IN THE UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral Citation Number: [2017] UKUT 461
UTLC Case No: LP/22/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – redevelopment of dwellinghouse by six flats in mansion style building – whether covenant secures practical benefits of substantial value or advantage – scheme of covenants – thin end of wedge – breach by sub-division of plots already occurred – application allowed on ground (aa) – compensation for temporary disturbance assessed at £8,100 – ss84(1)(a), (aa) and (c) Law of Property Act 1925

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY

PAMELA ANNE THEODOSSIADES

Re Land at Gaisgill, Barnet Lane, Elstree, Herts WD6 3QZ

Before: His Honour John Behrens and A J Trott FRICS

Sitting at: The Royal Courts of Justice, Strand, London WC2A 2LL

on

22 to 24 November 2017

Andrew Francis, instructed under the Direct Access Scheme, for the Applicant
Tom Weekes QC, instructed by Teacher Stern LLP, for the Objectors

The following cases are referred to in this decision:

Re Truman Hanbury Buxton Co Ltd's Application [1956] 1 QB 261

Shephard v Turner [2006] EWCA Civ 8
Re Snaith and Dolding's Application (1996) 71 P & CR 104 LT
McMorris v Brown [1999] 1 AC 142
Re Hextall's Application (2000) 79 P & C R 382
Re Bass Limited's Application (1973) 26 P&CR 156
Rogers v Hosegood [1900] 2 Ch 389
Willow Court Management Co (1985) Limited v Alexander [2016] UKUT 290 (LC)
Re Dean's application [2017] UKUT 203 (LC)
PGFII SA v OMFS Co 1 Limited [2014] 1 WLR 1386
Re Hennessey's Application [2017] UKUT 243 (LC)

DECISION

Introduction

1. This is an application under grounds (a), (aa) and (c) of section 84(1) of the Law of Property Act 1925 by Mrs Pamela Theodossiades to modify or discharge restrictive covenants which affect her property, Gaisgill, Barnet Lane, Elstree, Herts WD6 3QZ ("the application land").

2. It will be necessary to set out the covenants in more detail later in the decision. For the purpose of the introduction it is sufficient to note that the application land was part of a larger plot sold in 1896 and 1900 and which was subject to covenants restricting the purchaser to the erection of not more than two private dwellinghouses of a specified minimum cost.

3. There are currently two dwellinghouses on the original plot – Gaisgill, the application land, which occupies the southern part of the original plot and is owned by Mrs Theodossiades and Copperfields which occupies the northern part of the plot and is owned by Mr and Mrs Smith. At present Gaisgill is a large seven-bedroomed house laid out in the main on two floors.

4. On 8 August 2012 Mrs Theodossiades was granted planning permission (on appeal) to demolish Gaisgill and to erect a two-storey building comprising six two-bedroomed apartments with roof and basement accommodation and underground parking.

5. It is not in dispute that the proposed development is in breach of covenant. By this application Mrs Theodossiades seeks modification of the covenants so as to permit the development. Her case is primarily that the proposed development will have either no, or very little, effect on the enjoyment, amenities or value of the objectors' properties. Therefore, the main ground of application is under paragraph (aa) of section 84(1). Additionally, and alternatively, she relies upon grounds (a) and (c).

6. The application is opposed by the owners of three of the neighbouring properties – Mr Richards, the owner of Red Roof Cottage which is immediately to the east of but on lower ground than Gaisgill, Mr and Mrs Zaum, the owners of Willow Lodge which is the plot to the east of Copperfields and Mr and Mrs Canetti the owners of High Carrs which is to the east of Red Roof Cottage. Mr Smith (a joint owner of Copperfields) is subject to the covenants and thus not entitled to benefit from them. He however supports the objections.

7. In his skeleton argument on behalf of the objectors Mr Weekes accepts that when viewed in isolation the development will have a modest detrimental impact on the amenity of the objectors' houses. However, the principal ground of opposition comes from the precedent it would create. He submits that it strikes at the heart of the core principles governing the development of this and neighbouring areas of land as established by a scheme of covenants – that plots should be occupied with houses and not flats and that development should be of high value and low density. He submits that that the owners of the land to the north of Barnet Lane

between Gaisgill and Deacon's Hill Road to the east have been well served by the restrictions in the past and should continue to be so in the future.

8. The Tribunal heard evidence from Mrs Theodossiades on her own behalf and from Mr Westley Richards, Mr Dan Zaum, Mr Bernard Canetti and Mr Lewis Smith on behalf of the objectors. In addition, we heard expert evidence from Mr Ruaraidh Adams-Cairns FRICS on behalf of Mrs Theodossiades and Mr Bruce Maunder Taylor FRICS on behalf the objectors. Mr Adams-Cairns is a Director of Savills (UK) Ltd, and Head of the Litigation Support Department, who specialises in all aspects of residential property valuation, including residential development sites. Mr Maunder Taylor has practised from Whetstone for over 45 years frequently dealing with high value properties in an area which includes Elstree. His work is mainly valuation but includes restrictive covenants and development sites. We made an accompanied inspection of the application land, the objectors' properties and the surrounding area on 23 November 2017.

History of covenants

9. In the light of the objectors' submissions it is necessary to set out in some detail the history of the covenants affecting the neighbouring properties and the extent to which they have been observed.

10. Henry Robinson died on 26 August 1885. His wife, Sophia Robinson, was the only beneficiary under his will. The land in Mr Robinson's estate included some fields situated to the north of Barnet Lane at Deacons Hill which is about a mile to the east of the centre of Elstree.

11. Between 1886 until her death in 1908, Sophia Robinson sold parts of these fields as building plots for upmarket houses. Those sales created a ribbon of development running eastwards from Gaisgill to Deacons Hill Road a distance of about 300 metres.

12. Sophia Robinson died on 19 February 1908. By then she had sold off most of this area of land. A further building plot was sold by the beneficiaries under her will on 28 April 1910. That left as unsold only one narrow strip of land.

13. The first plot to be sold was in 1886. It was at the far east of the field (i.e. closest to Deacon Hill Road). The covenants are contained in a conveyance dated 25 August 1886. The covenant was made "with the said Joseph Crosland his heirs and assigns". It is common ground that there are no express words of annexation. The most relevant covenant prevented the building of more than "three principal dwellinghouses on the said plot of land either with or without lodges stables coachhouses and other outbuildings and offices" There was a further requirement that each principal dwellinghouse when erected was to be of not less value than £1,000.

14. There are now three dwellinghouses on the plot which has been divided into three titles – Deacons Croft (HD 293795), 11 Belmor (HD 212618) and Deacons Court (HD 355164). However in the light of the absence of words of express annexation in this pre-1926 conveyance there must be considerable doubt whether the covenant could now be enforced against the owners of any of these three properties.

15. The second plot to be sold was in 1894. It is immediately to the west of the first plot. The conveyance dated 23 August 1894 contains a covenant with adequate words of annexation "not to erect on the property more than one private dwellinghouse with or without lodge stable coachhouse and offices such dwellinghouse…to be of not less prime cost than Eight hundred pounds."

16. There are now three dwellinghouses on the plot which is divided into three titles – Stonewold (HD 453964), Sunny Ridge (HD 518270) and Kailash (HD 173886). According to Mr Maunder Taylor Kailash was originally built around the date of the First World War, and then substantially extended later; he suggests that Stonewold and Sunny Ridge were constructed after the Second World War on the site of a large house which was demolished at that time.

17. The third plot to be sold off was in 1896. It is at the far west of Mrs Robinson's fields. The conveyance dated 12 August 1896 contains a covenant "Not to erect on the property more than two private dwellinghouses with or without lodge stable Coachhouse and Offices each such dwelling exclusive of the value of such Lodge stable Coachhouse and Office to be of not less than prime cost than £800". The covenant contains adequate words of annexation.

18. There are two dwellinghouses on the plot – Gaisgill (HD 187755) and Copperfields (HD 246929). Gaisgill was the original dwellinghouse on the site. It appears from the Copperfields' title deeds that Mrs Theodossiades sold the northern part of her plot in 1988 to enable the construction of Copperfields.

19. There is some confusion as to the next sale as the title deeds refer to conveyances in 1897 and 1899. It seems, however, the titles of what are now part of Hither Cottage (HD 355341), L'Escale (HD 408900) and Malabo Lodge (HD 129124) derive from a conveyance dated 15 August 1899. That conveyance restricts the building to "one private dwellinghouse with or without lodge, stables coachhouse and offices such dwellinghouse … to be of not less prime cost than Eight hundred pounds." The actual conveyance was not submitted to the Land Registry and there is no record as to whether there were adequate words of annexation. However, given that the 1894 and 1896 deeds contained sufficient words it seems to us likely that the covenants would have been annexed for the benefit of the remainder of the estate.

20. In his report Mr Maunder Taylor describes Hither Cottage as having been constructed sometime after February 1997 following demolition of the then existing property. He suggests that L'Escale was constructed after the Second World War to replace an existing building and that Malabo Lodge has been recently built to replace an existing building.

21. In 1910 Mrs Robinson's successors sold the final plot of land which is immediately to the east of Gaisgill and Copperfields. The conveyance dated 28 April 1910 contains covenants with adequate words of annexation "Not to erect on the property more than two private dwellinghouses with or without lodge stable coachhouse or motor car house and offices such dwellinghouses without such lodge stable coachhouse or motor car house and offices to be of not less prime cost than £600 each."

22. There are now three dwellinghouses on the plot – Red Roof Cottage (HD 141129), Willow Lodge (HD144816) and High Carrs (HD 5216). Significant extensions have been built to Red Roof Cottage and High Carrs over time.

23. There is one further thin plot of land which was not sold at the time but may have been kept as access to the field behind. It appears to have been sold in 1924 with a provision that any dwellinghouse built on the land should not cost less than £1,000. There is a dwellinghouse known as Ashiana (HD 92761) on the land. Ashiana is very close to the eastern boundary of High Carrs.

The integrity of the covenants

24. There are 15 relevant properties in the area covered by the covenants (including Ashiana). This is not a case where there is a building scheme. Furthermore because each of the covenants was granted before 1926 they can only be enforced insofar as they are validly annexed to the land of the person seeking to enforce them. This leads to a number of conclusions:

(i) It is extremely doubtful if the covenants can be enforced against the three properties at the eastern end of the area adjoining Deacons Hill Road. This is because there are no express words of annexation. It is possible (but in our view very unlikely) that some extrinsic evidence may be found which would assist anyone seeking to enforce them.

(ii) There may also be difficulties of enforcement against the successors in title to the 1910 conveyance (i.e. the three properties owned by the objectors). The only piece of land sold after 1910 was the thin strip of land now occupied by Ashiana and it is not wholly clear that the owner of Ashiana could enforce the covenants.

(iii) Ashiana is not subject to any covenants at all.

(iv) Whilst it is true that there has been no attempt to divide the properties into flats in the past there have been significant breaches of the density covenants. Thus, there are three properties (rather than one) on the plot that was subject to the 1894 conveyance, three properties (rather than one) on the plot that was subject to the 1899 conveyance and three properties (rather than two) on the plot that was subject to the 1910 conveyance. Thus, five out of the 15 properties have been built in breach of covenant.

The character of the neighbourhood

25. The covenants affect approximately a 300 metre stretch to the north of Barnet Lane from Gaisgill to Deacons Hill Road. In his report Mr Maunder Taylor described the position in this way:

> "This part of Barnet Lane, commonly known as the Deacons Hill area, is a location of particularly high-value properties and, in my opinion, the area of highest values in the Elstree/Borehamwood vicinity. The obvious supporting evidence for this is the size, value and quality of the nearly completed development at Malabo Lodge, and the even more considerable size, value and quality of the development at The Marians. These developments indicate an improving quality and value of residences greater than the tone of developments

which have occurred since, say, the 1970s. From my own firm's knowledge of the area (my Partner advised a one-time owner of The Chantries – on the south side of Barnet Lane – on various occasions) this is a location with similar values to some parts of Totteridge Lane/Totteridge Common and Hadley Wood.

Many of the properties have gated entrances with security controls. (An examination of the planning history for each house gives some dated timelines of when previously ungated properties have received planning consent to install gates.) The properties on both sides of Barnet Lane have all the appearance of having been individually designed. These are houses of individual character. It is noticeable that, almost without exception, the houses are known by their names and not by a house number. Each house appears to have been developed to the taste and character of the individual owner at the time of construction, which adds to the feel of individuality rather than estate planning. There are a significant number of Tree Preservation Orders and the general character is of low-density development, prestigious dwellings with an emphasis on privacy and security, suffering little noise interference, and rear gardens (in particular) generally in secluded circumstances. They are substantial buildings on large plots giving their owners a high level of privacy, being able to enjoy their own property with minimum intrusion from others, an ability to have a high degree of security in a location recognised to be prestigious yet with easy access by train into London (Borehamwood and Elstree Railway Station) and the main road network, particularly the Al, the M25 and the M1."

26. Whilst there are no examples of houses subdivided into flats on the north side of Barnet Lane, the same cannot be said of the south side. Mr Maunder Taylor's research indicates that the 12[1] flats at Deacons Heights were constructed in the late 1960s on the foot print of the old manor house. The flats were limited to two storeys in height. The other properties on the south side of Barnet Lane are generally high quality detached dwellings set in private grounds.

Changes in the character of the neighbourhood

27. Mr Adams-Cairns considered this issue in paragraph 13 of his report. In his view the land immediately to the west of Gaisgill has probably changed little over the past 120 years (although The Marians, a very substantial detached house, is currently under construction in this area). He considers that the neighbourhood has become more suburban and less rural with a higher density of development. In paragraph 13.4 he lists nine factors which support this view:

"13.4.1 Infilling with more modern houses in the grounds of the original large detached residences of the nature and style of Willow Lodge and Copperfields.

13.4.2 Development with detached houses of different sizes. Some such as those to the north along Clare Close are small whilst those to the south such as Chantry are similar to that consented.

[1] In cross-examination Mr Maunder Taylor agreed that there were 16 units some of which may be bungalows.

13.4.3 The expansion of Borehamwood from the north which is characterized by Clare Close immediately to the north of Willow Lodge. This is a comparatively recent development built to a high density (houses per acre) with compact detached houses around a cul de sac road system.

13.4.5 Developments such as Deacons Heights which is about 125 yards to the east along Barnet Lane which include both apartments and bungalows. (It is of interest to note that based on the OurProperty schedule of sales since January 1995 about 30% of the properties sold along Barnet Lane have been flats.)

13.4.6 Changes to the architectural style. (Neo Georgian is currently popular.)

13.4.7 There is currently also a trend to demolish existing houses fronting Barnet Lane and replace them with larger more impressive buildings. Examples of these include Malabo Lodge, two plots to the east of High Carrs ….and [The Marians] (a 13,000 sq ft house) which is the first plot to the west of Gaisgill after the Green Belt land.

13.4.8 Numerous existing houses have been enlarged or extended (as per Red Roof Cottage, High Carrs and Copperfields).

13.4.9 A dramatic increase in size and number of motorized vehicular traffic along Barnet Lane."

The proposed development

28. The proposal is described most fully in the planning officer's report to the planning committee:

"10.5 …It is proposed to demolish the existing house comprising 546 sq.m. in basement, ground, 1st and loft space and construct a significantly larger building of 1,762 sq.m. gross internal area (GIA) to contain 6 large two bedroomed flats. The proposal shows a symmetrical building with a unified appearance. It would take the appearance of a single large detached dwellinghouse using consistent window designs and recessed level roof front dormers. This would be consistent with the character of the locality and acceptable in its context.

10.6 The new building would be located in a similar position at the front as the existing house with most of the roof set back to the level as the existing house. This with the exception of a central element for a study on the top floor which would have a 3.5m width jutting 3 metres higher than the existing eaves.

10.7 The proposal would have a maximum height of 10.7m to the ridge above the forecourt ground levels of the existing house. This is 1 metre above the ridge line of the existing house. However, as the existing house is 2 metres lower and

setback 12 metres from the road, this would have no detrimental impact on the streetscene.

10.8 At the deepest part of the proposal, where the basement would project to the rear, it would be deeper than the original house by up to 9.5m from the existing rear patio projection. The building would be 11.5 metres deeper than the existing house at ground and first floors with the second floor being up to 5.9 m deeper. The proposal would be slightly narrower overall. It is considered that although a significant change the scale of the development would be acceptable.

10.9 The layout of the proposal would reuse the existing forecourt. It would retain trees and landscaping at the front, protected by a group Tree Preservation Order (TPO), which would mainly conceal the proposal, as it does the current building that is set below street level. The proposal would be 1.5 metres further away from the boundary with the Green Belt to the west than the existing house and would have trees screening views from this direction. This would have an acceptable impact on the Green Belt adjacent.

10.10 The proposed block would retain a spacious setting leaving a 19.7m gap to the nearest property of Red Roof Cottage to east, with the access road serving Copperfields in-between, and distance of 41.6m to Copperfields to the north.

10.11 The building would be narrower allowing for space to the protected Oak tree to the west of the house. The forecourt and boundary structures to the front would remain as for the existing house retaining a spacious setting to the new block. Internally the flats would be accessed centrally with a single point of access to a central stairwell around space that can accommodate a lift. Each flat would have a lobby area from which rooms would be accessed of generous space standards of between 184 and 274 sq.m. for each flat….

10.28 The proposal would provide 12 car parking spaces in a proposed new basement accessed by a ramp to the side near the access road to Copperfields. It would also provide parking on the forecourt for four cars including two disabled spaces, bicycle stand space on the forecourt and in the basement as well as motorcycle parking. For six two bed flats there is a requirement in the SPD for 12 spaces plus one disabled space plus 7 cycle parking stands. Consequently the proposal provides slightly more parking than is required under the standards ie an extra three spaces including one disabled space. The forecourt spaces are mainly aimed at visitors in space formerly the parking area for the existing 7 bedroom house, which could accommodate more car parking spaces than this currently. Given the flexibility in parking standards encouraged by guidance this slight overprovision is not considered to be detrimental to highway safety. This would comply with the above transport policies."

29. Despite the views of the planning officer the Tribunal did have concerns at the parking arrangements. We thought it likely that the basement car park would be fully utilised by the tenants. In those circumstances we envisage that there would often be occasions when the two

parking spaces and two disabled spaces would be insufficient for visitors with the result that there would be a risk that they would park on Barnet Lane which is a busy road especially in the rush hour. Furthermore if one approaches the site from the west Gaisgill is just after a left hand bend.

The Law

Statutory Material

30. As already noted this application is brought under section 84(1)(a), (c) and (aa) which, as far as relevant to this application, provide:

> (1) The Upper 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 —
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or
>
> (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; or
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> (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 Upper 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 loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

Under section 84(1B) the Upper Tribunal is required 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.

Authorities

31. We were referred to a number of authorities by counsel in their skeleton arguments and closing submissions. It is not necessary to refer to all of them. It is however necessary to refer to some:

(i) A covenant is said to be obsolete within ground (a) if its original purpose can no longer be served: per Romer LJ in *Re Truman Hanbury Buxton Co Ltd's Application* [1956] 1 QB 261 at 272.

(ii) There is some discussion in the authorities as to whether the practical benefits secured by the covenant are of "substantial value or advantage" to those entitled to the benefit. In *Shephard v Turner* [2006] EWCA Civ 8 Carnwath LJ considered that a safer guide was whether the benefit was "considerable, solid, big". He preferred not to seek a substitute for the expression used by Parliament but encouraged the Tribunal to promote uniformity of decision by applying the section in a common sense way.

(iii) The "thin edge of the wedge" argument is set out clearly in the decision of the President, Judge Marder QC, in *Re Snaith and Dolding's Application* (1996) 71 P&CR 104 LT at 118:

> "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see *Re Ghey & Galton* [1957] 2 Q.B. 650; 9 P&CR 1 and *Re Farmiloe* (1983) 48 P&CR 317. It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example *Re Henman* (1972) 23 P&CR 102; *Re Saviker (No. 2)* (1973) 26 P&CR 441; and *Re Sheehy* (1992) 63 P&CR 95.
>
> Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

This passage was cited with approval by Lord Cooke in *McMorris v Brown* [1999] 1 AC 142 at 151 and Carnwath LJ in *Shephard* who emphasised that the issues were issues of fact not law.

(iv) In *Re Hextall's Application* (2000) 79 P&CR 382 the Tribunal was faced with an argument that the "thin edge of the wedge" argument was confined to cases where the

> covenants were enforceable by virtue of a scheme of development. The argument was rejected by the President (George Bartlett QC) but who made the point at 392 "although no doubt it is in such cases that it is most likely to have application".

Grounds (a) and (c)

32. Although Mr Francis did not abandon the claim under grounds (a) and (c) he recognised that the main claim was under ground (aa). We accept the evidence of Mr Adams-Cairns that the neighbourhood has changed in the last 130 years in the ways he has identified. Nevertheless we do not think the density covenants have become obsolete in the sense set out above. As Mr Weekes pointed out in his skeleton argument:

> "the covenants have created a low-density ribbon of development consisting of upmarket houses that command high prices. The impact of these covenants can be seen by noting the contrast between the density and nature of development on this land compared to the development that has taken place elsewhere to the north of Barnet Lane."

33. Even though, as set out above, there have been breaches of the covenants and there are difficulties in enforcement we do not think they are obsolete.

34. Equally we do not think it can be said that the modification of these covenants will not injure the objectors. We shall consider the impact on the objectors of modification of the covenant to allow the proposed development in more detail in the discussion of ground (aa). For present purposes it is sufficient to say that the objectors can establish some injury. That is enough to defeat ground (c).

Ground (aa)

35. We propose to follow the conventionally asked questions based on those suggested by leading counsel for the applicants in *Re Bass Limited's Application* (1973) 26 P&CR 156.

Is the proposed development reasonable?

36. This is common ground between the parties. The development has been granted planning permission. We agree that it is reasonable.

Do the covenants impede that user?

37. This is also common ground between the parties. Residential flats with communal entrances and staircases are not "private" dwellinghouses: see *Rogers v Hosegood* [1900] 2 Ch 389, per Collins LJ (delivering the judgment of the Court of Appeal) at 409. Furthermore, each of the flats counts as a "dwellinghouse" with the result that the total number of dwellinghouses on

the plot sold in 1896 would amount to seven. It follows that the covenants impede the development.

Does impeding the proposed user secure practical benefits to the objectors?

38. In his skeleton argument Mr Weekes identified a number of practical benefits to the objectors secured by the covenants. These included the ability to prevent the increase in car movements from 12 to 28, the loss of privacy to Red Roof Cottage and increased disturbance due to noise, light and other factors. In his closing submissions he referred in addition to the parking by visitors on Barnet Lane, the increased size of the building which he described as "massive" and greater overlooking including overlooking into the gardens of High Carrs and Willow Lodge.

39. Mr Weekes' main submission was that the modification would create a precedent which would make it very likely to result in flat development and/or subdivision of plots and that would substantially harm those with the benefits of the covenants. He pointed out that Mr Adams-Cairns accepted in cross-examination that it was likely that that attempts would be made to build flats or subdivide the plots if it is legally possible to do so. He submitted that the covenants were the only legal way of preventing such subdivision or building of flats. He said that as planning permission had been granted for this development it was likely that further planning permissions would be forthcoming. He identified two prime candidates for development within the next 20 years – Deacons Croft and Kailash. He submitted that it was likely that the owner of Kailash would move to The Marians when it was completed. That would leave Kailash as ripe for development.

40. Mr Adams-Cairns considers the impact of the development in paragraph 20 of his report. He points out that the development looks more like a large house than a block of flats. The planning permission is for six high value flats likely to be purchased by wealthy individuals. He considers in detail the degree of overlooking from each of the objectors' properties. He points out that Willow Lodge is some 50m away. He accepts that there will be a more prominent view of Gaisgill from the galleried library window on the first floor but describes this as negligible. In relation to High Carrs he notes that the main concern is the view from the balcony outside the master bedroom and from the north eastern end of the garden. The effect of the development is, in his view, extremely limited having regard to other houses in the vicinity such as Red Roof Cottage and Ashiana. Red Roof Cottage is of course the closest house. It is lower than Gaisgill and nearly 20m away. He accepts that there might have been some overlooking from the proposed upper floor terraces but notes that the issue is addressed by the provision of 1.7 m opaque screens. There are four windows facing Gaisgill but only one is visible from Gaisgill – the shower room on the first floor. The window now has partial opaque screens which substantially (though not totally) obscure the view. The overall impression is that the visibility is almost completely screened by the trees and bushes along the boundary.

41. Mr Adams-Cairns accepts that six families living at Gaisgill are likely to create more noise and light than one although he points out that Gaisgill is at present a large family house and could have quite a large number of occupants. In his view the increased noise and light pollution are likely to be small or minimal.

42. We, of course, have had the benefit of a view and have seen Gaisgill and the objectors' properties in detail and all of the other properties (including The Marians) in this part of Barnet Lane from the outside.

43. In our view the matters referred to by Mr Weekes do collectively provide some practical benefits to the objectors.

Are any practical benefits identified under question (iii) of substantial value or advantage to the Respondents?

44. As already noted Mr Weekes accepted that, apart from the "thin edge of the wedge" argument the practical benefits to the objectors were collectively modest and (as he put it in submissions) might not get them "over the line".

45. We agree. Whilst there is a significant increase in the size of the property, this is an area where there are substantial detached houses and it will be no larger than some of the other properties in the neighbourhood. It will be smaller than The Marians currently under construction a short distance to the west. It will not look like a conventional block of flats. There is no consistent architectural design in the developments in Barnet Lane and the proposed development, when viewed from Barnet Lane will not be out of keeping with the other large and prestigious houses there.

46. We accept that the rear of the property will be nearer Willow Lodge but the distances are such that we do not consider it to have a substantial effect. Similarly, we accept the views of Mr Adams-Cairns on the views, overlooking and noise and light pollution. We were of course able to see the views for ourselves when we visited each property.

47. We have expressed concern at the amount of outside parking even though it is apparently sufficient for planning purposes. We think that there is a risk of visitors from time to time having to park in Barnet Lane. However, this risk is not sufficiently substantial to affect our conclusion.

48. A number of points can be made about the thin edge of the wedge argument. First, as is clear from the authorities, the question of whether it secures practical benefits of substantial value or advantage to the objectors depends on the facts of each case and is ultimately a question of fact.

49. Second, it cannot be said that the modification of the covenant would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development. As noted above there have been a number of breaches in density covenants. Five of the thirteen properties on the fields originally owned by Mrs Robinson appear to have been built in breach of covenant including Willow Lodge. Thus, the decision would not create a precedent for subdivision. That precedent has been created long ago.

50. Third, there must be doubts about the enforceability of the covenants against some of the 15 properties. Thus, it is difficult to see how in the absence of express annexation they can be

enforced against the successors in title of the 1886 conveyance. This includes Deacons Croft which is said to be the prime candidate for redevelopment.

51. Fourth, there are 12 flats at Deacon Heights on the south side of Barnet Lane opposite some of the properties within the covenants.

52. Fifth, there is now no enforceable restriction on the size or appearance of any development within Gaisgill. The proposed scheme is not for a conventional block of flats but is, in effect, for an enlarged dwellinghouse not out of keeping with the other dwellinghouses on the north side of Barnet Lane.

53. We accept that there is a likelihood of further development in the foreseeable future on some of the houses within what may loosely be described as the scheme of covenants. We also accept that it is likely that attempts will be made to develop flats. We are required to take into account any ascertainable pattern for the grant or refusal of planning permission. We accept that it is likely that planning permission is likely to be granted for flats provided, of course, that other planning matters are satisfactory. When we take all these factors into account we have come to the conclusion that the practical benefits of the thin edge of the wedge argument are not either individually or collectively with the other benefits of substantial value or advantage to the objectors.

54. We accordingly propose to modify the restrictive covenant so as to permit the proposed development.

Compensation

55. None of the objectors have put forward any written evidence of a diminution in the value of their property caused by the proposed development. Mr Adams-Cairns considers there will be no permanent diminution in value. In response to a question from the Tribunal Mr Maunder Taylor hazarded a guess at a figure of 5-10% for the permanent diminution in value of Red Roof Cottage. But he had not inspected the inside of the property and had not been instructed to consider compensation. In those circumstances little if any weight can be attached to his guess. In our opinion the proposed development, while being a significantly larger building than the existing house at Gaisgill, will not adversely affect the capital value of the neighbouring houses. It is designed sympathetically with the surrounding properties, has the appearance of a single mansion style house and maintains the tone of a high quality and prestigious residential area. A substantial tree and hedge screen, protected by tree preservation orders, acts as a visual barrier between the applicant's and objectors' properties. The views of the proposed development are likely to be few and/or distant. While we appreciate the objectors have genuine concern that their quiet enjoyment will be disturbed and that this will be reflected in the reduced value of their homes, we think these fears are unfounded. The peaceful nature of this location is achieved largely by good sized plots, established vegetation and the location of the houses on the crest of a steep hill that provides views to the rear and secures a general sense of seclusion despite the close proximity of the residential estate immediately to the north. The proposed development will not affect these benefits or the value of the objectors' properties. We think this is a case where the prospect of development is likely to be worse than its reality.

56. There remains the question of whether compensation should be awarded for disturbance during the building works. Mr Adams-Cairns says, and we agree, that only Red Roof Cottage is likely to be adversely affected. The applicant has secured an agreement with the adjoining landowner to the west for the provision of vehicular access and a worksite on land adjoining Gaisgill away from the objectors' properties. This should help to minimise any adverse impact of the works.

57. Mr Adams-Cairns says that the building period will be 18 months and that any disturbance from construction will only last for 12 months. He assumes (without providing any comparable evidence) that the rental value of Red Roof Cottage is £4,250 per month or £51,000 per annum. He considers that the loss of rental income due to the works will be 7.5% of the rental value which, taken over 12 months, means a loss of value of £3,825. Mr Maunder Taylor was not instructed on the point but in answer to the Tribunal suggested that Mr Adams-Cairns' estimate was too low.

58. In our opinion the disturbance caused by the building works is unlikely to cease after 12 months and we consider that they will have an effect on the value of Red Roof Cottage for the whole construction period which we think will be a minimum of 18 months. In our opinion Red Roof Cottage would command a slightly higher rent than that suggested by Mr Adams-Cairns and we take £4,500 per month or £54,000 per annum. Furthermore we think that the rental value would be reduced by 10% throughout the works. This gives a figure of compensation for Red Roof Cottage of £8,100 for the 18 month construction period.

Determination

59. We are satisfied that the applicant has established ground (aa) and we therefore allow the application for modification of the covenants. Under section 84 (1C) of the 1925 Act we may add such further provisions restricting the user of or the building on the land as appear to us to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and we may refuse to modify the restrictions without some such addition.

60. In this case we consider that the modification of the covenant should be limited so as to allow only the development for which planning permission was granted on appeal. The following order shall be made:

> The restrictions in the Second Schedule to the conveyance dated 12 August 1896 shall be modified under section 84 (1)(aa) of the Law of Property Act 1925 by the insertion of the following words at the end of that schedule:
>
> "PROVIDED that the development permitted under the grant of planning permission in appeal reference APP/N1920/A/12/2171834 dated 8 August 2012 and subject to the conditions in the Schedule at Annex A thereof may be implemented in accordance with the terms, details and approved drawings referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached thereto."

61. An order modifying the restrictions shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have:

(i) signified her acceptance of the proposed modification of the restrictions in the Second Schedule to the conveyance dated 12 August 1896; and

(ii) paid the sum of £8,100 to Mr Westley Richards, objector and owner of Red Roof Cottage.

62. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Dated 1 December 2017

His Honour John Behrens

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)

Addendum on costs

63. We have now received submissions on costs from the parties.

64. Mr Francis says the applicant has succeeded in her application and therefore Practice Direction 12.5(3) of the Tribunal's Practice Directions applies. That direction provides that unless an unsuccessful objector has acted unreasonably they will not normally be ordered to pay any of the applicant's costs. The applicant argues that the conduct of Mr Richards and his expert witness Mr McGill was unreasonable and that she should therefore be awarded part of her costs.

65. Mr Richards originally appointed Mr Alistair McGill MRICS, a consultant to Lambert Smith Hampton, as his expert witness. Mr McGill prepared a detailed report dated 12 May 2017 which Mr Adams-Cairns had to consider at length. Mr Adams-Cairns tried to contact Mr McGill to progress a statement of facts and issues in accordance with the Tribunal's directions but was told by him on 8 August 2017 that he was seeking instructions. Thereafter Mr Adams-Cairns heard nothing from Mr McGill. Neither Mr Richards nor Mr McGill told the applicant or her expert that Mr McGill was no longer instructed. It was not until the hearing on 22 November 2017 that the applicant discovered Mr Richards had instructed Mr Maunder Taylor as his expert two days previously.

66. Mr Francis submits that Mr Richards' conduct should be considered by reference to the guidance given by the Tribunal in *Willow Court Management Co (1985) Limited v Alexander* [2016] UKUT 290(LC) and adopted in the context of an application under section 84 of the Law of Property Act 1925 in *Re Dean's application* [2017] UKUT 203(LC).

67. Such guidance required the objective assessment of the objector's conduct based on the relevant facts; to consider, in all the circumstances, whether such conduct was unreasonable and should, as a matter of discretion, be made the subject of an order for costs; and, if so, to determine the terms of the order.

68. The applicant acknowledges the Tribunal's warning at paragraph 26 of *Willow Court* that "Tribunals ought not be over-zealous in detecting unreasonable conduct after the event." Mr Francis submits that the applicant is not trying to apply hindsight to the objector's conduct; this is a case where the issue is simply about one element of wasted expense incurred by the applicant's expert due to the unreasonable conduct of Mr Richards and his expert. Mr Francis says the facts show that the objector and his expert failed to tell the applicant that the objector's expert was no longer instructed. Engagement between experts was required in order to narrow the issues and to save time and costs at the hearing. The failure of Mr McGill to do this was serious and the responsibility lay with Mr Richards.

69. Mr Francis says that the application of the guidance in *Willow Court* shows that a costs order against Mr Richards would be appropriate. Details of Mr Adams-Cairns' wasted costs were provided and amount to £6,840 including VAT.

70. For the objectors Mr Weekes accepts that the correct starting point is paragraph 12.5(3) of the Tribunal's Practice Directions. He says the guidance contained in that paragraph reflects the more general point that an objector to a section 84 application is to be treated more favourably than a party engaged in ordinary litigation because he has not acted unlawfully, has not incurred any liability to the applicant and has had to deal with an application that seeks, under compulsion, to interfere with his rights.

71. Mr Weekes argues that it is necessary to make an overall assessment of the objectors' conduct. The objectors had acted commendably by making appropriate concessions and producing a helpful bundle dealing with the multifarious covenants affecting the various plots of land. Their evidence had been focused and helpful. The complaint that Mr Richards' expert had for a period of time been unresponsive was a relatively trivial criticism that did not justify a costs sanction when taken in context. Mr Richards' decision to dispense with his own expert and separate legal representation in favour of the expert and legal representation used by the other objectors was a reasonable one for him to take.

72. Mr Weekes identifies three other features of the case which he says are relevant to the exercise of the Tribunal's discretion on costs. Firstly, the applicant failed on two of the three grounds ((a) and (c)) upon which she relied. The application under ground (a) was, says Mr Weekes, wholly misconceived and should not have been brought. Inevitably the objectors incurred costs in dealing with these grounds. Secondly, the applicant had unreasonably refused to engage in mediation without giving any reasons. Such conduct was itself deserving of a costs sanction: see *PGFII SA v OMFS Co 1 Limited* [2014] 1 WLR 1386. Thirdly, Mr Richards succeeded, against the applicant's submission that he would suffer no loss or injury, in obtaining an award for compensation. The applicant had not offered a payment to Mr Richards in return for the release of the covenant, so in order to obtain his award of compensation Mr Richards had to oppose the application.

73. Mr Weekes submits that in the light of these three points the applicant should make a contribution towards the objectors' costs, being 75% in the case of Mr Richards and 50% for the other objectors. The total costs incurred by the objectors was said to be £98,753.

74. In reply Mr Francis submits that the claim for costs against Mr Richards was not a trivial criticism as it related to a significant amount of costs. The work undertaken by Mr Adams-Cairns with Mr McGill and for Mr Richards was totally wasted. For Mr Richards (seemingly) not to inform the applicant or Mr Adams-Cairns at the earliest opportunity, or at all, that he was going to use the same expert as the other objectors was a failure which led to wasted costs.

75. Mr Francis said that the applicant's partial success, i.e. succeeding on ground (aa) but failing on grounds (a) and (c) should be considered in the context of *Re Hennessey's Application* [2017] UKUT 243 (LC) at paragraph 86:

> "It is not necessary for an applicant to succeed on each of the pleaded grounds and this application was successful under ground (aa). If an additional ground has added significantly to the costs incurred, by prolonging the hearing or requiring consideration of much extra evidence that will be a relevant consideration, but this is not such a case."

76. In this application, while the applicant did not withdraw her reliance on grounds (a) and (c), no evidence or argument was put forward on those grounds and both the hearing and the decision focused on ground (aa) where the applicant was successful.

77. The applicant wrote on 31 July 2016 to her neighbours before the application was made explaining her proposal and offering to discuss the entire matter and perhaps reach a compromise or settlement without the need for an application. This was not an attempt to mediate because clearly there were no objectors at that time. Subsequent correspondence from the applicant did not refuse mediation; it proposed a discussion as to the way forward. A meeting was held in October 2016 but no progress was made. The applicant was open at all times to mediate or negotiate a settlement. The objectors made no offer to mediate. Mr Francis submits this is not a case where the appellant's conduct on the question of mediation (or any other type of ADR) can sound in the penalty of a costs award against her.

78. Mr Francis says that Mr Richards sought "substantial" compensation in his objection but did not put forward any evidence of loss. Mr Adams-Cairns was the only expert to give a specific compensation figure and the Tribunal decided to award a higher figure for temporary disturbance. The objectors had not made a sealed offer and the issue required no substantial time to be spent at the hearing which might be reflected in costs.

79. The applicant has succeeded in her application under ground (aa). We do not accept that her failure to satisfy us that grounds (a) and/or (c) were also established is a matter which signifies in costs and we agree with Mr Francis that these grounds formed little part of the proceedings. We do not find the applicant's conduct to have been unreasonable and the objectors' submission that the applicant refused to engage in mediation cannot be sustained on the evidence. We therefore determine that the objectors should pay their own costs.

80. The applicant's submission that she should be awarded Mr Adams-Cairn's "wasted costs" in dealing with Mr McGill should be placed in the context of the proceedings as a whole (Practice Direction 12.2). The objectors were helpful in their approach and made reasonable concessions, especially in relation to the nature of the objections. For her part the applicant persisted in pursuing grounds (a) and (c) despite the Tribunal's encouragement that they should be abandoned. Mr Adams-Cairns spent time considering ground (a) and that issue takes up a significant amount of his expert report.

81. Mr Adams-Cairns did not provide any evidence to support his estimate of a loss of rental value during the construction work and we did not accept his view that such disturbance would only last for 12 months. Our award for compensation for temporary disturbance was more than double Mr Adams-Cairns' figure. Mr Adams-Cairns does not suggest that the comparables put forward by Mr McGill were generally irrelevant to the issues in dispute, only that Mr McGill's analysis of them was wrong due to his use of (allegedly) incorrect areas. Presumably the comparables identified by Mr McGill were of assistance to Mr Adams-Cairns in reaching an independent view about the compensation issues in the application.

82. We do not consider the objectors' conduct to have been unreasonable overall and we consider the appropriate order to be that the applicant should bear her own costs.

Dated: 19 February 2018

His Honour John Behrens

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)