LP/83/2005

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – discharge – modification – proposed residential redevelopment of application land – whether recently imposed covenant was obsolete – whether practical benefits of substantial value or advantage secured – whether local authority objector agreed to application by implication – effect of grant of planning permission and negotiations – whether objector injured by the application – application for discharge granted – compensation – negotiated share approach rejected – £23,500 awarded – Law of Property Act 1925, s84(1)(a), (aa),(b) and (c)

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

B Y

JOHN DEREK GRAHAM

Re: Land at Alisha House,
Blackhills Road,
Horden,
County Durham,
SR8 4DW

Before: A J Trott FRICS

Sitting at Hartlepool County Court, Victoria Road, Hartlepool, Cleveland, TS24 8BS on 19-21 November 2007 and at Procession House, 110 New Bridge Street, London EC4V 6JL on 14 December 2007

Thomas Dumont, instructed by MSP Legal Services LLP, for the applicant
Howard Smith, instructed by Crutes LLP, for the objector

The following cases are referred to in this decision:

Winter and Another v Traditional & Contemporary Contracts Limited [2007] RVR 353
Stockport MBC v Alwiyah Developments (1983) 52 P & CR 278
Stokes v Cambridge Corpn (1961) 13 P & CR 77
Jones v Rhys-Jones (1974) 30 P & CR 451
Cresswell v Proctor [1968] 2 All ER 682
Re Truman, Hanbury, Buxton and Co Ltd's Application [1956] 1 QB 261
Re Abbey Homesteads (Developments) Ltd's Application (1986) 53 P & CR 1
Gilbert v Spoor and Others [1983] Ch 27
Re Susan Wake's Application (2002) Lands Tribunal LP/2/2001 (unreported)
Re Martins' Application (1988) 57 P & CR 119
Robinson and O'Connor's Application (1964) 16 P & CR 106
Ridley v Taylor [1965] 1 WLR 611
Re Skupinski's Application [2005] RVR 269,
Re SJC Construction Company Limited Application [1976] RVR 219
Stockport MBC v Alwiyah Developments (1983) 52 P & CR 278
Lawntown v Camenzuli [2008] 1 All ER 446

The following cases were also cited in argument:

Amsprop Trading Ltd v Harris Distribution Ltd and Another [1997] 1 WLR 1025
Re Beech's Application (1990) 59 P & CR 502
Re Jones and White's Application (1989) 58 P & CR 512

DECISION

Introduction

1. This is an application made by John Derek Graham (the applicant) under section 84 of the Law of Property Act 1925 (the Act) for the discharge or modification of a restrictive covenant over land at Alisha House, Blackhills Road, Horden, County Durham SR8 4DW (the application land). If successful the application will allow the residential redevelopment of the application land.

2. The covenant was imposed under a transfer of the freehold interest in the application land dated 19 July 2000 between Easington District Council and Keith James Pygall. The covenant states:

> "12(D) The Transferee hereby covenants with the Transferor on his own and his successors in title behalf
>
> (i) Not to use the property for any purpose other than as a coach depot with an associated bungalow for residential use. Occupation of the bungalow must be linked to the use of the land as a coach depot and the bungalow cannot be sold or leased separately from the depot.
>
> ...."

3. Mr Pygall transferred the application land to Dick Graham 4 x 4 Ltd on 19 July 2000. That company then transferred it to the applicant on 10 August 2000. The transfer between Mr Pygall and Dick Graham 4x4 Ltd and the subsequent transfer to the applicant contained similar, but not identical, covenants:

> "12D The Transferee hereby covenants with the Transferor on his own and his successors in title behalf
>
> (i) Not to use the Property for any purpose other than as a vehicle depot with an associated house for residential use. Occupation of the house must be linked to [the] use of the Property as a vehicle depot and the house cannot be sold or leased separately from the depot.
>
> ...."

4. The applicant made an application under section 84 of the Act on 9 November 2005 and relied upon grounds (1)(a), (aa) and (c). Easington District Council (the objector) objected to the application. At the hearing the applicant also relied upon ground (1)(b) with the consent of the objector.

5. Mr Thomas Dumont of counsel appeared on behalf of the applicant and he called Mr John Wilson FRICS, Principal of Messrs Appletons, Chartered Surveyors of Stockton-on-Tees, as an expert witness.

6. Mr Howard Smith of counsel appeared on behalf of the objector and called the following witnesses of fact:

Mr Dale Eric Clarke, Head of Asset and Property Management, Easington District Council.

Mr Michael Smith, Principal Valuer, Easington District Council.

Mr Alan Dobie, Principal Planning Officer, Easington District Council.

Ms Shirley Craig, Technical Officer of the Environmental Health Team, Easington District Council.

Ms Dolly Hannon, Principal Planning Policy Officer, Easington District Council.

Mr Peter Rippingale, Business Support Team Leader, East Durham Business Service.

Mr Smith called Mr Norman John Freeman FRICS, a Commercial Director of G L Hearn and Partners, as an expert witness.

7. I made an accompanied site inspection of the application land and the surrounding area on 21 November 2007.

Facts

8. The application land is situated to the east of the former mining village of Horden on the eastern fringes of the Peterlee conurbation. It is approximately 10 miles south of Sunderland and the same distance east of Durham. The application land forms part of the former Horden Colliery, which closed in February 1986 and was then acquired by Easington District Council. The colliery buildings have been demolished and the majority of the site is now the Seaview Industrial Estate.

9. The estate is not fully developed. Adjoining the application land to the east are two industrial buildings, a council depot and the building known as Unit A which is occupied by several users including a coach operator, Jayline Travel. There are four other industrial buildings nearby. These are known as Units B to E, and are situated to the north of the application land along the western side of Kilburn Drive, which is the main spine road of the industrial estate. The council has sold Units A to E and the current owner does not have the benefit of the restrictive covenant. Further to the north there is a small courtyard development of industrial units located on the northern side of Timber Road together with a newly constructed coach depot occupied by Style Travel. The remainder of the estate is undeveloped apart from a water treatment works/colliery pumping station some 150 metres east of the application land.

10. To the south of the application land is a council owned car park which is largely unused. This fronts onto to Blackhills Road which also serves the southern boundary of the application land before turning north along the western boundary of the Seaview Industrial Estate. To the west of Blackhills Road is a residential estate of older terraced houses many of which front the Seaview Estate and the backs of industrial units B to E. However, the houses are screened from the industrial buildings by a wooded area that lies between the two.

11. Between the western boundary of the application land and Blackhills Road is the site of a disused electricity substation that was acquired by the applicant and his father from Northern Electric in June 2003 (the substation land).

12. The application land is irregular in shape and has an area of 0.792 hectares (1.957 acres). It is divided into two parts. To the south is the plot of Alisha House, a substantial two-storey house with a detached triple garage block and lawned gardens enclosed by a brick and metal-railed wall. This area extends to approximately 0.27 hectares (0.66 acres). The remainder of the site to the north comprises a level, tarmac surfaced yard extending to 0.522 hectares (1.29 acres). It is surrounded by a steel palisade fence with gates on the north eastern boundary. The eastern boundary of the application land is significantly higher than the industrial land to the east.

13. During the late 1990s the objector let the application land to Mr Pygall for use as a coach park/depot. In response to Mr Pygall's concerns about security at the site the council granted planning permission to construct a bungalow on the application land on 5 May 1998. The council accepted that it would offer greater security if Mr Pygall or one of his employees occupied the bungalow. However, the planning permission did not contain a condition limiting the occupancy of the bungalow in this way. The council agreed to sell the freehold of the application site to Mr Pygall in 2000. The sale was subject to the imposition of the restrictive covenant limiting the use of the site to a coach depot and associated bungalow. Mr Pygall immediately sold the application site on to Dick Graham 4 x 4 Limited who sold it a month later to the applicant.

14. The applicant made a planning application for the erection of a house on the application land on 2 June 2000. He made a separate application on the same day for a vehicle storage depot with associated garage on the remainder of the site. Both applications were granted planning permission on 21 July 2000, two days after the transfer of the land to Mr Pygall. It was a condition of the permission that the occupancy of the dwelling should be limited to a person or persons owning or employed by the company or organisation operating from the adjoining premises (the larger northern part of the application land). The reason given for the imposition of this condition was that the close proximity of the adjacent business use meant that unrestricted residential use was not acceptable. In mid 2001 the applicant submitted a planning application for the removal of the condition restricting the occupancy of the house. This application was refused. The residential permission was implemented and the house that was built became Alisha House that now occupies the southern part of the application land. The vehicle storage depot was not constructed.

15. On 22 July 2004 Mr D Graham applied for outline planning permission for the residential development of an area of 0.987 hectares (2.44 acres) including the northern part of the application land (0.522 hectares), the substation land (0.21 hectares) and an area of land that was owned by the objector (0.255 hectares). The proposal was for the construction of 30 houses. The illustrative design showed a 6 metre wide bund and landscape strip along the eastern boundary of the site where it adjoined the council's depot and Unit A. There was also a proposal for earth bunding and tree planting on a strip of council owned land at the north of the site. Vehicular access was proposed from Blackhills Road to the south with the existing access from Kilburn Drive to the north being closed. The Council granted outline planning permission on 22 April 2005. It was subject to seven conditions including a requirement for the approval of a site investigation and

assessment in respect of contamination, a landscaping scheme and a scheme to protect the proposed dwellings from noise from the adjacent industrial estate.

The case for the applicant

Ground (a)

16. Mr Wilson identified a number of changes in the character of the application land and its neighbourhood, and in other material circumstances, by reason of which he said the Tribunal might deem the restrictive covenant to be obsolete. He explained that he was not saying that these factors did make the covenant obsolete. He was just providing factual information about the various changes of circumstance that had taken place since the covenant was imposed that might enable the Tribunal to reach that conclusion.

17. The application land was entirely open space when the restrictive covenant was imposed in July 2000. Since then a substantial detached house, together with a large garage block and a brick boundary wall, had been constructed on about one-third of the site. The original vehicular access to the application land was via Kilburn Road to the north. This was replaced by a new and improved access from Blackhills Road to the south following the purchase by the applicant and his father of the substation land in 2003. This new access served all of the application land. The objector had entered into negotiations with the applicant for the inclusion of an area of 0.255 hectares of the objector's land within a residential development site including the application land and the substation land. The council granted planning permission for this redevelopment in 2005. It was a condition of the residential planning permission that the development should be carried out in accordance with an approved landscaping scheme which included the formation of a bund and a tree screen along the entire northern and eastern boundaries of the planning application land. This would form a barrier between the industrial and residential uses. It had only recently been discovered that the application land and the remainder of the residential redevelopment site were far more severely polluted than was previously realised, which rendered uncommercial any use with a limited financial return.

18. The applicant had not used the northern part of the site as a coach depot whilst two other coach depots had been brought into operation since the covenant was imposed; Jayline at Unit A and Style Travel at a newly constructed unit in Timber Road. Mr Wilson said that there was no strong demand at the Seaview Industrial Estate for traditional industrial users. The neighbouring unit to the east now comprised a coach depot, a dog grooming business and a car mechanic workshop which he argued were not the types of industrial use than might have been expected when the covenant was imposed. Units B to E had proved difficult to let and had been sold by the objector. The focus of the estate was now much more on modern service type businesses than general industrial users. The council depot to the south of Unit A appeared to be closed or about to close and was likely to be marketed by the objector in the reasonably near future. The adjoining council car park was virtually disused.

19. The District of Easington Local Plan was adopted in December 2001, some 18 months after the covenant was imposed. Mr Wilson identified two policy proposals in that plan that concerned the neighbourhood. The first was policy Ho5 which identified an area of 11 hectares for the expansion of the Seaview Industrial Estate. This land was located to the north of the units in Timber Road. The second was policy Ho6 which designated an area of 3 hectares south of the colliery pumping station for recreational or housing purposes.

20. Finally, Mr Wilson said that Horden had continued to be overshadowed by neighbouring Peterlee since the imposition of the covenant. The population of Horden had declined considerably over 30 years and it was now dominated by elderly and retired people. Younger people had moved away, school rolls were falling and house prices were lower than in Peterlee. The council's attempts at economic regeneration of Horden had not been accepted by the market which preferred to locate along the A19 corridor closer to Peterlee. In contrast to the bleak industrial outlook there was a demand in the village for modern housing.

21. Mr Wilson acknowledged that he had not seen the local plan that had preceded the one adopted in December 2001. Consequently he could not say that there had been any change in the policy for the neighbourhood between the two plans. He was also challenged about his assertion that young people had moved away from Horden. He said that he had obtained this information by talking to people in Horden, visiting corner shops and chatting to customers. In total he had talked to about 30 people. His information about falling school rolls had been obtained from conversations he had with the applicant and his father, one of whom he suspected was a school governor. He also admitted that his comments regarding the demand for modern housing in Horden were based upon his own perception rather than upon any published information. Mr Wilson conceded that the covenant recognised the possibility of a bungalow being constructed upon the application site and that therefore the construction of a house or bungalow on part of the site could not make that covenant obsolete.

22. Mr Dumont submitted that the original purpose of the covenant was to restrict the use of the application land to that of a coach depot with an associated residential bungalow. It was a specific restriction rather than a general restriction to industrial use only. The objector claimed that the purpose of the covenant was to facilitate Mr Pygall's request for security on the site in order to protect his coach business. Mr Dumont rejected this interpretation. In a report to the Economic Development Committee of the council dated 14 January 1997 about the proposed sale of the application land to Mr Pygall, the Head of Valuation and Estates of the council had not even referred to a restrictive covenant let alone explained its purpose. Mr Dumont maintained that the purpose of the covenant was to ensure that the land was used as a coach depot. It had not been able to achieve this and was therefore obsolete.

23. He addressed the objector's criticism of the applicant's failure to give evidence in person by saying that the applicant had no relevant evidence to provide and that the position was clear from the documents. The objector had not asked to cross-examine him. The application land had not been used as a coach depot as a matter of fact and it was not to the point that it did not look as though the applicant had any intention to so use it. The objector had also criticised the evidence of Mr Wilson. But Mr Dumont submitted that his report had been helpful by comparison with that of Mr Freeman who had sought to maximise the amount of compensation payable.

Ground (aa)

24. Mr Dumont said that this and ground (c) were the principal grounds upon which the application had been made. The objector had accepted that the continued existence of the covenant would impede the residential redevelopment of the application land and that this was a reasonable user of that land. He submitted that the restriction, in impeding that user, did not secure to the objector any practical benefits of substantial value or advantage and that money would be an adequate compensation for the loss or disadvantage (if any) which the objector would suffer from the discharge or modification.

25. The issue was not about the loss of the objector's amenity. It was about its argument that to allow residential development upon the application land would prejudice the provision of a wide range of industrial uses on the Seaview Industrial Estate. It wished to ensure that industrial land remained available because of an alleged lack of supply of such land in the area and a perceived increase in demand due principally to the relocation of displaced occupiers from the North East Industrial Estate at Peterlee following a major proposal from Persimmon Homes for residential redevelopment of part of that estate. It was argued by the objector that the proposed residential redevelopment of the application land would limit the type of industrial use to which the adjoining land could be put and, in particular, would prejudice the objector's proposed marketing and/or development of its neighbouring council depot.

26. Mr Dumont submitted that the proposal would have no such detrimental impact. There was already a lot of residential development in the area and there was only a very small amount of industrial development that was near it when considered in the context of the whole estate. None of the existing industrial users, nor any that were proposed, would come into conflict with the residential development. There was no suggestion that there would be heavy, polluting industrial activity close to the houses. Seaview Industrial Estate was big enough for any such uses to be located at a clear distance.

27. Mr Wilson said that not only was there a poor take up of industrial accommodation in the area there was also a considerable amount of alternative industrial land available nearby. He referred to the Easington Development Framework Core Strategy, Issues and Option Consultation Document published by the council in June 2006. This showed that there was 2.81 hectares of land available immediately at the Seaview Industrial Estate and a further 7.35 hectares available in the long term (Mr Howard Smith explained that this area was the developable part of the 11hectare site identified in local plan policy Ho5. The balance of 3.65 hectares was required for infrastructure). In total (both short and long term) there were 124.41 hectares (307 acres) of industrial land available in the Easington District. He disagreed with the revised industrial land availability figures put forward by Ms Hannon for the objector and did not accept that there were only 3.9 hectares of general industrial land available short-term.

28. Mr Wilson had visited the North East Industrial Estate at Peterlee and had spoken to three occupants about where they wished to relocate in the event of the Persimmon redevelopment proceeding. They replied that they would move to either the North West or South West Peterlee Industrial Estates but not to Seaview. They considered that it had inadequate infrastructure and was isolated from, and had no access to, the A19. They would not

countenance a move there. Only one company had relocated from the North East Peterlee Industrial Estate to the Seaview Industrial Estate (Style Travel). There had been no influx of companies seeking to relocate. At the hearing the applicant produced nine witness statements from occupiers at the North East Peterlee Industrial Estate all of whom said they would not consider relocating to Seaview.

29. Mr Wilson said that there was no demand to use the application land as a coach depot although he agreed that the applicant had not attempted to so use it or to market the site for that purpose. However, he said that the council's economic development officers had failed to introduce anybody to the application land despite the existence of planning permission for a vehicle storage depot. Nor had anybody expressed any interest in it for a coach depot.

30. Mr Dumont submitted that the council's planning committee had considered all of the objector's arguments at the time the planning application for the residential redevelopment of the application land was considered in April 2005. The planning officer's report had recommended refusal due to the adverse impact that the adjacent industrial estate would have on the proposed dwellings. Notwithstanding the planning officer's recommendation the planning committee resolved to grant planning permission on the grounds that the development would assist in the regeneration of Horden and provide much needed affordable housing and improve an area of land that was currently derelict and unsightly. None of the adjoining industrial occupants had objected to the planning application. Indeed three adjacent owners had said that they would sell their own land for residential redevelopment if they could obtain planning permission.

31. The objector had been negotiating with the applicants since 2003 for the inclusion of an area of 0.255 hectares of its own land within the residential redevelopment site. Indeed they said that they would only treat with the applicant if he first obtained the necessary planning permission, which he did at a cost of some £10,000. In reality the objector had been content to see its own land developed for housing and was not concerned about any prejudice to the future of the industrial estate. It was only interested in maximising the price it received for the sale of the land to the applicant. When the applicant refused to pay the price it wanted the objector argued that the position regarding the impact of the proposed residential development upon the industrial estate had fundamentally changed. But there was no documentary evidence of any sort from the objector that demonstrated such a policy change. Nor was there any contemporaneous note of any communication with Persimmon in or after November 2005, supporting the alleged importance to their proposals of having industrial land available at Seaview for the relocation of existing occupiers at the North East Peterlee Industrial Estate.

32. Mr Dumont queried whether the council's objection was genuine. In his witness statement Mr Michael Smith confirmed that at one stage the council was prepared to sell a release of the covenant. In his evidence to the Tribunal, however, Mr Smith said that he could not effect such a sale on his own authority. But the objector had negotiated with the applicant until mid to late 2005. It had not expressed concerns about the change of use to residential at that stage. It had wanted to include its own land. There was clear evidence that the objector was prepared to release a covenant but could not agree on the price. It was happy to negotiate for the sale of its own land and for the release of the covenant on the application land, both of which immediately adjoin the industrial estate that it said it was trying to protect. Mr Dumont invited the Tribunal to ignore the

objector's arguments about the current occupiers because it had already disregarded their interests by negotiating for the release of the covenant in the first place.

33. The applicant was not asking for any industrial land to be taken out of use. One-third of the application land was residential (Alisha House) and the remainder was not used at all. Both the site of the old electricity substation and the objector's land that it had negotiated to sell were vacant and unused. There would therefore be no reduction in the amount of industrial land. The objector said that companies wishing to move to Seaview would be deterred by the proximity of the residential development but that was also the case when the objector was negotiating for the release of the covenant. The objector's claim that it needed to retain industrial land at Seaview and that it was of benefit to retain flexibility into the long-term had not been considered an advantage when the application land had been granted residential planning permission in 2005. The objector had not made out the case for a wholesale relocation of industry from the North East Peterlee Industrial Estate to Seaview. Mr Clarke had said that Seaview was being reserved for displaced companies from Peterlee but Mr Rippingale had not been aware of this. He only knew about a parcel of land that was previously of interest to Jayline but that would only involve relocation within the Seaview Estate.

34. Mr Wilson said that the adjoining council depot land was soon to be vacated and marketed. He felt that this land, and the council car park to the south, which might also soon be declared surplus to requirements, would clearly benefit from a residential user on their boundary. In his view the objector should seek to redevelop those sites for housing also.

35. Mr Dumont submitted that the local plan allocated the objector's own land to the south of the colliery pumping station as an area for recreational or residential development (the site identified as Ho6). Such residential development would make nonsense of the council's objection. The council saw the Ho6 land as being suitable for residential development and its proximity to the Seaview Industrial Estate was not considered to be a problem. This was not a planning decision forced upon them by a developer. If the Ho6 land was suitable for housing then, given the proximity of both sites to the industrial estate, so was the application land.

36. The applicant owned property, Alisha House, that adjoined the council depot and so the risk of complaints about industrial users causing a statutory nuisance already existed both from the applicant and from the houses to the west of Blackhills Road.

Ground (b)

37. The applicant introduced this ground at the hearing with the consent of the objector. Mr Dumont submitted that the objector had implicitly agreed to the covenant being discharged or modified when it agreed to the inclusion of its land in the residential planning application submitted in July 2004. It had encouraged the applicant in his proposals and had agreed in principle to sell its own land to him as part of the residential development. The objector's Estates Department had not opposed the grant of residential planning permission and the objector's Development and Control Licensing Panel had unanimously resolved to grant such permission. The objector had also designated a site very close to the application land for

recreational or residential use (policy Ho6). Mr Michael Smith had confirmed in his witness statement that at one stage the council was prepared to release the covenant. He said that its position had changed as a result of proposals by Persimmon plc to redevelop the North East Industrial Estate at Peterlee for housing. The objector had therefore agreed to the residential development taking place and had accepted the discharge or modification of the covenant in principle. The remaining dispute between the parties was about how much of the development value the objector could claim.

38. Mr Wilson considered that the council had implicitly agreed to the discharge of the bungalow covenant when it gave planning permission for a house on 21 July 2000 only two days after imposing the covenant. Similarly it had accepted the discharge of the covenant in relation to the coach depot by granting planning permission on the same day for the redevelopment of the northern part of the site for a vehicle storage depot and subsequently in 2005 for residential redevelopment.

Ground (c)

39. Mr Dumont argued that the proposed discharge or modification of the covenant would not injure the objector. The land with the benefit of the covenant was either in industrial or commercial use or was derelict. There was no amenity or other interest that would be protected by the continuation of a covenant that resulted in the majority of the application land remaining unused and the residential development of the site would not adversely affect the benefited land. The objector's arguments about the loss of industrial land and the adverse impact upon existing and prospective occupiers of the Seaview Industrial Estate had been dealt with in the evidence and submissions given and made in respect of ground (aa). He submitted that the discharge or modification of the covenant would benefit rather than injure the objector because it would unlock the development value of its adjoining land.

Compensation

40. Mr Dumont argued that the requirements of section 84(1A)(a) of the Act were satisfied and that the lack of any loss or damage from the discharge or modification of the restriction meant that it was inappropriate for the Tribunal to award consideration under section 84(1)(i) of the Act. Any such consideration could only be awarded under section 84(1)(ii) which provided for the award of 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. He submitted that a substantial sum could only be awarded for the loss of amenity which was not the case here. The objector was not entitled to a windfall payment and could not expect to receive a high price for the release of the covenant. The objector had wrongly relied upon how much it would have received on the basis of friendly negotiations between the parties. Mr Dumont submitted that this approach was misconceived and wholly inappropriate where no amenity issue was involved. He referred to the recent decision of the Court of Appeal in *Winter and Another v Traditional & Contemporary Contracts Limited* [2007] EWCA Civ 1088 where Carnwath LJ said at paragraph 37:

> "[The case of *Stockport MBC v Alwiyah Developments* (1983) 52 P & CR 278] should have dispelled any idea that objectors in cases of this kind have any expectation of a windfall '*Stokes* percentage' of the released development value, or anything like it. Even if the reasoning of *Stockport* was not sufficiently clear, the figures spoke for themselves. The award of £2,250 was upheld, in the face of an apparently credible *Stokes* claim of £75,000. Against that background, we find it surprising that, almost a quarter of a century later, this basis of claim is still being advanced by valuers and advocates.... This can only create unrealistic hopes in objectors, thus delaying settlement...."

41. Mr Dumont submitted that the amount to be awarded under section 84(1)(ii) was relatively straightforward to assess and that, unlike the objector's expert, Mr Wilson had approached this valuation correctly. Mr Wilson accepted that the imposition of the covenant had reduced the consideration that the objector would otherwise have received. It was his evidence that the purchase price without the restriction at the date the covenant was imposed would have been £49,000. The appropriate consideration to be paid to the objector was therefore £10,000 being the difference between this figure and the actual price paid by Mr Pygall of £39,000.

42. Mr Wilson valued the application land by reference to industrial land values, taking £25,000 per acre as the value without the covenant and £20,000 per acre subject to the restriction. He had not included anything in respect of residential hope value. He supported his valuation by reference to the purchase in 2003 by the applicant and his father of the former substation land adjoining the application land. This was purchased for £24,000 although initially a price of £15,000 had been agreed with the vendor. The higher price was paid on the basis that it was free of a covenant against residential development or a claw-back provision in favour of the vendor. The effect of such a restriction on the value of the land was therefore £9,000 which Mr Wilson argued supported his assessment of the consideration payable in respect of the application land.

43. Whilst it was not part of the applicant's case that the amount the objector would expect to receive through friendly negotiations in order to release the covenant was a proper measure of the consideration to be determined, Mr Wilson had considered the point in order to rebut the valuation put forward by the objector's expert. He submitted this alternative valuation at the hearing. He assessed the development value of the whole of the application land (including Alisha House) with the benefit of residential planning permission at approximately £1,174,000 and deducted from this a number of cost items. These were in respect of the costs of demolishing Alisha House, apportioned decontamination costs, the cost of acquiring access, apportioned costs of a section 106 agreement and the apportioned costs of making a planning application. These costs totalled approximately £630,000 giving a net development value of £544,000. He deducted the current use value of the application land, £385,000, from this figure to leave what he described as the enhancement value of £159,000. He considered that the objector would be able to obtain a 20% share of the enhancement value through friendly negotiations, amounting to £32,000 (rounded).

44. Mr Wilson explained that the figure of 20% was obtained from a comparable transaction with which he was involved at Seaton Lane, Hartlepool. It involved the release of restrictive covenants that limited the use of an area of land to industrial purposes. The developer wanted to redevelop it for housing and negotiated with the council for the payment of 20% of the enhancement in value that the residential development would create.

45. The largest items of costs that Mr Wilson had allowed for in his valuation related to decontamination costs and the cost of acquiring vehicular access to the development site. He said that the former were taken from an estimate produced by Dunelm Geotechnical and Environmental Limited on 22 September 2006. This stated that the cost of remediation works would be just over £455,000. The estimate was apparently based upon a preliminary assessment by Armstrong Site Investigation of the application land (including Alisha House), the substation site and the 0.255 hectares of council owned land forming part of the planning application site for residential redevelopment. Mr Wilson said that this survey showed that the site was far more severely polluted than had been previously realised and was the best information available upon which to base a valuation.

46. He argued that the owner of the substation land controlled the access to the development site and would therefore demand a ransom payment. He calculated the development value of the residential development site before considering its access difficulties to be approximately £816,000. He said that the amount of the ransom payment, following *Stokes v Cambridge Corporation* (1961) 13 P & CR 77 would be one-third of this amount or £272,000. He described this fraction as being the traditional figure associated with payments for ransom access. He distinguished this amount from the increased payment of £9,000 that the applicant and his father had paid to Northern Electric in order to avert the imposition of a restrictive covenant or a claw-back agreement in respect of the residential development of the substation land. Whilst ransom payments for access were clearly associated by the market with the *Stokes* decision there was no such rule in respect of the release of restrictive covenants, payments for which Mr Wilson described as being "all over the place".

The case for the objector

Preliminary issues

47. Mr Howard Smith identified four preliminary issues. Firstly, he said that it was surprising that the applicant had not given evidence in person. It had been left to Mr Wilson to deal with factual as well as expert evidence and this was not within his knowledge. Mr Smith submitted that the applicant's reason for not giving evidence was that he did not wish to be cross-examined and that this was a matter of some concern that the Tribunal should take into account when exercising its discretion.

48. Mr Smith outlined several issues that the objector had wished to ask the applicant about but had been unable to do so. Mr Pygall had sold the application land on the same day that he bought it from the council. The applicant must have said that he was happy for the covenant to be imposed, but nothing had changed between then and now. The applicant's argument that the application land was derelict was a ploy to obtain planning permission. Having agreed to

the imposition of the restriction the applicant simply did not bother to use the land. The planning committee had been influenced by this and had said that the application land was derelict and unsightly. Mr Smith doubted that the applicant had ever intended to use the application land as a coach park but in fact had always intended to develop it residentially. This perception was supported by the applicant's development of such a large house on the southern part of the application land. The impression formed was that the council had sold the application land with the covenant in good faith but that all the time the applicant had intended to renege on the deal by seeking to redevelop the site with housing.

49. Mr Smith queried whether the applicant had been entirely frank with Northern Electric about his intentions for the application land. In its letter to the board dated 13 August 2001 Malcolm Smith and Partners, on behalf of the applicant's father (who was seeking to buy the substation land jointly with the applicant) said:

> "All of our enquiries of the local authority indicate that this land can, and will, only be used for industrial purposes. This is our client's intended user.
>
> Your client seeks a restrictive covenant which would run with the land to protect your client if ever, in future, the land would be released by the local authority for residential user – a highly unlikely future occurrence. The factual situation, however, is that the land is designated for industrial user only and the valuation reflects this."

50. The applicant had not provided the Tribunal with copies of any correspondence with the electricity board between that revealed in August 2001 and the date of the transfer two years later. So it was not known what led from this correspondence and an offer of £15,000 to the eventual purchase price of £24,000. Mr Wilson knew nothing of what had happened and had not enquired. The applicant was asking the Tribunal to rely upon partial correspondence and he had been selective in what had been disclosed.

51. In August 2005 the applicant withdrew from negotiations with the council about the sale to him of its land north of the application land. Mr Michael Smith said in a letter to Malcolm Smith and Partners dated 4 October 2005 that:

> "Mr Graham telephoned me on 22 August to advise that he had decided to sell his site to a company at the existing use and therefore no longer required the covenant to be lifted."

The applicant's statement was either not true, because he wanted the council to accept less money for his land, or it was true, in which case there was demand for the use of the application land as a coach depot.

52. Mr Smith's second preliminary point concerned Mr Wilson's evidence. He submitted that this had gone well beyond the limits of his expertise and that he had taken on the role of an advocate, asserting as fact that which was supposition. Thus he had stated, without any evidence, that the council had hoped to undertake a comprehensive redevelopment of all of the

former colliery land. He said, without knowing, that Mr Pygall had used the application land as a coach scrap yard. This was contradicted by the objector's evidence which comprised documents contemporary with Mr Pygall's approaches to the council to acquire the site and which referred to his coaches having expensive equipment on board and being attractive to thieves. Other examples of such assertions included the former use of the site, the falling population of Horden, falling primary school rolls, a bleak industrial outlook, the decline of Horden generally and the lack of demand for a coach depot, none of which was supported by any evidence. Mr Wilson had been obliged to give evidence of fact because the applicant chose not to do so. But he had based his assertions upon what his client had told him and he had shown partiality towards the applicant. He had not been objective, for instance in his assessment of site contamination, and his evidence should be treated with caution.

53. Thirdly, Mr Smith disputed the applicant's submissions that the objector's opposition to the application was not genuine but was based instead upon a desire to extract more money from the applicant and that it was using Persimmon's proposals at North East Peterlee Industrial Estate as an excuse to do so. It was clear from the evidence of Mr Clarke and Mr Rippingale that the demand for general and light industrial land had increased between 2003/04 and 2005. The Persimmon proposals had magnified this. The chronology of the correspondence supported the objector's interpretation of events. It was just a coincidence that Mr Graham withdrew from negotiations at the same time as Persimmon approached the council about the use of Seaview to relocate industrial users. Mr Dumont had complained about the lack of any document from the objector that identified its change of policy but there had not been any such specific change. Mr Michael Smith had only had authority to negotiate a price for the sale of the council's land to the applicant; he had no authority to release the covenant. There had been no lack of genuineness in the actions of the objector.

54. Mr Dumont had also said that the objector had asked for its own land to be included within the development site. But the planning officers had been consistent in this respect. Their primary concern had been that residential redevelopment should not proceed, though if it did then the council's land should be included. The objector had not been in negotiations since Persimmon expressed its interest in Seaview and the council's objection was not financially motivated.

55. Mr Smith's final preliminary issue considered the contractual relationship between the applicant and the objector. The objector was the original covenantee under the transfer to Mr Pygall dated 19 July 2000. He subsold the freehold interest on the same day to Dick Graham 4x4 Limited. That company sold on to the applicant on 10 August 2000. The applicant, as transferee, covenanted with the transferor and Easington District Council in the terms of the restriction. Therefore the applicant covenanted with the objector and, for the purposes of section 56(1) of the Law of Property Act 1925, is effectively the original covenantor. Therefore the objector can sue on the covenant as a matter of contract and not just rely upon it in equity. In view of this, and the fact that the covenant had been imposed very recently, Mr Smith submitted that the applicant faced a heavy burden in seeking to discharge or modify the covenant, as per Ormrod LJ in *Jones v Rhys-Jones* (1974) 30 P & CR 451 at 461.

Ground (a)

56. Mr Smith submitted that a restriction was obsolete if it no longer fulfilled its original purpose; as per Romer LJ in *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261 at 272. More recently that interpretation was followed by the Court of Appeal in *Re Abbey Homesteads (Developments) Ltd's Application* (1986) 53 P & CR 1; per Nourse LJ at 12.

57. The evidence of Mr Michael Smith and Mr Clarke had been that the objector had imposed the restrictive covenant in order to prevent the use of the application land in a way that might prejudice the industrial use of the Seaview Industrial Estate. In particular the objector was concerned that the residential redevelopment of the application land might hinder or prevent the continued occupation of existing industrial units on the estate due to residents complaining of statutory or common law nuisance. Planning applications for future industrial development would have to take account of any new residential development and the prospect of the residents' opposition would deter new businesses from coming to Seaview. Any such deterrent would adversely affect the council's industrial development strategies and would restrict the future industrial use of its retained land that had the benefit of the covenant. Furthermore the covenant was also intended to ensure that the application land itself remained available for industrial use. There was no evidence that the purpose of the covenant had been to extract a ransom payment from the applicant.

58. This interpretation of the purpose of the covenant was supported by a draft report dated 14 January 1997 from the council's Head of Valuation and Estates to its Economic Development Committee. The purpose of the report was to seek authority to sell the freehold interest in the application land to Mr Pygall who wished to move to Seaview from another site. The sale was dependent upon Mr Pygall obtaining planning permission to construct a bungalow on part of the site. The reports stated:

> "It is envisaged that if Mr Pygall does obtain planning permission for a bungalow it will be a condition of sale that the bungalow must be ancillary to and used in connection with the adjoining [coach] depot only and cannot be used or disposed of separately."

The bungalow was only permitted to facilitate the industrial use of the application land. The subsequent planning permission for a house that was granted on 21 July 2000 gave as the reason for the imposition of a condition containing an occupancy restriction that:

> "The close proximity of the adjacent business use is such that unrestricted residential use is not acceptable."

The covenant had been imposed for similar reasons just two days earlier. In his report to the planning committee recommending refusal of the applicant's later planning application to remove this occupancy condition the planning officer said that:

> "A core aim of the council is to help foster regeneration and employment creation within the District and it is considered that approval of this application could prove prejudicial to this aim"

59. The fact that the application land had not been used as a coach depot for 5½ years did not mean that the original purpose of the restriction was impossible to achieve. The applicant had described the application land as being derelict but that was not the case. It remained unused through the applicant's choice and for no other reason. There was no evidence that there was a lack of demand for a coach depot. That had been an assertion made by Mr Wilson. But he had made no enquiries about the market and there was no evidence that the applicant had tried to let the application land for this use. Mr Wilson's view had been based upon the fact that Mr Rippingale had not sent anybody to see the site who wanted to use it as a coach depot.

60. Mr Smith rejected Mr Wilson's evidence and submissions concerning the changes in the character of the application land and the neighbourhood since the imposition of the restriction. There had been no such changes. Seaview remained an industrial estate and the covenant still allowed the objector to prevent uses that would adversely affect its industrial use. Mr Wilson had identified a list of changes in the character of the application land, its neighbourhood and in other material circumstances between 2000 and 2007. But he had not explained how these changes rendered the restriction obsolete. They did not do so and they did not bear upon the question of the purpose of the restriction and its obsoleteness.

61. Mr Smith considered Mr Wilson's list of changes in detail. The restriction had always anticipated the construction of a bungalow and so the construction of a house did not render the restriction obsolete. It had been built to facilitate an industrial use and was tied to it by a planning condition. The occupier of the house was therefore unlikely to complain about the industrial use of the remainder of the application land. There had been a change of access to the application land but this was irrelevant in terms of the current application because the imposition of the covenant had not been influenced by access. The substation land had been acquired but this had no bearing on the purpose of the covenant and Mr Wilson could not say why this acquisition made the restriction obsolete. Mr Wilson suggested that the covenant was obsolete because the council had entered into negotiations with the applicant to sell him some of its land. The restriction did not become obsolete simply because the council would have to lift the covenant should it eventually decide to sell its land. The restriction could, and did, still achieve its purpose.

62. The applicant's reliance upon the construction of a landscaped bund to create an effective barrier between the residential and industrial users was misplaced. It may not be possible to build such a bund because of the height difference between the two sites. The applicant produced no evidence to show that such a bund would be sufficient to avoid the type of complaint that the restriction had been imposed to prevent. When considering this issue in the context of the 2004 planning application for the residential redevelopment of the application land and other land the Development and Control Licensing Panel said that the Environmental Health Officer's concerns should be taken in the context of the industrial site that was already there, not what might be there in the future. Mr Smith emphasised the importance of the distinction between the Panel's concern with what was there now and the purpose of the restrictive covenant which was to control future uses.

63. Mr Wilson had also suggested that the recently obtained information on the extent of pollution on the application land might be a factor that the Tribunal considered to be a physical change in the character of the property that had occurred since the imposition of the restriction.

Mr Smith submitted that Mr Wilson knew nothing about contamination and had no expertise in the subject. There had been no real evidence about the need for, or costs of, remediation works and the report from Armstrong Site Investigation referred to the fact that only preliminary works had been undertaken to assess the site. The costings provided by Dunelm were based upon unknown information and they recommended that further investigation works should be carried out. Contamination had not apparently affected the development of other buildings in the vicinity; including the applicant's own property, Alisha House.

64. The grant of planning permission for the redevelopment of the application land made the restriction more rather than less important since it could continue to control the use of the land outside of the planning regime.

65. Mr Wilson identified a number of changes regarding the use and development of the Seaview Industrial Estate and said that there was a lack of occupational demand. But this was not evidence of change since 2000 and the covenant continued to preserve the opportunity to bring in general industrial users onto the Seaview Estate. Mr Wilson's opinion that there was other land available for such users apart from Seaview was disputed. The adjacent council depot was to be closed but that land was still available for industrial use. Mr Smith said that Mr Wilson's views about the bleak industrial outlook for Horden were apocryphal and not supported by evidence. Mr Wilson's argument that the identification in the local plan of site Ho6 for housing was a material change since 2000 was wrong. The site had been identified as such in 1998 so there had been no change in policy since the restriction was imposed.

Ground (aa)

66. The covenant secured to the objector practical benefits that were of substantial value or advantage. Mr Smith identified these as the ability to control the development of the application land and to prevent complaints from householders that would curtail the existing and future industrial use of the Seaview Industrial Estate. The objector received these benefits both as the owner of adjoining land and as the guardian of the public interest. The council had relied upon these benefits when refusing the planning application to remove the condition limiting the occupancy of Alisha House to a person owning or employed by the company operating from the adjoining part of the application land to the north. The planning committee had accepted the validity of these arguments even though it granted the residential planning permission in 2005.

67. Mr Dobie was the Team Leader of the Development Control Unit for the council and he said that there was a potential conflict between the proposed residential use and the nearby established industrial uses in terms of noise, fumes, vibrations and dust. Ms Craig's evidence supported this view and she explained how it would be difficult to prevent any nuisance from neighbouring industrial users in Unit A due to the difference in ground level between that site and the application land. Because the former was much lower than the latter it would not be possible to construct a chimney that extended one metre above the height of the nearest housing roof ridge in order to alleviate any nuisance due to fumes, gas, dust and steam. The coach operator on Unit A started diesel engines early in the morning and left them to idle. The emergency doors had to be tested every day and involved the activation of an audible alarm.

She also said that Seaview was a general industrial site and that the emission of fumes, gas, dust etc was a normal by product of such users and that this was not compatible with residential use. For these reasons Ms Craig did not consider that the site allocated for housing as Ho6 would be suitable for such unless the neighbouring land use was light industry. Mr Smith submitted that the only evidence about the effect of residential development upon the continued ability of the Seaview Industrial Estate to support general industrial activity had come from the objector's experienced planning and environmental health officers.

68. The objector was entitled to rely upon practical benefits even if they were not specifically related to its adjoining land. Mr Smith argued that the scope of section 84 was very wide and that any practical benefit could be considered; as per Eveleigh LJ in *Gilbert v Spoor and Others* [1983] Ch 27 at 32 E-F.

69. It was not necessary for the objector to enjoy the practical benefits now; it was sufficient that they could be enjoyed in the future in order to protect the public interest. It was the risk of complaint and not its actuality that the restriction protected against. Mr Smith drew support from *Re Susan Wake's Application* (2002) Lands Tribunal LP/2/2001 (unreported) where the member, P F Francis FRICS, accepted the argument that there was no requirement for the objectors to have enjoyed, or to have been in the habit of enjoying, the benefit claimed. That the risk of complaint was real was demonstrated in Mr Rippingale's evidence where he said that one of the users in Unit C had delayed expansion until the outcome of this application was known. If the applicant were allowed to build housing on the application land this would be the thin end of the wedge. Mr Wilson had accepted that this was the case. It was demonstrated by the statements of a number of occupiers on the Seaview Estate that they would also wish to develop their land for housing if the application was successful. But the objector's practical benefit was its ability to preserve the estate for industrial purposes in the broader public interest.

70. Mr Smith rejected the argument that the restriction did not benefit the objector because it had granted planning permission for the residential development of the application land. The planning and section 84 regimes were different and distinct, as the Court of Appeal had held in *Re Martins' Application* (1988) 57 P & CR 119.

71. The objector had a real and continuing concern to protect the future use of the neighbouring industrial land from the potential complaints of new householders. The planning committee had accepted the validity of these concerns when it considered the planning application for the redevelopment of the application land. But it had not considered the council's public duty to maintain the employment potential of the Seaview Industrial Estate.

72. The applicant's argument that there had been very little uptake of industrial land at Seaview was not correct. Mr Rippingale explained that his role with the East Durham Business Service was to assist businesses relocate. He said that there had been enquiries for industrial land and that the market was quite buoyant for such land given its limited supply. Units D and E at Seaview had been leased by a distribution company that had relocated from Blackhall some two to three years ago. Actem, a metal fabrication company, which was under new management and wanted to diversify, occupied unit C. It had been in discussion with the

objector about extending its unit onto land retained by the council at the rear of Units B to E. However, it was reluctant to proceed until the present application had been determined. Its business involved steel fabrication, the movement of forklift trucks, deliveries, and night shifts for four days a week with shift changeovers, all of which were noisy activities that would lead to increased complaints if the application was granted. The East Durham Partnership, who occupied Unit B, wanted to increase the office accommodation at the front of the unit and to review the possibility of using the land at the rear of the unit for storage. An area of approximately 1 hectare immediately south of Timber Road was being marketed by the council and there had been interest from three companies to purchase it, including a building firm and a coach operator.

73. Jayline had been seeking to expand its business from Unit A to another site on the Sea View Estate. It required a larger site and proposed more vehicular movements. Style Travel had recently constructed a new unit on the estate in Timber Road having moved from Peterlee North East specifically because of the Persimmon proposals. Mr Smith submitted that Mr Rippingale's evidence demonstrated that there had been take up at Seaview but in any event the council had to look to the future provision of industrial land, especially if the Persimmon proposals at the North East Peterlee Industrial Estate proceeded.

74. Mr Wilson, who had no personal knowledge of industrial land availability, had relied upon outdated figures in reaching his conclusion that there was plenty of such land for development. The evidence of Ms Dolly Hannon was that there was very little industrial land available for general industrial purposes in the short term. The latest Annual Monitoring Report for Easington District showed a total of 33.31 hectares of industrial land available in the short-term. However, Ms Hannon said that only 3.87 hectares of this total was suitable for general industrial use, of which 2.02 hectares was at Seaview. In addition there was a further 7.35 hectares of long-term general industrial land available at Seaview, being the site shown in the local plan as Ho5. The development of this land depended upon the provision of infrastructure. Ms Hannon stated that the take up rate of short-term industrial land in Easington District had averaged 10 hectares per annum for the last two years.

75. Mr Smith submitted that the Tribunal should consider the practical benefits to the objector at the date of the hearing. What mattered was the availability of general industrial land at Seaview at that date. The availability of other sites was not relevant to the application. The objector owned land at Seaview that had the benefit of the restriction and had continued to secure and safeguard the industrial development of both that and other land. There was no reason to suppose that nobody would relocate from Peterlee North East Industrial Estate to Seaview. It was one of the only general industrial estates available in the locality and there was a restricted choice of where else to go.

76. It was untrue to say that the council depot adjoining the application land was the only land that was even theoretically capable of being affected by the proposed residential development. That and the car park were the closest council properties but there was also the strip of land behind Units B to E and the 2.02 hectares of land to the east of Kilburn Road and located between Unit B and the Council's car park. The proximity of Alisha House to the Industrial Estate was not a problem given the planning condition and the covenant restricting its occupancy to a person connected with the adjoining industrial use of the application land.

The practical benefits of the covenant should not be considered solely in the context of the industrial users that were presently on the Seaview estate. Those benefits allowed the objector to encourage further industrial development. The existing residents to the west of the estate lived in old colliery houses that were considerably further away from the council depot, the car park and other industrial users than the proposed housing would be. Those residents were also separated from the industrial estate by a shrub and tree screen. Householders on the estate to be built on the application land would be likely to complain more about industrial activity at Seaview.

77. The objector had been prepared to negotiate for the sale of its land to the applicant only in order to establish a price. It had not done so on the basis of having already decided to release the restrictive covenant. It had never made such a decision.

78. The area of land known as Ho6 was said by Ms Hannon to have been identified primarily for rugby pitches. Whilst the local plan said that it was suitable for housing Ms Hannon explained that the national agenda for planning for housing had changed considerably since the base date for the preparation of the local plan in 1998. The Regional Spatial Strategy determined how much residential land each authority should plan for. The annual average provision for Easington was 165 units (net). The council had exceeded that figure for the past two years and the supply of housing was already what it should be by 2012. The emerging planning policy was to contain new housing because the district was exceeding its regional quota. When the local plan was published in 2001 the council had struggled to find sites. That was no longer the case. The redevelopment of Peterlee North East with some 600 houses represented a strategic housing opportunity that would help regenerate the area.

79. Mr Smith submitted that the restriction was not contrary to the public interest merely because it was stopping a use that was in the public interest. The purpose of the restriction, to ensure the continued availability of industrial land at Seaview, was itself of public benefit. The loss or disadvantage that would accrue were the restriction to be discharged or modified was not one for which money would be an adequate compensation.

Ground (b)

80. Mr Smith submitted that this was an unusual ground for the applicant to rely upon under the circumstances. The applicant needed to show that there had been something that had actually been agreed between the parties and this was not the case (see *Robinson and O'Connor's Application* (1964) 16 P & CR 106). The objector had negotiated with the applicant for the sale of its land in the event that the decision was taken to release the covenant. But that decision was not in the power of those who were negotiating and it had not been taken. There was no correspondence or other evidence to show that it had been. It was not enough for the applicant to assert that the objector had agreed in principle to sell its land to the applicant. There was no evidence to support this and the point had not been put to the objectors' witnesses.

81. The fact that the objector's estates department had not opposed the grant of residential planning permission on the application land was irrelevant. It was not possible to infer an agreement to release the restriction from a lack of opposition of one council department to a planning application. The grant of planning permission could not be considered an express or implied agreement by the objector to the discharge or modification of the restriction since the planning regime was distinct from the requirements of section 84 of the Act. Furthermore the designation of Ho6 as a possible housing site took place in 1998 and this could not constitute any form of agreement to release a later covenant.

Ground (c)

82. Mr Smith submitted that the modification or discharge of the covenant must cause the objector injury for the reasons outlined under ground (aa). He referred to *Re Abbey Homesteads (Developments) Ltd's Application* (1986) 53 P & CR 1 where Nourse LJ said at 12:

> "In any event, there is authority for the view that paragraph (c) is only a long stop against vexatious objections to extended user; see *Ridley v Taylor*, per Russell LJ [[1965] 1 WLR 611 at p622]"

The objector had not been vexatious in making its objection in this application.

Compensation

83. Mr Freeman's evidence was that compensation could not be assessed under section 84(1)(i) because the loss to the objector could not be measured in monetary terms. He therefore concentrated upon the compensation payable under section 84(1)(ii). He approached the assessment of this compensation in two ways. Firstly he considered how much the purchase price of the application land had been reduced as a result of the imposition of the restriction in July 2000. Using comparables of sales of residential development land sold between October 1998 and June 2000 Mr Freeman estimated that the application site, not subject to the restriction, would have been worth £244,625. The compensation payable was this sum less the £39,000 that was actually paid, ie £205,625. In reaching this figure Mr Freeman assumed a residential planning permission as at July 2000, arguing that the only equitable approach was to assume that a similar planning permission to that subsequently granted in 2005 existed at the time the restriction was imposed. At the hearing Mr Freeman revised this part of his evidence by discounting his previous figure of £205,625 by 30% to reflect the fact that the majority of the site was industrial land at the date the restriction was imposed. He therefore valued all of the site (including the 0.6 acres which already had planning permission for a bungalow and would receive planning permission for a house two days after the date of the restriction) at a hope value represented by 70% of residential development value. His revised valuation was £144,000 from which he deducted the purchase price of £39,000 to give compensation under section 84(1)(ii) of £105,000.

84. Mr Freeman's second approach was to consider what would have been the outcome of friendly negotiations between the parties at the present time. He did this by establishing the current value of the land and buildings as existing and the enhancement that would occur as a result of the discharge and modification of the covenant. He estimated the current value of

Alisha House, based upon comparables, as £320,000. He reduced this by one-third to £215,000 to reflect the effect of the occupancy restriction upon the value of the house. The remainder of the application land was valued as industrial land at £50,000 per acre to give £65,000. Mr Freeman estimated the total current value of the application land, subject to the restriction, to be £280,000.

85. Mr Freeman considered the enhanced value of the application land without the restriction in two ways. Firstly, he assumed that the whole of the land would be developed residentially and secondly he assumed that Alisha House would remain and only the rear land (1.3 acres) would be redeveloped by housing. On his first approach he calculated the value to be £1,160,000 and on his second approach at £1,000,000. He took the higher figure and subtracted £280,000 from this, being the current value of the existing site, to give an enhancement value of £880,000. Mr Freeman said that in his opinion this enhancement value would be divided equally between the parties to give a figure of compensation of £440,000. In reaching this conclusion he relied upon two comparables, one involving the release of a restriction against residential development and the other involving negotiations in respect of a ransom strip, in both of which the parties had agreed a 50% share of the enhancement value.

86. Mr Freeman concluded that the appropriate figure of compensation was £440,000, which was the higher of the two figures that he had estimated. In cross-examination Mr Freeman acknowledged that his valuation has not taken account of any possible contamination nor the possibility that there should be a deduction in respect of an access ransom. He also said that the figure negotiated by the applicant for the substation land seemed very low compared with his valuation.

87. Mr Smith submitted that the objector's main case was that compensation was not appropriate. But subject to that overriding point he reviewed the broad principles of compensation under section 84(1)(i) and (ii) of the Act. Under grounds (a) and (c) he said that subsection (i) did not apply but subsection (ii) was available. Under grounds (aa) and (b) both subsections were available.

88. Mr Smith considered the compensation payable under section 84(1)(i) by reference to *Re Skupinski's Application* [2005] RVR 269, *Re SJC Construction Company Limited's Application* [1976] RVR 219, *Stockport MBC v Alwiyah Developments* (1983) 52 P & CR 278 and to the recent Court of Appeal decision in *Winter and Another v Traditional and Contemporary Contracts Limited* [2007] RVR 353. He concluded from these that if there was a real prejudice to the objector that could not be evaluated financially, such as the loss of amenity or the loss of policy benefits as in this application, then one can have regard to the "friendly negotiation" approach to the assessment of compensation that was adopted in *SJC and Stockport.* The approach was not being used to determine compensation for loss of bargaining power but as a way of assessing the loss of amenity or other value. Under these circumstances Carnwath LJ had said in *Winter* that "the negotiated share approach is a permissible tool for the Tribunal" (paragraph 33). The type of losses that the objector would suffer in this case could not be assessed by way of diminution in value. Indeed the modification or discharge of the covenant may increase the value of at least some of the land that was benefited but nevertheless there would still be a loss of benefit.

89. Mr Smith said that there was not a significant difference between the parties in terms of the principles upon which the valuers had sought to quantify the outcome of friendly negotiations. The major item of disagreement was in respect of decontamination costs. He rejected Mr Wilson's reliance upon the Armstrong and Dunelm reports for the reasons set out in paragraph 63 above. There was no reliable evidence about contamination costs and it should be left out of account. The likelihood was that contamination was not very serious otherwise it would have formed the subject of a proper report. The percentage of the enhancement value that the objector should be entitled to by way of friendly negotiations varied in the reported cases but should lie between 20 to 50%. Mr Freeman's evidence had been supported by comparables at the upper end of this range.

90. Turning to the amount of compensation payable under section 84(1)(ii) Mr Smith submitted that Mr Wilson had not given any evidence or reasoning in support of his figure of £10,000. The transaction to acquire the substation land was a weak comparable. Mr Freeman had made a reasonable assumption in discounting the residential value of the application land by 30% to allow for hope value. The applicant had produced an attendance note which referred to a letter from the council that stated that no such planning permission would ever be granted. But the letter itself had not been produced and did not form part of the applicant's evidence. Nor was there any evidence to suggest that there would be any access problem from Blackhills Road.

Conclusions: Ground (a)

91. For the applicant to establish this ground I must be satisfied that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which I consider material, the restriction ought to be deemed obsolete. I agree with Mr Smith that the test of obsoleteness is whether the original purpose of the restriction can still be achieved. The meaning of the word "obsolete" in this context was considered in *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261 where Romer LJ said at 272:

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84(1)(a)."

The Court of Appeal upheld this view in *Re Abbey Homesteads (Developments) Ltd's Application* (1986) 53 P & CR 1; per Nourse LJ at 12:

> "Moreover the test for obsoleteness is whether the original object of the restriction can still be achieved... In this case we are presented with the compelling fact that not only is the original object capable of being achieved; it is in course of actual flourishing achievement."

92. I do not accept Mr Dumont's argument that the original purpose of the restriction should be narrowly interpreted as being no more than to ensure that the application land was only used as a coach depot and an associated bungalow. That merely restates the restriction itself. I prefer the objector's submission, supported by the evidence that I have summarised in paragraphs 57 and 58 above, that the purpose of the restriction was to prevent the use of the application land in a way which might prejudice the industrial use of the Seaview Industrial Estate. There was no evidence to suggest that the restriction was imposed in order to extract a ransom payment subsequently.

93. Mr Wilson listed, but did not comment upon, a number of changes in the character of the application land and its neighbourhood, and in other material circumstances, which he invited the Tribunal to consider as having made the restriction obsolete. I have considered all of these but I am not persuaded that, either individually or collectively, these changes are such as to render the restriction obsolete. Indeed I found some of them to be fanciful and unsupported, for instance Mr Wilson's comment that construction of a house on the application land represented a material change when the restriction itself contemplated a limited residential development on that land or his comments about falling school rolls which he had based, solely it seems, upon a conversation he had with the applicant and his father, one of whom he "suspected" to be a school governor.

94. The restriction was recently imposed in July 2000 and in my opinion its purpose is still capable of being fulfilled. There have been no changes in the character of the application land or its neighbourhood or in any other circumstances of the case which satisfy me that the restriction ought to be deemed obsolete. I find that the restriction is not obsolete and the application for its modification or discharge under ground (a) is refused.

Conclusions: Ground (aa)

95. The questions that arise for determination under section 84(1)(aa) of the Act are whether the restriction impedes some reasonable user of the land; if so, whether in so doing it secures to the objector any practical benefits; if so, whether those practical benefits are of substantial value or advantage to it; and, if not, whether money would be an adequate compensation for any loss or disadvantage suffered; and, if so, how much if anything I should award as compensation.

96. On the first question the parties agree that residential development of the application land would be a reasonable user of it.

97. The expression "practical benefits" is to be construed widely and is not limited to a restriction for the benefit or protection of land. In *Gilbert v Spoor and Others* [1983] Ch 27 Eveleigh LJ said at 32F:

> "The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase 'any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical

benefits. The expression 'any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis."

98. This is not a case about the loss of amenity despite the objector owning adjoining land that has the benefit of the restriction. I am satisfied from the evidence that the purpose of the restriction was a planning one, as was the reason for the council's objection to the application. The practical benefits that the objector says are secured by the restriction are its ability to control the development and use of the application land and the prevention of complaints from future householders that would curtail the existing and future industrial use of the Seaview Industrial Estate, part of which is owned by the objector. As such they are benefits that are secured for planning purposes. Mr Smith acknowledged this in his submissions when he said that the objector had relied upon these benefits when refusing the planning application to remove the condition restricting the occupancy of Alisha House. He also said that the planning committee had accepted the validity of the planning officer's concerns about the adjacent industrial site when granting planning permission for the residential development of the application land in 2005.

99. The practical benefits described above must be of substantial value or advantage to defeat an application under ground (aa). There is no evidence that the benefits are of substantial value to the objector. Indeed Mr Smith conceded that the modification or discharge of the covenant was likely to increase the value of at least some of the benefited land retained by the council. The question in this case, therefore, is whether the restriction secures practical benefits of substantial advantage to the objector. The objector argues that this advantage is the protection of the integrity of the Seaview Industrial Estate as a site for industrial, and more particularly general industrial, development. The restriction is thus viewed as securing a planning advantage that safeguards a policy of strategic economic importance. The applicant is scornful and suspicious of this argument and questions whether the objector's opposition is genuine. The applicant's scepticism was provoked by the grant of planning permission by the objector for the residential development of the application land in April 2005, a decision that was taken against the recommendation of the planning officer who relied upon the same planning arguments that lay behind the imposition of the restriction. In the light of the grant of such planning permission, and the subsequent willingness of the objector to negotiate the sale of its adjoining land, the applicant queries how the objector can now argue that it derives practical benefits of substantial advantage from the restriction.

100. The objector's answer to this point is twofold. Firstly, it submits that restrictive covenants and planning law are distinct and separate systems of control. As Fox LJ said in *Re Martin's Application* (1988) 57 P & CR 119 at 124-125:

> "When a restrictive covenant is entered into between owners of adjoining, or otherwise affected, lands the fact that the owner for the time being of the burdened land subsequently obtains planning permission to develop that land in a manner which is prohibited by the covenant does not entitle him to ignore the covenant. The benefit of the covenant is an interest in land and it is not extinguished by the acts of a planning authority….

> The granting of planning permission is, it seems to me, merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by section 84. It is for the Tribunal to make up its own mind whether the requirements of section 84 are satisfied."

101. In the recent case of *Lawntown v Camenzuli* [2008] 1 All ER 446 the Court of Appeal considered this issue again in the context of an application under section 610 of the Housing Act 1985. Richards LJ said at paragraph 41:

> "Most importantly, it is for the court to make its own assessment of the relevant factors and the weight to be accorded to them. It must not leave matters out of account, or give them no weight in the overall balancing exercise, merely because the local planning authority in granting planning permission has already considered them. The court's task under s 610, although triggered by the grant of planning permission, is separate from the planning process and requires an independent exercise of judgment. That does not mean the court has to second-guess the authority's planning judgments or to reach a view on the correctness of the grant of planning permission. It is simply that the authority's factual assessment is not determinative, however careful it may have been, and the court has to examine the facts for itself and to carry out its own balancing exercise."

102. The second argument raised by the objector in response to the applicant's doubts about the genuineness of its objection is that the Tribunal must consider the facts and the evidence as they existed at the date of the hearing. It says that circumstances have changed since planning permission was granted in April 2005. There is now less pressure to release land for housing given that the council has exceeded its regional targets, whilst the latest figures for industrial land availability show an increasing shortfall of such land in the District, pressure upon which has been exacerbated by the Persimmon proposals at the North East Peterlee Industrial Estate. Those proposals were unknown when residential planning permission was granted on the application land. The objector also notes that the planning committee only referred to existing rather than future industrial users when considering the planning application for that residential development.

103. I prefer the evidence of Ms Hannon and Mr Rippingale about industrial land availability in the Easington District to that of Mr Wilson. The former was based upon more recent data than the local plan and the 2006 consultation document relied upon by Mr Wilson. It was apparent from the current figures that there is some, albeit disputed, pressure upon employment land supply, especially in the short term. Ms Hannon also gave evidence that the supply of housing was ahead of regional targets. At the date of the hearing, however, the Persimmon proposal was not the subject of a planning application and remained a tentative proposal.

104. I have considered the objector's arguments carefully regarding the change in the substantiality of the practical benefits that are secured to it by the restriction since planning permission was granted in 2005. The circumstances of this case are unusual in that the objector is also the local planning authority and has imposed the restriction for planning purposes.

There is therefore a close coincidence between its role as landowner and that of local planning authority. Under these circumstances I cannot attribute to those roles the degree of independence suggested by the objector. The grant of that permission was, in my opinion, an event of singular importance in this case and is the best evidence that the practical benefits secured by the restriction are not of substantial advantage to it. Those benefits were considered by the objector in the context of the residential planning application and were overridden in favour of residential development. I do not think that the changes that have occurred subsequently are sufficient for me to conclude that the practical benefits should be regarded as substantial given the grant of residential planning permission in April 2005.

105. Section 84(1B) requires me, when determining whether this case is one falling within section 84(1A) or otherwise, to have regard to 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.

106. The development plan is the District of Easington Local Plan that was adopted in December 2001. The application land is not shown as the site of any proposals in that plan. The Seaview Industrial Estate is not a defined area in the local plan. There are two proposals, both of which were discussed at the hearing, which have a potential impact upon that estate and the application land. The first proposal is policy Ho5, which allocates 11 hectares of land to the north of the valley on the former Horden Colliery site as an extension to the Seaview Industrial Estate. The second is Ho6, which allocates 3 hectares south of the former colliery pumping station for recreational or housing purposes. The applicant relies upon the allocation of Ho6 as making a nonsense of the council's objection for the reasons I have outlined in paragraph 35. There is substance in this argument given that the land designated as Ho6 is close to the existing industrial units (although it is not as close as the application land). However, it is clear that the primary purpose of the designation of Ho6 was for its recreational use as three rugby pitches. The council laid it out as such but that use was precluded due to the condition of the ground. The local plan states at paragraph 17.19:

> "In the event that it proves to be impossible to utilise the ground for the primary purpose of rugby pitches, the council will consider its development for housing purposes."

The objector owns the Ho6 land and at present it remains unused. Ms Hannon said in cross-examination that the council had identified this site as being suitable for housing in 2001 at a time when it was struggling to find suitable residential sites. That was no longer the case as the emerging planning policy was to contain the amount of new housing as the District of Easington had exceeded the quota set for it in the Regional Spatial Strategy in both 2005/06 and 2006/07. She viewed Ho6 as having always been primarily a recreational site and said that it was no longer required for the secondary purpose of housing. There were other housing sites available.

107. It was not contended by either party that there was any declared or ascertainable pattern for the grant or refusal of planning permissions in the area and I have not identified any from the evidence before me.

108. The period at which and the context in which the restriction was imposed should be considered, in my opinion, by reference to whether the present planning regime differs to that which obtained when the covenant was entered into, both generally and specifically with regard to the application land. I have already outlined the recent evidence regarding industrial land availability and the changed policy context in respect of proposal Ho6. I have also considered the proposal by Persimmon to redevelop a large part of the Peterlee North East Industrial Estate that came to light in 2005.

109. The restriction in this case is recent and the parties treat the applicant as the original covenantor (although it seems to me that he is only the original covenantor so far as the amended restriction is concerned). Neither factor in itself means that the application should automatically be refused. But whilst these factors are not decisive on the issue they are nevertheless relevant as Stephenson LJ stated in *Jones v Rhys-Jones* (1975) 30 P & CR 451 at 459:

> "Without the assistance of authority I would have thought that the shortness of time which has elapsed since the burden of a covenant was imposed on an original covenantor or was transferred to a subsequent purchaser was a factor which could properly be put into the scale against modification or discharge whether the application under section 84 be made by an original covenantor (when it would weigh more) or by a subsequent purchaser (when it would weigh less)."

At 461 Ormrod LJ commented upon of the judgment of the Court of Appeal in *Cresswell v Proctor* [1968] 1 WLR 906:

> "Their Lordships, in my judgment, were doing no more than formulating a proposition of good sense, namely, that where an original covenantor is applying for a modification of a restrictive covenant recently entered into by him this is one of the matters, and an important one, which the Lands Tribunal can, and must, take into account and to which it must give due weight in deciding whether or not, in its discretion, to modify the covenant."

110. When considering the application in the context of section 84(1B) of the Act I have attributed weight to the fact that the restriction is recent and that the applicant is an original covenantor. I have also had regard to the applicant's reliance upon Mr Wilson's evidence to establish the background to the acquisition and use of both the application land and the substation land. This was necessarily hearsay evidence in some respects and I have reflected this in the weight I attach to it.

111. The objector argued that to allow the application would be the thin end of the wedge and referred to Mr Wilson's evidence in which he had identified three owners of units on the Seaview Estate who intended to pursue residential development on their land if the application is successful. That evidence consisted of short, four line, identical pro forma responses and gave no detailed information. I attach little weight to it. The grant of the application is unlikely to make the restriction vulnerable to future applications under section 84 because the application land comprises the whole of the burdened land.

112. I conclude that the restriction does not secure to the objector practical benefits of substantial advantage. But in order for the application to succeed under ground (aa) I must also be satisfied that money will be an adequate compensation for the loss or disadvantage (if any) which the objector will suffer from the discharge or modification of the restriction. For the reasons I have given there is no loss of value or amenity arising from the discharge or modification of the restriction nor will the objector be disadvantaged by it. I am therefore satisfied that all of the requirements of ground (aa) have been met. I therefore have jurisdiction to discharge or modify the restriction. That being so I must now consider whether it is appropriate for me to exercise my discretion under such jurisdiction.

113. In reaching my decision I have taken into account the specific and other circumstances referred to in section 84(1B) of the Act. I have also had regard to the fact that the restriction is recent and to the status of the applicant as an original covenantor but neither factor justifies a different conclusion on the facts. The application is for discharge or modification of the restriction. It is not necessary to discharge the restriction in order for the residential planning permission to be implemented but its retention in a modified form would not serve any purpose in terms of protecting the amenity or value of the objector's property or the public interest generally. Having found that the restriction does not secure any practical benefits of substantial value or advantage to the objector I find no reason to refuse the relief sought as a matter of discretion, such relief to be by way of discharge of the restriction.

Conclusions: Ground (b)

114. To establish this ground the applicant must show that the objector has agreed, either expressly or by implication, by its acts or omissions, to the restriction being discharged or modified. There was no evidence that the objector had given any such express agreement. The applicant relied instead upon the implications of the objector's acts and omissions.

115. The applicant relied mainly upon the grant of planning permission by the objector and its willingness to negotiate with the applicant for the sale of its land to the north of the application land. I have already dealt with the grant of planning permission in the context of my consideration of ground (aa) in paragraph 100 et seq above. The objector, as a local authority, fulfils multiple functions and the exercise of such a function by one department of that authority does not imply acceptance of that decision in relation to another such function. In my opinion the grant of planning permission does not imply agreement to the discharge or modification of the restriction. The importance of such planning permission in this case lies in the light that it sheds upon the substantiality of the practical benefits that are secured to the objector by the restriction. Similarly I do not consider that the absence of opposition to the residential planning application by the objector's estates department is an omission that can be deemed to be such an agreement.

116. The evidence shows that the objector negotiated for the sale of its land to the applicant for residential development. Such development depended upon the modification or discharge of the restriction and I am satisfied that the negotiations between the parties were conducted on the basis that the restriction would be released. Mr Michael Smith said as much in his witness statement. The objector argued that the negotiations, whilst they proceeded on this basis, were

restricted to establishing a price. Both Mr Clarke and Mr Michael Smith said at the hearing that they had no authority to agree to the release of the restriction.

117. Mr Clarke said that he was looking for best value and was happy to negotiate the release but that the decision to do so was not his and had wider implications. Mr Graham had approached the council and it had explored the opportunity. Mr Clarke said that it would have been a condition of any sale that Mr Graham would have to get planning permission for housing but it was not necessary to do so before the council talked to him. Mr Clarke was prepared to make a recommendation on a specific value but ultimately the council would undertake a cost benefit analysis and would consider the financial receipts against the wider economic and policy background.

118. There was no evidence that the parties had agreed a price for the release of the restriction which Mr Clarke could recommend to the council. Negotiations had ended, according to Mr Michael Smith, in August 2005 and, according to the applicant, in October 2005. The application under section 84 of the Act followed in November 2005. On balance I do not believe that these unsuccessful negotiations can be said to be an act on the part of the objector that should be construed as implying its agreement to the release of the restriction. To negotiate on the presumption that the restriction would be released does not imply an agreement that it has been so released. To establish an agreement in the circumstances of this case would depend upon its imputation by the applicant rather than its implication through the actions of the objector. An imputed agreement is not one which satisfies the requirements of section 84(1)(b) of the Act and I therefore conclude that the application fails under this ground.

Conclusions: Ground (c)

119. Having found above that the restriction does not secure practical benefits of substantial value or advantage to the objector and that it would suffer no loss or damage as a result of the discharge or modification of the restriction it follows that the objector would not be injured by such discharge or modification. The application therefore succeeds also under ground (c).

Conclusions: compensation

120. An order discharging or modifying a restriction under section 84 may direct the applicant to pay 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:

(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.

I have found that the objector will not suffer any loss or disadvantage as a result of the discharge of the restriction and therefore no consideration is payable under heading (i) above. But the applicant accepts that compensation is payable under heading (ii). Mr Wilson assessed this as £10,000 and Mr Freeman as £440,000.

121. I find Mr Freeman's approach to the assessment of compensation to be misconceived in principle. He relies upon the higher of two valuations, namely a current valuation based upon the negotiated share approach. That valuation bears no relation to the requirement of section 84(1)(ii) to identify 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. In my opinion Mr Freeman was wrong to have considered the circumstances and values as they existed when he wrote his report rather than when the restriction was imposed. The result was an exaggerated figure. Mr Smith's submissions suggested that the negotiated share approach related to compensation assessed under section 84(1)(i), but that was not how it was presented in evidence by Mr Freeman. In *Winter* Carnwath LJ said at paragraph 33 that:

> "There is no "hard and fast rule" as to how that loss [caused by diminution in the value or enjoyment of the objector's property] is to be assessed, but the negotiated share approach is a permissible tool for the tribunal. Where that approach is taken, the percentage must bear a reasonable relationship to the actual loss suffered by the objector."

I do not believe that the negotiated share approach is appropriate in this case because the objector has not suffered any loss or disadvantage. In any event I think that Mr Freeman's use of a 50% share is disproportionate and unjustified.

122. Mr Freeman produced an alternative valuation in respect of heading (ii). In his expert report he said that this figure should be the difference between the residential development value of the application land as at the date the restriction was imposed (£244,625) and the price paid (£39,000). This gives a valuation of £205,625. At the hearing Mr Freeman revised this approach and said that he should not have assumed residential planning permission. Instead he said that it was appropriate to take the hope value of such development at 70%. Accordingly he reduced the figure of £205,625 by 30% to give £144,000 and then deducted the price paid to give a revised compensation figure of £105,000. Mr Freeman did not support his figure of 70% with evidence. He also applied the discount to the whole of the application land, including the site of the bungalow which had been granted planning permission in 1998. He accepted that his valuation made no allowance for possible contamination.

123. I believe that Mr Freeman's calculations are wrong. He should have discounted the residential development value of the whole site, £244,625, by 30% to give hope value of £171,250 (rounded). The purchase price should have been deducted from this to give compensation of £132,250. Mr Freeman appears to have deducted the purchase price twice in his valuation. This highlights a difficulty that I have with Mr Freeman's expert report, namely that he is not the author of it. It was written by Mr Jonathan Howard MRICS in November 2006 who at that time was a Director of G L Hearn based in their Sunderland office. He left that firm shortly afterwards and Mr Freeman adopted his report verbatim. He has also adopted its mistakes. I appreciate that Mr Freeman was substituted for Mr Howard at short notice but his uncritical acceptance of another surveyor's work undermined the credibility of his

evidence. This was further demonstrated during cross-examination when Mr Freeman acknowledged that he had not even changed the report to give the correct date for his own inspection of the application land. He was also unable to cite the case law upon which he said in the report he had based his valuation approach.

124. Mr Wilson explained that the figure of £10,000 compensation contained in his expert report had been based upon industrial land values. He had taken such values as £15 - 25,000 per acre. He considered that there would be a difference of £5,000 per acre between the value of the application land with and without the restriction. Rounding the site area to 2 acres gave compensation of £10,000.

125. Mr Wilson introduced the substation land as a comparable in a supplementary bundle and relied upon that transaction in support of his figure of compensation. Mr Smith dismissed this as a weak comparable the full history of which had not been disclosed. But it was an arm's length transaction of an adjoining site with a vendor who was professionally represented. It reflected the parties' views about the prospects of obtaining residential planning permission, which the applicant argued was unlikely at that time (June 2003). The outcome of the negotiations for the purchase of the substation land was an uplift of £9,000 (or 60%) from £15,000 (presumably based upon industrial values) to a purchase price of £24,000.

126. I prefer Mr Wilson's approach. But I consider that the value of the application land without the restriction may have had hope value for residential development. The front part of that land already had an unfettered planning permission for a bungalow at the time the restriction was imposed. The imposition of the restriction is therefore likely to have diminished the value of that part of the site. However the purchase price of £39,000 was not analysed by either party in terms of the constituent parts of the application land. Doing the best I can with the limited evidence available I consider that an uplift of 60% over the purchase price, similar to that achieved by the vendor of the substation land, is appropriate to reflect the impact of the restriction on the value of the application land as a whole and the limited hope value that may have existed for its complete residential development as at July 2000. Without the restriction I consider that the value of the application land would have been £62,500 (rounded). The consideration payable under heading (ii) is therefore £23,500. The parties did not give any evidence or make any submissions about whether compensation should be adjusted for inflation from July 2000 until the present and I therefore make no such adjustment.

The order

127. An order discharging the restriction shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have paid the sum of £23,500 to the objector. For the avoidance of doubt the order shall discharge both the restriction contained in the original transfer to Mr Pygall dated 19 July 2000 and the amended version of it contained in the transfer to the applicant dated 10 August 2000.

128. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is decided. The attention of the parties is drawn to paragraph 22.4 of the Lands Tribunal Practice Directions of 11 May 2006.

Dated 14 March 2008

A J Trott FRICS