discharged wholly, or discharged to the extent of, or modified by "Permitting the erection and maintenance on the said land of three dwelling houses with proper offices, outbuildings and garages, of design and specification approved by the Castle Morpeth Borough Council by and or pursuant to the said council's grant of planning permission to the applicant dated October 11, 1976."

6. Mr Gilbert's neighbours, who wished to object to the 1978 Application, wrote to the Lands Tribunal, and were advised by its letter of 22nd August 1978, that the only persons who might object to the application –

> "… are those with a legal entitlement to the benefit of the relevant restrictions. If there is a doubt about the entitlement of a potential objector, the Tribunal may determine the matter of such entitlement at a preliminary hearing.
>
> … if you or the other signatories of your letter wish to appear at the hearing, you must lodge a formal Notice of Objection …, and you must be able to prove your entitlement

to the benefit of the restrictions."

Subsequently the neighbours did lodge such formal Objections. Amongst those doing so was Mr King, who is the Eighth Defendant in these proceedings. By his Objection, Mr King asserted his claim to the benefit of the restriction described above.

7. The Lands Tribunal dismissed the 1978 Application, subject to one point mentioned below. In his decision, the member of the Lands Tribunal stated that in his judgment "… the power which the relevant restrictions gave to the persons entitled to the benefit of them to prevent interference, by the erection of dwelling houses, with the landscape view from a certain part of Centurion Way, Heddon-on-the-Wall, or from the public seats situated thereon or from the road itself or the vicinity of the said seats was a practical benefit to the persons aforesaid." Mr Gilbert appealed to the Court of Appeal from this decision. In the Case Stated by the Lands Tribunal, it was recorded, at para 4, that by consent of all parties "the hearing had proceeded upon the footing that the Respondents [the Objectors] were entitled to the benefit of the said covenants by virtue of a Scheme of Local Law." However, the member's decision was that the restriction affecting the Land should be modified so as to permit the erection upon the Land of a building then in the course of erection upon it.

8. Mr Gilbert's appeal to the Court of Appeal (Waller, Eveleigh and Kerr LJJ) was dismissed; see [1983] 1 Ch 27. Judgment was delivered on 5th February 1982. The leading judgment of the Court of Appeal was delivered by Eveleigh LJ, who noted, at page 29, that there had been "a number of objectors who like the applicant derived title under a common vendor in circumstances in which it is agreed the land was subject to a scheme of reciprocal rights and obligations amounting to a local law." Eveleigh LJ upheld the Lands Tribunal's decision as to the practical benefit of the Covenant. He said at pages 32-33:

> "In my judgment the tribunal was entitled to hold that the view was a benefit whether or not that benefit could be said to touch and concern the land. However, I am also of the view that the land of the objectors is, in each case, touched and concerned by the covenant. The covenant is intended to preserve the amenity or standard of the neighbourhood generally. The covenant is specifically aimed at density of housing. Extensive building can affect the amenity of a district in many ways. An estate can easily lose its character when buildings obstruct the views. It seems to me to be perfectly reasonable to say that the loss of a view just round the corner from the land may have an adverse effect upon the land itself for the loss of the view could prove detrimental to the estate as a whole. In my opinion, therefore, the tribunal was entitled to find as it did."

9. Both other members of the Court agreed with the judgment of Eveleigh LJ. Waller LJ (at page 35) made reference to the fact that "it was agreed at the Bar that the restriction has to be treated as a covenant within a building scheme or, as is sometimes said, as local law. The effect therefore was that the covenant to build only one house on the land edged red on the plan and belonging to the applicant was a covenant for the benefit of all other purchasers of land within the building scheme or their successors in title." Kerr LJ also delivered a short judgment.

The parties' respective cases

10. This background, it is contended on behalf of the First, Eighth and Twelfth Defendants, in submissions ably developed by Mr Ballance, has given rise to an estoppel *per rem judicatam*, either by way of cause of action estoppel, or issue estoppel. Alternatively, Mr Ballance maintained, the present proceedings amount to a relitigation of the issue, decided by the Lands Tribunal whose decision was upheld on appeal, that the benefit of the Covenant was enjoyed by the Defendants or their predecessors in title. Such relitigation, Mr Ballance argued, constitutes an abuse of the process of the court, and thus the present claim should be struck out, applying the principles identified in *Henderson v Henderson* (1843) 3 Hare 100. He submitted, further, that the attempt to relitigate the issue amounts to a collateral attack on the Lands' Tribunal's decision which, apart from being a decision *in rem* pursuant to s84(5) of the 1925 Act, binds the Claimants as successors in title to Mr Gilbert.

11. The Claimants deny that any estoppel, whether as to cause of action or issue, has arisen, and dispute the alleged abuse of process. Reduced to its essentials, their submission, helpfully advanced by Mr McCreath, was that having regard to the structure and provisions of the 1925 Act, and in particular subsections 84(1) and (2), the decisions of the Lands Tribunal and the Court of Appeal did not amount to a finding that the Objectors had the benefit of the Covenant. Thus, there is no scope for any estoppel to have arisen; equally there is no question of abuse of process, because there was no decision upon which these present proceedings could amount to a collateral attack. These conclusions flow, Mr McCreath argued, from the demarcation in the respective functions of the Lands Tribunal under s84(1), and the court under s84(2) of the 1925 Act; under the former provision, in defined circumstances, the Lands Tribunal had power (now exercised by the Upper Tribunal) to discharge or modify a restriction arising under a covenant as to the user or building upon freehold land; by contrast, under the latter provision, the court had, and has, power to declare whether any freehold land is affected by a restriction.

DISCUSSION

The applicable principles

12. The present case involves consideration of what Lord Sumption described, in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, at para 25, as the "distinct, although overlapping legal principles" of res judicata and abuse of process. The former, he explained, "is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers". These principles, he continued, shared "the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc [1991] 2 AC 93*, 110G, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process"." Lord Neuberger delivered a concurring judgment, agreeing with Lord Sumption's reasoning. Baroness Hale, Lord Clarke and Lord Carnwath agreed with both Lord Sumption, and Lord Neuberger.

13. Earlier in his judgment, Lord Sumption brought together, at paras 17- 19 the various principles applicable to res judicata and abuse of process, though I shall confine myself to setting out only those directly applicable in the present case:

> "17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. … Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 , 561 and adopted by Diplock LJ in *Thoday v Thoday [1964] P 181* , 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson (1843) 3 Hare 100* , 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.
>
> 18. It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* 3 Hare 100, 115. This was an

action by the former business partner of a deceased for an account of sums due to him by the estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. Wigram V-C said, at pp 114–116:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time
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> … Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is, whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

19. Wigram V-C's statement of the law is now justly celebrated. The principle which he articulated is probably the commonest form of res judicata to come before the English courts. …"

14. In developing his analysis of the principles, Lord Sumption referred to the speech of Lord Keith in *Arnold* citing respectively from p104D-E and p105D-E the following passages:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened …"
>
> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

Having analysed *Arnold* fully, Lord Sumption, at para 22, said that the decision in that case was authority for the following propositions:

> "(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non- existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

15. In order for res judicata estoppel to operate there is no doubt that the party seeking to rely upon the plea must establish its constituent elements, identified in *Spencer Bower & Handley's Res Judicata* (4th edition 2009) at para 1.02, namely:

> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;
>
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
>
> (iv) the decision was –
>
> (a) final;
>
> (b) on the merits;
>
> (v) it determined a question raised in the later litigation; and
>
> (vi) the parties are the same or their privies, or the earlier decision was in *rem.*"

These principles have not been in issue upon the application before me.

16. Returning to *Virgin Atlantic,* Lord Sumption went on, in paras 24-26, to consider the relationship between cause of action and issue estoppel and abuse of process. He paid particular attention to the well-known decision of the House of Lords in *Johnson v Gore-Wood & Co* [2002] 2 AC 1, explaining that nothing in the reasoning of their lordships in that case justified the view that because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of res judicata. This led him to the identification of the purpose of limiting abusive and duplicative litigation in the passage in para 25 of his judgment, to which I have already referred above.

17. In *Johnson v Gore-Wood* at page 31, Lord Bingham identified factors relevant to an assessment of whether the process of the court was being abused:

> "… *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any

additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

18. In order to consider the application of these principles, as to which there was no issue between the parties, to the present case, it is necessary first to consider the legislative framework of section 84 of the 1925 Act. It is in the light of the proper interpretation of the statutory provisions, and determination as to what was the scope of the Lands Tribunal's jurisdiction, that conclusions must be reached as to what issues were decided by the Lands Tribunal upon the 1978 Application, and also what issues could and should have been raised for decision.

The framework of s84 of the 1925 Act

19. I have set out above the material provisions of s84(1) of the 1925 Act. Other provisions of the section relevant to the present application are as follows:

"(2) The court shall have power on the application of any person interested—

(a) To declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.

…

(3) The Upper Tribunal shall, before making any order under this section, direct such enquiries, if any, to be made of any government department or local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries notices or other proceedings previously made, given or taken, the Upper Tribunal may think fit.

(3A) On an application to the Upper Tribunal under this section the Upper Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but Tribunal Procedure Rules shall make provision whereby, in cases in which there arises on such an application (whether or not in connection with the admission of persons to oppose) any such question as is referred to in subsection (2)(a) or (b) of this section, the proceedings on the application can and, if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, or otherwise, as may be provided by those rules or by rules of court.

…

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

…"

20. The court, by s84(2) is expressly given the power to declare whether freehold land is affected by a restriction imposed by any instrument, or upon the true construction of any instrument, the nature and extent of the restriction thereby imposed and issues as to its enforceability. It is to be noted that this power is not, unlike the power conferred upon the Lands Tribunal (now the Upper Chamber), expressed to be without prejudice to any concurrent jurisdiction of the relevant Tribunal. As to s84(1), and the reference to the concurrent jurisdiction of the court wholly, or partially, to discharge or modify any such restriction, the industry of both counsel in preparing their supplemental submissions, has revealed that there is a number of statutory provisions pursuant to which the court is, or was, expressly empowered to vary, modify, or discharge covenants affecting land, or the impact of such covenants. Such provisions include, or included, s610 of the Housing Act 1985 (a power originally dating from s27 of the Housing and Town Planning Act 1919), s3 of the Landlord and Tenant Act 1927, and s8 of the Celluloid and Cinematograph Film Act 1922, and s169 of the Factories Act 1961, the latter two provisions having been repealed. I am grateful to both counsel for their research in this regard, but, in the event, none of these other provisions actually throws light on the matters that I have to decide.

21. Free of any authority, as to the respective competencies of the Lands Tribunal (now the Upper Tribunal) and the court, and when taking into account the provisions of sub-s(3A) upon which Mr Ballance placed much emphasis for reasons to which I must return below, in my judgment s84 draws a clear distinction between the functions of the Tribunal and the court in determining disputes as to (i) whether and to what extent a restriction affects land (being a matter for the court under s84(2)), and (ii) whether any such restriction should be discharged or modified (being a matter for the Tribunal under s84(1)). The machinery established in sub- s(3A), which was inserted and introduced by amendment by the Law of Property Act 1969, would appear, in this setting to be to facilitate (i) the resolution of disputes as to who may oppose any application under s84(1), and (ii) the suspension of s84(1) proceedings pending determination by the court upon relevant related questions under s84(2). There is, however, some authority upon the inter-relationship between sub-ss 84(1) and 84(2) of the 1925 Act, to which I must now refer.

22. Both counsel referred me to, and relied upon, the Court of Appeal's decision *In re Purkiss' Application* [1962] 1 WLR 902. In that case, Mr Purkiss made an application to the Lands Tribunal under s84(1) of the 1925 Act for discharge or modification of restrictive covenants affecting a plot of land at Stoke Bishop, Bristol. The restrictions affected the density, and other aspects, of development. Having heard objections from a number of persons who claimed to have the benefit of the restrictions, the member of the Tribunal considered the various covenants, and stated that although the common vendor of the various plots of land concerned could enforce the various covenants, the same were not enforceable by the purchasers *inter se.* If that interpretation was correct, he said, there was no building scheme, so that none of the objectors had the benefit of the restrictions. In the light of this "conclusion", the member of the Tribunal said that Mr Purkiss could safely carry out his proposed development notwithstanding the covenants. However, the member also found that, if he was wrong in his conclusion as to the benefit of the restrictions, whilst there was a case for some modification of the restrictions, but not a case for the multi- storeyed block of flats that Mr Purkiss proposed, so that his application should be dismissed. Mr Purkiss appealed against the dismissal of his application, and the objectors cross-appealed from the decision, insofar as it amounted to a decision, that there was no scheme of development, such that none of the objectors had any *locus standi.*

23. All three members of the Court of Appeal (Lord Evershed MR, and Upjohn and Diplock LJJ, as they then were) delivered reasoned judgments; they agreed in the result that the appeal must be dismissed, but their reasoning differed, and it is therefore necessary to consider what each member of the court said. Lord Evershed began his

judgment by reciting the material history of the application to the Tribunal, noting that nowhere upon the face of Mr Purkiss' notice was there suggested to be a challenge of the restrictions as still being effective as regards the land in question; his lordship accepted that this form of notice was commonly used in such applications. Lord Evershed then went on, at p906, to identify what he considered to be an obvious problem, namely, "what exactly was the question of law as to the correctness of which [the Lands Tribunal] invited the decision of the Court of Appeal?" He continued at ps 906-907:

> "But I observe from what I have read that the member of the Lands Tribunal said that in his view there was no such scheme, that is, no building scheme, and then went on to say that none of the objectors had the benefit of the covenants in question, that is, the covenants contained in the deed poll. It, therefore, raises obviously the question whether this decision involves a conclusion, which, by virtue of subsection (5) of the section, might operate in rem as regards all the land formerly part of this particular estate, that there was no effective building scheme. Let me say at once that, assuming for the moment that was the decision, it does not necessarily follow (and Mr. Newsom [leading counsel for Mr Purkiss] agreed) that some of the persons resident on the estate might not be able to prove that they had acquired a right, by virtue of express assignment, for example, to enforce one or more of the restrictions contained in the deed poll. … When I look further at the decision, for reasons which I will state presently, my own clear conclusion is that the tribunal did not intend to find finally that no building scheme existed and that no one had any right to the benefit of the covenants under the scheme, because had he done so, then it seems to me quite plain that he should inevitably have gone on to say that there was, therefore, no problem for him to solve, no question to decide."

24. Lord Evershed then considered the terms of sub-ss84(1) and (2) of the 1925 Act, and continued on ps907-909:

> "It cannot I think be doubted, if one places the two subsections in contrast, that the first subsection was, at any rate primarily, directed to questions of fact; it was the Parliamentary intention on the face of the language to confer upon what was the authority, now the Lands Tribunal (a tribunal in each case which was not consisting, or exclusively consisting, of persons of legal training) the right to say as a matter of fact that either changes had taken place, that there had been a waiver or that there would be no injury to people if modifications to the covenants were imposed. It is to be noted from the language I emphasised in reading that the power so conferred was a power to be exercised on the application of any person interested in freehold land *affected by any restriction*. If, therefore, the applicant's land was held not affected by any restriction, or if, to take an extreme case as here suggested, it was the right answer to say that there was no building scheme and no other suggestion of restriction had been put forward, then the premise upon which the tribunal's jurisdiction rested had gone altogether. That has raised the question, which has been a little debated before us, to what extent it is right that the Lands Tribunal should embark upon matters which are, primarily at any rate, matters of law, such as a conclusion whether a building scheme ever existed or still exists. It may well be that in dealing with these matters, problems of law or mixed fact and law have to be dealt with by the tribunal, and to take an extreme case, it might be that the tribunal would have to come to a conclusion whether the land in question was affected by any restriction in order to found its own jurisdiction to proceed. I should not for myself wish on this occasion to say finally that the tribunal under subsection (1) has no jurisdiction to decide questions of law — particularly questions of the kind enshrined in subsection (2). But I do think (and I say this out of no disrespect to the Lands Tribunal) that it should be extremely cautious in embarking upon problems of law of this kind which are obviously suitable rather for decision under subsection (2) or other appropriate legal procedure.

> However, in this case, in spite of the language in the case stated, I think the member of the Lands Tribunal in fact took good care not to attempt final determination of subjects which were perhaps not strictly within his — if I say "competence," I hope I shall not be misunderstood, but not within the scope of the inquiry which, on the face of the notice at any rate, he was called upon to make. He did deal, as the matter had been argued before him, with this matter of a building scheme, and he expressed his own view that there was not a scheme, or that it had not been proved, or (at least) that the objectors before him had not so proved it. If that had been intended by him to be a final determination, that was the end of it, and there was nothing further that he need do. But what he did was to proceed to deal with the matter invoked by the notice, namely, the question whether the restrictions should be modified or whether anybody would be injured if they were modified, upon the hypothesis that he was wrong in the view that he had himself expressed that there was no building scheme. …He expressed it in the case stated as a matter of discretion, but I think it is quite plain from the decision that what really he did was to conclude and to state that he had not been satisfied as a fact, in the language of the section, that the discharge or modification which Mr. Purkiss's scheme involved would not injure persons entitled to the benefit of the restrictions and, therefore, strictly speaking, the reference to a discretion was inaccurate. But that I feel clear is the sense and intention of the conclusion …
>
> I think [the member of the Tribunal] founded his eventual conclusion on the failure of the applicant, according to his conclusion of fact, to satisfy the premise necessary to justify the making of an order."
>
> (Original emphasis)

25. This analysis of the Tribunal's decision led Lord Evershed to the conclusion, at p909, that it was "impossible to say in this court that there is a question of law for this court to decide and it seems to me that the present appeal must fail." In my judgment, Mr Ballance was correct when he submitted that, properly analysed, it did not form part of the *ratio* of Lord Evershed's judgment that the Tribunal had no jurisdiction to decide questions of law such as those "enshrined" in s84(2). To say the least, he left the matter open, but urged caution on the part of the Lands Tribunal before embarking upon such matters.

26. Upjohn LJ concluded that the member of the Tribunal had not attempted to decide that the land was not affected by the covenants concerned. He gave three reasons for this conclusion at ps 910-912:

> "First of all, the tribunal did not say so, he merely stated that the objectors appearing before him had no locus standi. Secondly, I am sure that the tribunal was well aware that he would have no jurisdiction whatever to decide that question, by which I mean the question whether the land was affected by a restriction imposed by any instrument or not, which is a matter which can only be determined by the court under subsection (2). The authority had no jurisdiction to decide any matters falling properly within the ambit of subsection (2): nor was that altered when the authority became the Lands Tribunal, because members of the panel of the Lands Tribunal, like the old authority, do not necessarily have any legal qualification. It was no doubt for that reason that when Parliament enacted section 84, it assigned the powers and duties under subsection (1) to the authority (though without prejudice to any concurrent jurisdiction of the court) for they are practical matters primarily of fact, and it assigned the powers and duties under subsection (2) to the court, as that raised questions primarily of law.
>
> The third reason which leads me to this conclusion is that if the tribunal had purported to decide that the land was not affected by the restrictions, he could not sensibly have referred to the possibility of granting permission in respect of revised plans, for there would be no covenants to modify. …Non-appearing objectors can only be deprived of

all their rights if the court has declared that the land is not affected by restrictions under subsection (2). I think that what the tribunal was really intending to say was that he recognised that he might reach a wrong conclusion in holding that the objectors had no rights; therefore, he did not finally decide that, but having regard to his views on the facts, he proposed to make no order. I think he was wrong only in putting the matter as one of discretion. The truth of the matter is that all orders under subsection (1) are made on the footing that the restrictions contained in the deed under review are enforceable by some one or more persons, for only in those circumstances is there anything to modify or any jurisdiction in the tribunal to modify.

On that footing in this case the tribunal was bound to refuse an order because the applicant had not satisfied him that paragraph (c) had been complied with; it was not a matter for discretion. I have already pointed out that the authority has no jurisdiction to determine any question falling properly within the ambit of subsection (2). On the other hand, the right of the tribunal to investigate the title of individual objectors appearing before him is inherent in the duties cast upon him under subsection (1). For example, an individual objector close to the land affected may be able to prove as a matter of fact that the proposals by the applicant will obviously injure him, but unless he can show some title to the benefit of the relevant restrictions, he has no locus standi to be heard. A good example of this is to be found in the recent case *Spruit v. John Smith's Tadcaster Brewery Ltd.* [(1957) 9 P&CR 24, CA], where this court directed the matter to be referred back to the tribunal in order that the title of a Mr. and Mrs. Peake, who lived close to the land affected, and a firm of Watts and Waller might be further investigated. But the tribunal, for the reasons I have already pointed out, is not in its nature equipped to deal with difficult questions of law in what is a most technical and difficult branch of our law, and while not doubting the jurisdiction of the tribunal to investigate the title of the individual objectors who appeared before him, I personally deprecate the fact that he thought it right to decide this difficult question as to whether a building scheme existed in 1870; I say that not the less because at first sight I am bound to say that the reasons that he gave for reaching the conclusion that there was no building scheme appear to me startling. But I say no more about that, because we have heard no argument upon it, and of course in the end Mr. Newsom might well have quieted my startled feelings. In my view the proper practice in all but simple cases is for the tribunal not to undertake an investigation into the title of individual objectors but to assume that there are persons entitled to enforce the restriction or, alternatively, of course it may be convenient to stand the matter over in order that the legal rights of the parties may be determined under subsection (2) by the court. But the usual course is for the tribunal to assume that the objectors are entitled to the restrictions, and, jurisdiction thereby being conferred upon the tribunal, to make whatever is the appropriate order under subsection (1). If it is subsequently found by the court that there are no restrictions affecting the land, no doubt the tribunal's finding is a nullity, and it matters not whether it is a nullity because it was made without jurisdiction or because there are in fact no covenants to modify."

27. Not surprisingly, Mr McCreath placed considerable reliance upon the second of Upjohn LJ's reasons which directly addressed the issue lack of the Tribunal's jurisdiction under s84(1). In my judgment, the passage which I have cited is significant, also, in the explanation that the Tribunal's decisions at that time (before it is to be recalled sub-s(3A) had been enacted), were made upon a footing as to the enforceability of restrictions, with the consequence that if a court subsequently found that there were no restrictions, any Tribunal finding (as to discharge or modification) would be a nullity.

28. Diplock LJ began his short judgment, at p913, by recognising that the decision of the Tribunal could have been intended as a final decision as to whether the land concerned was affected by a restriction, or merely as expressing a provisional view to that effect. He continued by stating that the Lands Tribunal was a court of

limited jurisdiction, the foundation of which was that any order must be made in relation to "freehold land affected by any restriction arising under covenant … as to the use thereof or the building thereon." He continued at p914:

> "The tribunal, before embarking on any reference, must of necessity decide for itself whether the conditions necessary to found its jurisdiction are fulfilled, but since it is a court of limited jurisdiction it cannot by its own finding on this matter extend the jurisdiction which the statute has conferred upon it. Its decision, either that it had jurisdiction or that it had not jurisdiction, is not conclusive. It can be questioned either on appeal where the statute provides for appeal or by certiorari. *In the absence of appeal or certiorari, it can be questioned in any subsequent legal proceedings in which the order made by the court of limited jurisdiction is in question. In this case either the land on which the appellant desires to build flats is affected by a restriction or it is not. If it is not affected by any restriction (as was either the determination or the provisional opinion of the member of the Lands Tribunal, it matters not which), the tribunal had no jurisdiction to make any order.* If, on the other hand, he was wrong as to that and the land was affected by a restriction, he has found (and this is a finding of fact) that the proposed modification will injure the persons entitled to the benefit of that restriction and on this ground has refused to make an order under paragraph (c) of subsection (1). Thus, whether he was right or whether he was wrong in determining that there were no restrictions imposed upon the land, the order that he made dismissing the application was the proper order to make."
>
> (Emphasis added)

29. In my judgment, the judgment of Diplock LJ is entirely consistent with the reasoning of Upjohn LJ as to the lack of jurisdiction in the Tribunal (at least prior to the enactment of sub-s(3A)) to decide issues as to whether land was affected by a restriction. The Tribunal could decide an application brought under s84(1) on the footing that the land was so affected, but that would not give rise to a binding decision. The "decision" could always be questioned in subsequent legal proceedings.

30. I consider that, in light of the judgments of Upjohn and Diplock LJJ, Mr McCreath correctly relied upon the decision in *Purkiss* as authority for the proposition that the Lands Tribunal did not have authority, prior to the enactment of sub-s(3A), to decide issues as to the enforceability of covenants, and the restrictions imposed by them, upon land. This conclusion is supported by the decision of Megarry J, as he then was, in *Shepherd Homes Ltd v Sandham (No 2)* [1971] 1 WLR 1062. In that case, a procedure summons sought determination of the issue as to whether the Lands Tribunal had jurisdiction to modify a restrictive covenant; the summons also sought the removal of a stay of proceedings in which the plaintiff had applied by motion for an interlocutory mandatory injunction for the removal of a fence said to be in breach of the covenant which precluded the erection of such a fence. The defendant had sought a stay of the action so that he might apply to the Lands Tribunal for the discharge or modification of that covenant. Megarry J, having been referred to both *Purkiss* and *Spruit* said at ps 1071-1073:

> "*In re Purkiss' Application [1962] 1 W.L.R. 902* is a case which has been the subject of some comment and, perhaps, some misunderstanding. Even if what is said about difficult points of law is not of the ratio, the dicta are no mere passing remarks but statements by members of a powerful Court of Appeal after what, from the names of counsel engaged in the case, I imagine to have been powerful arguments. If the Lands Tribunal is confronted by some difficult point of law upon which its jurisdiction depends, such as whether an ancient building scheme exists which entitles objectors to the benefit of the covenant, it seems to me clear from the judgments of Upjohn and Diplock L.JJ. that the Lands Tribunal should proceed to hear and determine the application on its merits after either assuming or deciding that the objectors are entitled to the benefit of the covenant. Such an assumption or decision, being on a matter for the

court under section 84 (2), will not be binding on those concerned, and may subsequently be questioned in the courts. *Like any other tribunal of limited jurisdiction, the Lands Tribunal must have power to determine whether or not the case falls within the limits of its jurisdiction: but as with other inferior tribunals, that power does not enable it to expand or contract the jurisdiction that Parliament has conferred upon it, and so no party who is minded to challenge that decision upon jurisdiction will be bound by it in the courts.* As a matter of convenience and prudence, the Lands Tribunal will no doubt decide the matter in most cases where the legal complexities are not over-burdensome, and assume the point where they are. Indeed, in *Spruit v. John Smith's Tadcaster Brewery Ltd. (1958) 9 P. & C.R. 24, the Court of Appeal* remitted the case to the Lands Tribunal for a further hearing in which the title of certain objectors to the benefit of the restriction could be investigated. The dicta in *In re Purkiss' Application [1962] 1 W.L.R.* 902 give a valuable warning as to the extent to which decisions of the Lands Tribunal are binding on the parties, and offer a counsel of prudence to the Lands Tribunal: but I do not think that the case is authority for any general rule that the Lands Tribunal is bound to abstain from resolving points of law merely because they are said to be difficult."

(Emphasis added)

31. Mr McCreath relied also upon a decision of the Lands Tribunal (Mr V G Wellings QC) itself in *Re Victoria Recreation Ground, Portslade's Application* (1981) 41 P&CR 119. In that case, the Tribunal heard an interlocutory application to determine which persons were entitled to object to the modification of certain restrictive covenants. Upon a previous application in respect of the same land, three of the five objectors had been admitted to be objectors upon concessions made by counsel. Addressing the status of the directions that had been given in those earlier proceedings, Mr Wellings QC said at page 123:

> "If the directions which I gave in the previous proceedings had the force of a declaration granted by a court I would hold that those directions are binding on the Council in the present proceedings as successor to the Portslade-by-Sea Urban District Council. However the Lands Tribunal's power to grant declarations applies in very limited cases specifically provided for in particular statutes. No such power is provided for in section 84 of the Law of Property Act 1925. Accordingly I am of the opinion that those directions have no force outside the proceedings in which they were made and that they do not bind the Council in the present case. It appears to me also that the concessions made by learned counsel in the previous case had effect for the purposes of those proceedings only and create no estoppel binding in the present case."

From the report, it does not appear that the Lands Tribunal in that case had been referred to the decisions in *Purkiss* or *Shepherd Homes*, but Mr Wellings' conclusion upon the effect of the Tribunal's directions or counsel's concessions as to title to the benefit of the covenants concerned, was completely in line with the reasoning to be found in the judgments of Upjohn and Diplock LJJ, and Megarry J, in those earlier cases.

32. Finally, by way of authority, Mr McCreath relied upon a passage which is to be found in all of the 7th, 8th, 9th and 10th editions of Preston & Newsom's Restrictive Covenants (at para 16-15 in the last-mentioned edition), though the wording has changed slightly between editions:

> "If an application admits the title of a given objector for the purposes of one set of proceedings, he is not thereby precluded from challenging it in later s84 proceedings."

This commentary is, I find, fully justified on the basis of the authorities to which I have referred, even though the only authority cited is the *Victoria Recreation Ground* case.

Sub-section (3A) of the 1925 Act

33. Subject only to consideration of sub-s(3A) of the 1925 Act, in my judgment upon a proper interpretation of s84 as a whole, and in light of the authorities which I have mentioned, it must follow that Mr Ballance's submissions run into inescapable difficulties. The section must, of course, be interpreted as a whole, but it is convenient to consider sub-s(3A) separately, before reaching an overall conclusion, not only because of the importance to it which Mr Ballance attached, but also because it was introduced only by the provisions of the 1969 Act, so that there is scope for an argument that its introduction might have heralded a change in what had previously been the effect of the section. Quite plainly, *Purkiss* was decided before the new provision was even in contemplation, and *Shepherd Homes* was decided only very shortly after its introduction, and might therefore, at least on Mr Ballance's case, have been reflective of a previous, unreformed, approach to the overall interpretation of s84 which is no longer justified.

34. Mr Ballance submitted that sub-s(3A) expressly recognises that the Tribunal may have to decide issues as to whether a restriction is valid, and who is entitled to its benefit, and that such issues would arise not merely in connection with issues of standing for the purpose of making objection, but more broadly. He placed particular emphasis upon the sub-section's requirement that the Tribunal Procedure Rules should make provision whereby, in cases in which there arises on an application *whether or not* in connection with the admission of persons to oppose, any such question as is referred to in sub-s(2)(a) or (b), the proceedings can be suspended to enable the decision of the court to be obtained. Whilst accepting that the subsection does not state that the Tribunal shall not, or may not, decide such questions, it follows, it was argued, that where neither the parties nor the Tribunal wish to refer the matter to the Court, the Tribunal's jurisdiction to decide those issues is not ousted.

35. In *Shepherd Homes*, Megarry J was referred to the subsection and to the new rules made thereunder. He said at p1072:

> "I should add that where, as in the *Purkiss case [1962] 1* W.L.R. 902, the difficulty arises in a case which falls within section 84 (2), section 84 (3A) of the Act of 1925 and rule 22A of the Lands Tribunal Rules 1963 now enable the Lands Tribunal of its own motion to suspend the proceedings so as to enable an application to be made to the High Court under section 84 (2), and they require the tribunal to do this if the applicant or any person who has given notice of objection so applies. The new subsection and the new rule are derived from section 28 (6) of the Law of Property Act 1969 and rule 4 of the Lands Tribunal (Amendment) Rules 1970 respectively…" made to the High Court to determine a point which the High Court has already determined, even if only as part of a decision on a procedural point."

36. Megarry J's observations made in the case as to jurisdictional matters, were therefore, made in knowledge of the changes effected to the section, and of the consequential changes made to the relevant rules. His comments, however, bring me conveniently to the next submission made by Mr Ballance, as to the "mischief" to which the provisions introduced by the 1969 Act were directed. In this connection, Mr Ballance referred to Law Commission Report No. 11 "*Transfer of Land; Report on Restrictive Covenants*" (1965), which had originally been relied upon by Mr McCreath. He drew attention to explanatory note 1 to Proposition 11 (page 25 of the Report) which referred to *Purkiss* as revealing "an unsatisfactory situation in that the Lands Tribunal must either assume the covenant to be valid and enforceable and give a determination as to modification or discharge which may turn out to be a nullity or, if the validity or enforcement of the covenant is in doubt, adjourn the proceedings until the Court has decided this matter on an application under s.84(2). The procedure suggested… is designed to ensure that all questions of law are raised and conclusively determined in the simplest way before the issue of modification or discharge is considered." These observations, Mr Ballance submitted, suggest that the Law Commission identified *Purkiss* as a part of the "mischief" to be cured.

37. I do not accept Mr Ballance's submission as to the effect of, or intention behind, sub-s(3A). In my judgment, it was not intended to effect a jurisdictional change to the arrangements already established under the section. If Parliament had intended that sub-s(3A) should bring about a jurisdictional change because of a perceived mischief revealed by the decision in *Purkiss*, it might have been expected that the new provision would have expressly addressed the point. However, the new subsection said nothing expressly as to the expansion of the

Tribunal's jurisdiction, nor, does it seem to me, that there was anything of the kind implicit in the new subsection. Its purpose was confined to facilitating a more convenient procedure for resolving issues which were within the court's jurisdiction under s84(2) where such issues were connected with an application proceeding in the Land's Tribunal. The new subsection makes it clear that the Tribunal is entitled to give directions as to persons who may be admitted to appear as objectors, that is to say "those appearing to be entitled to the benefit of the restriction"; such a direction would not amount to a decision as to entitlement or the effect of the restriction. The directions would be purely procedural for the purposes of the instant applications; they would not enter upon the territory which was the jurisdictional preserve of the court. As for the power to suspend proceedings, there might be occasions when it would be more convenient and cost-effective for the Tribunal simply to proceed in the traditional fashion, described by Upjohn LJ in *Purkiss*, and decide an application on some footing as to the effect of a covenant; for example, the s84(1) application might involve limited evidence and argument only, whereas the costs of resolving a related application under s84(2) could be expected to take up much time, and incur greater expense. In such circumstances, it might make sense simply to press on with the former, because it would be apparent that if a covenant had the effect for which the objectors contended, it would not avail them if the s84(1) application were to succeed. In other cases, the reverse might be the case, and the issues as to the effect of a covenant might be very limited in contrast with a time consuming and costly application as to discharge or modification. Thus, affording to the parties, and to the Tribunal, the possibility of not suspending the proceedings allowed maximum flexibility in terms of the most appropriate manner in which to deal with the problem of resolving related issues in different jurisdictions; decisions could be made in accordance with the factors specific to individual cases and circumstances.

38. In the circumstances, I have not found it necessary to look beyond the wording of sub-s(3A) or the materials which I have already mentioned in order to reach my conclusions as to the effect of the subsection. I was, however, invited by Mr McCreath to consider remarks made by the Lord Chancellor, Lord Gardiner, when introducing the Bill which became the 1969 Act (Hansard, 24th April 1969, vol 301, cc588):

> "The subsection implements Proposition 11 of the Report with certain modifications and is designed both to preserve the existing jurisdiction of the court to determine issues of law and at the same time to ensure that the Lands Tribunal can for practical purposes decide who are to be parties to the proceedings before them without trespassing on the court's jurisdiction.
>
> The subsection aims to dispel the doubts raised by the decision of the Court of Appeal in *Re Purkiss' Application* [1962] I.W.L.R. 902, as to the extent to which the Lands Tribunal can decide who is entitled to oppose an application, where that question involves, as it often will, a decision as to the validity of a restriction or who is entitled to the benefit of the restriction. The subsection expressly enables the Tribunal to decide who may oppose an application, but requires rules to bemade for the proceedings to be suspended, with a view to obtaining the determination by the court of any questions of law underlying the Tribunal's decision. By leaving rules to govern the detailed provisions, both on the circumstances in which proceedings are to be adjourned and on the method of reference of legal points to the court, the subsection provides a flexible machinery. It is intended that Lands Tribunal Rules will require the Tribunal to refer legal issues to the court whenever a party so requests and will give the Tribunal a discretion to do so of its own motion."

39. Lord Gardiner's words, in my view, do lend support to Mr McCreath's submission that the subsection in question was not intended to extend the jurisdiction of the Tribunal; there should be no "trespassing on the court's jurisdiction". However, Mr Ballance objected that the passage cited did not fall within the requirements established in *Pepper v Hart* [1993] AC 593 for the admission of such Parliamentary material. He submitted that (i) there was nothing ambiguous or obscure about the words used in the subsection, and the legislation led to no absurdity, (ii) the specific words of the subsection were not addressed by Lord Gardiner, and (iii) his statement was not clear and did not inform the question of whether s84 as a whole was intended to vest in the Tribunal a conclusive fact-finding jurisdiction. I accept Mr Ballance's submission that the first requirement mentioned is

absent in that I find that the meaning of the subsection is clear, not ambiguous, and leads to no absurdity; I consider that the subsection's effect can be readily ascertained, and its meaning understood, without the need to resort to the words of Lord Gardiner.

40. In light of the conclusions that I have expressed above, it follows that the Defendants' application, insofar as it is based upon cause of action or issue estoppel must fail. The Lands Tribunal did not have jurisdiction over the subject matter which falls within the ambit of s84(2) of the 1925 Act. It made no decision upon such matters, and even if it did, such decision was not final. It made no determination upon a question raised in later litigation. It makes no difference that there may have been a concession in the 1978 Application as to the applicability of the Covenant, because the Tribunal made no decision based upon it; it simply proceeded upon a footing, and thus bound no-one.

41. For closely related reasons, in the circumstances of this case, there was no abuse of process on the part of the Claimants. The public interest that there should be finality in litigation, and that a party should not be twice vexed in the same matter, identified by Lord Bingham at page 31 in *Johnson v Gore-Wood* is not infringed in the circumstances of this case. None of the Defendants has been twice vexed in the same matter, because the matter in which the Lands Tribunal was concerned (discharge or modification of a restriction arising under the Covenant, pursuant so s84(1) of the 1925 Act) is a different matter from that before the court in the present proceedings (considering whether land is affected by a restriction and the effect thereof, under s84(2) of the same Act). For reasons that I have developed at some length above when considering the framework of section 84 of the 1925 Act, it was simply not possible for issues which it is for the court to consider under s84(2) to be raised for determination in the 1978 Proceedings. Any determination of s84(2) issues, had any attempt been made to ventilate them in the course of the 1978 Proceedings, would have had to be put off for the consideration of the court, perhaps using the machinery introduced by sub-s(3A) of the Act. This results from Parliament's decision to allocate different functions in relation to resolving differing kinds of disputes as to covenants affecting land, to what is now the Upper Tribunal on the one hand, and the court on the other. There has, in light of these considerations, been no harassment of any Defendant, and there is no question of a collateral attack upon the correctness of any decision made by another court or Tribunal. I keep in mind Lord Bingham's exhortation, in the passage cited above, to focus attention on the crucial question of whether, in all the circumstances one party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. The answer to that question, in this case, is plainly "No".

42. I would add that in my view it would be a remarkable, and most unjust result, for any contrary conclusion to be reached in this case. As consideration of the authorities (*Purkiss, Shepherd Homes, Victoria Recreation Ground*) and leading practitioner texts (Preston & Newsom, in several editions) demonstrates, many very distinguished judges, members of the Lands Tribunal, and learned authors have, over many years, held, or expressed the view, that where the Tribunal has proceeded to hear and determine an application, having assumed or decided that objectors are entitled to the benefit of a covenant, such an assumption or decision will not be binding, and may subsequently be challenged in the courts; this extends to concessions made as to the title of an objector (*Victoria Recreation Ground*, and Preston & Newsom). It would be unjust, and unfair, to characterise as abusive the adoption and following of a course of conduct which accords with those well-established principles.

DISPOSAL

43. For the reasons set out above, I conclude that no cause of action or issue estoppel has been disclosed in the circumstances of this case, and that there has been no abuse of process. It follows that the Defendants' application for summary judgment, or alternatively, the striking out of the claim brought against them, must be dismissed.

44. If the parties are unable to agree consequential orders, I will hear further submissions from counsel upon the handing down of this judgment.

45. I am very grateful to counsel for their extremely clear, thorough, and well- argued oral and written submissions.