UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE – ***application by original covenantor to discharge covenant of recent origin – local authority covenantee not consenting but choosing not to participate – application dismissed***

IN THE MATTER OF AN APPLICATION UNDER SECTION 84(1), LAW OF PROPERTY ACT 1925

BY:

MURRAY PAUL BARTER

and

LORNA ANNE BARTER

Applicants

Re: Ivy House,
23 Friarn Street,
Bridgwater
TA6 3LH

Before: **Martin Rodger QC, Deputy Chamber President**
and Mr Paul Francis FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
31 October 2017

Duncan Kynoch, for the applicants

The following cases are referred to in this decision:

Re: Bass Limited's Application (1973) 26 P & CR 156

Re: Beech's Application (1990) 59 P & CR 502

Re: Bennett's and Tamarlin Ltd's Applications (1987) 54 P & CR 378

Cresswell v Proctor [1968] 1 WLR 906

Graham's Application (2007) (LP/83/2005), [2008] EWLands LP_83_2005

Jones v Rhys-Jones (1974) 30 P & CR 451

Millgate Developments Ltd v Smith [2016] UKUT 515 (LC)

Shepherd v Turner [2006] EWCA Civ 8

Stockport v Aliyah Developments (1983) 52 P & CR 278

Introduction

1. On 25 January 2013 the applicants, Mr and Mrs Barter, took a transfer of a substantial Victorian property known as Ivy House, at 23 Friarn Street in Bridgwater, for which they paid £249,950 to the transferor, Somerset County Council. The building was designed as a large residence but had more recently been used as a day-care centre. It is set in grounds of about half an acre which were also included in the Transfer.

2. When Ivy House was marketed for sale it was described as likely to "be of interest to residential and commercial developers." The applicants purchased it with the intention of obtaining planning permission for residential development. Nevertheless, the Transfer included a covenant, expressed as being for the benefit of adjoining highway land and any other adjoining land belonging to the County Council, by which the applicants agreed "not to build any additional building for use as residential accommodation" on the land comprised in the Transfer.

3. After completing their purchase the applicants applied for and obtained planning permission to divide Ivy House into flats, and to erect a new building containing 13 two bedroom flats in the grounds. In May 2015, having become aware of the planning consent, the County Council offered to negotiate the release of the covenant in return for a share of the resulting development value, but the parties subsequently failed to reach agreement on what would be an appropriate payment.

4. On 11 January 2017, less than four years after the Transfer, the applicants applied to the Tribunal for the covenant to be discharged under section 84(1), Law of Property Act 1925 ("the 1925 Act"). Assuming the grounds of application are made out, the issue to which the application gives rise is whether the Tribunal should exercise its discretion to discharge a covenant so recently entered into by the applicants themselves as a term of their acquisition of Ivy House.

5. At the hearing of the application the applicants were represented by Duncan Kynoch of counsel. The County Council chose not to respond to the application but it wrote to the Tribunal making it clear that it did not consent to it.

The Tribunal's jurisdiction

6. Section 84 of the Law of Property Act 1925 gives the Tribunal power to discharge or modify restrictions affecting land where certain grounds in section 84(1) are made out. The grounds relied on in this application are (aa) and (c). As Mr Kynoch acknowledged, the power conferred by section 84(1) is a discretionary one.

7. So far as is material to this application ground (aa) requires that, in a case falling within subsection (1A), the Tribunal must be satisfied that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes. Subsection (1A), which must also be satisfied to establish a successful claim on this ground, provides as follows:

"(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either —

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification."

8. In determining whether a case falls within subsection (1A), and in considering whether a restriction ought to be discharged or modified under any of the statutory grounds, the Tribunal is directed by subsection (1B) to take into account a number of relevant matters. These include "the period at which and context in which the restriction was created or imposed", as well as the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area, and any other material circumstances.

9. Mr Kynoch also relied on ground (c), which is available where the Tribunal is satisfied that the proposed modification will not injure the persons entitled to the benefit of the restriction.

10. Where the Tribunal makes an order discharging or modifying a restriction under section 84(1), it may direct the applicant to pay to any person entitled to the benefit of the restriction such sum as the Tribunal may think it just to award to make up for the loss or disadvantage suffered by that person in consequence of the discharge or modification. Alternatively, the Tribunal may award 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.

11. Mr Kynoch accepted that, in determining whether the covenant in this case ought to be discharged under either of the statutory grounds relied on, it was relevant for the Tribunal to take into account the fact that the Transfer containing the covenant had been made less than four years before the application to discharge it. That was the effect, he suggested, of the reference in subsection (1B) to "the period at which" the restriction was created or imposed. Mr Kynoch also accepted that it was a material circumstance that the application is made by Mr and Mrs Barter, who were themselves original covenanting parties and who had willingly assumed the burden of the covenant as a condition of their acquisition of Ivy House at the agreed price.

The facts

12. Ivy House appears from the photograph and marketing information in the application bundle to be a substantial Victorian house of 7,664 sq ft set in grounds of approximately half an acre including a car park capable of accommodating ten vehicles. It is located close to Bridgwater town centre in a mixed residential and commercial street. When it was offered for sale in August 2012 it was described in the agent's particulars as being generally in good

condition throughout. It had been used for many years as an adult day centre but was advertised on behalf of the County Council as being suitable for a number of uses including as offices, a residential conversion or a hotel or guest house. The particulars pointed out that the building would readily sub-divide to form a number of apartments or could be reinstated as a single private residence, subject to planning permission. It is clear from the particulars that the building was expected to be of interest to both residential and commercial developers. The property was offered for sale with a guide price of £250,000. No mention was made in the particulars of any intention on the part of the vendor to include a covenant restrictive of the use of the property in the eventual transfer.

13. On 5 September 2012 Mr and Mrs Barter contacted the County Council's agent and made an offer of £220,000. This was not accepted and on 7 September an increased offer of £232,000 was made. That offer having also been rejected, the applicants did not express any further interest until they were contacted by the vendor's agent on 2 October. This contact prompted Mr Barter to make what he described in an email as "a final bid" of £250,000, which he explained was the upper limit of his interest as it represented the threshold above which stamp duty would become payable. The same email referred to Mr Barter's significant property portfolio in Bridgwater and elsewhere and implied that he was an experienced property investor.

14. Mr and Mrs Barter were not the only prospective purchasers of the property, and on 4 October 2012 the County Council's agent informed them that the sale would proceed on the basis of a contract race. Mr Barter explained that both he and the other interested party had made offers of £250,000, but that at no time until after solicitors were instructed by the County Council had any suggestion been made that a restrictive covenant was to be included in the transfer.

15. The first occasion on which the applicants became aware of the intention to include a restrictive covenant as part of the transaction was when they received a letter from the County Council's newly appointed solicitors on 19 October 2012 explaining the terms of the proposed contract race and enclosing a draft contract. The letter also explained that no amendments would be permitted to the contract nor would any additional inquiries be answered. Both parties therefore entered the contract race on the understanding that the property was available to them only on the terms of the draft contract.

16. The draft contract provided that there was to be included in the final transfer a right of access to the land for the County Council as Transferor "for the benefit of the adjoining land of the Transferor on which the highway is situated and any other adjoining land owned by the Transferor ("the Adjoining Land")." There was also to be a covenant in the following terms:

> "The Transferee covenants with the Transferor, pursuant to section 33 of the Local Government (Miscellaneous Provisions) Act 1982 to the intent that the covenant will bind the property and each and every part of it and benefit the Adjoining Land and each and every part of it into whosoever hands they may come, not to build any additional building on the Property for use as residential accommodation."

17. Mr Barter informed the Tribunal that he had been advised of the effect of the covenant by his own solicitors and had decided to proceed with the proposed contract. On 22 October his solicitors' delivered an executed contract to the County Council's solicitors unconditionally agreeing to purchase the property on the terms proposed. The transaction proceeded on those terms and on 25 January 2013 the property was transferred to Mr and Mrs Barter for £249,950 subject to the rights of access and the restrictive covenant in the terms referred to above.

18. In his oral evidence Mr Barter explained that when he and his wife purchased Ivy House they had done so with the intention of optimising the value of the site by building in the grounds as well as by converting the house to a number of flats. Having spoken to a local architect, and being aware that the property was in an area allocated in the local development plan for housing, Mr Barter was optimistic that an application for planning permission would be favourably received. In his own mind, he told us, he had hoped to obtain planning permission for a new three-storey building accommodating 15 to 20 flats each of which would have had a value, in the market as it was in 2013, of about £85,000. He also hoped to obtain planning permission for a further 7 or 8 flats in Ivy House itself.

19. On 23 October 2014 Mr and Mrs Barter applied for planning permission to convert Ivy House to 7 two bedroom flats and one bedsit, and this was granted on 17 December 2014. Next they sought planning permission to erect a new building comprising 13 two bedroom flats in the grounds. That application was successful on 31 March 2015. As a condition of planning permission Mr and Mrs Barter entered into a section 106 agreement with Sedgemoor District Council by which they agreed that two of the units in the new block of flats would be designated "affordable housing units" and would be let at favourable rents.

20. On 8 May 2015 the County Council's agent contacted Mr Barter by email. He explained that the covenant restricting development of an additional building "was simply placed on the property to ensure that any increase in value of the property is shared with the County Council." The County Council had therefore instructed him to open negotiations for the release of the covenant. Mr Barter's reply to that email is not in evidence but it appears not to have included a positive response to the County Council's overtures.

21. We do not know how matters then developed except to the extent that we have been shown emails thought to support Mr Barter's application. On 11 December 2015 in one such email the County Council's estates manager, Mr Field, informed Mr Barter that he had evidence of the release of covenants within the previous year in return for payments of between £5,000 and £250,000.

22. On 21 March 2016 Mr and Mrs Barter wrote to the Council in a letter headed "letter before action" in which they drew attention to the jurisdiction of the Tribunal under section 84 of the 1925 Act to release or modify restrictive covenants. They offered to pay £5,000 for the discharge of the covenant, describing this as their final offer.

The applicants' case

23. In a statement filed with the application to the Tribunal on 11 January 2017 Mr Barter complained bitterly of the behaviour of the County Council in introducing the restrictive covenant into the negotiation at the last minute after an understanding had been reached on the price of the property on an unrestricted basis. He said it was unclear at the time the covenant was proposed what its purpose or meaning was intended to be and suggested that he was prevented from understanding its effect by the County Council's solicitors' unwillingness to accept any amendment to the contract or to answer any additional enquiries. He pointed out that the County Council owned no adjoining land capable of benefiting from the restriction at the time it was created and that there was therefore no amenity to be protected. In short Mr Barter believed the inclusion of the covenant was "a money-making exercise" which he described as "previously undisclosed, covert and seemingly underhand".

24. Mr Barter also made a number of legal points in his first statement which were not pursued in submissions by Mr Kynoch and which it is therefore unnecessary for us to consider. We point out, however, that the fact that the County Council owned no land in the vicinity other than the highway, and that the highway land may not be capable of enjoying any practical benefit from the covenant, does not render the covenant unenforceable as between the applicants and the County Council.

25. In a second witness statement, dated 9 October 2017, Mr Barter emphasised that no reference had been made to the covenant before the purchase price had been settled on and suggested that had he been made aware of the intention to include it before the contract race began he would have reduced his bid by at least £25,000 or would have withdrawn his interest in the property altogether. He acknowledged that he could have pulled out of the contract race when his solicitors pointed out the presence of the covenant but suggested that, by that stage, he had already committed some 6 weeks of his time and expense to the transaction.

26. Mr Kynoch directed his submissions to the statutory grounds and began by drawing attention to the policy underlining section 84(1)(aa) as explained by Carnwath LJ in *Shepherd v Turner* [2006] EWCA Civ 8 (at paras 57 to 58) which included the following:

> "In my view, account must be taken of the policy behind para (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights."

27. Mr Kynoch submitted that the proposed use of the land was reasonable, as planning permission would not have been granted for the construction of the new block of flats if it had not been. We agree the proposed use is reasonable.

28. Does the covenant impede the proposed use? Again we agree with Mr Kynoch that it does, so far as the use is the construction of the new block of 13 two bedroom flats in the grounds.

29. Mr Kynoch next submitted that, in impeding the use of the grounds for the construction of the new block, the covenant does not secure "practical benefits" to the County Council. The County Council had not filed any formal objection to the application and Mr Kynoch suggested that its interest could therefore be overlooked. We do not agree. While the well known formulation of the questions which arise under ground (aa) by the Lands Tribunal (Stuart Daniel QC) in *Re: Bass Limited's Application* (1973) 26 P&CR 156 pose the relevant question in the form "does impeding the proposed user secure practical benefits to the *objectors*?", the language of section 84(1A)(a) itself is different and focuses on the impact on all "persons entitled to the benefit" of the restriction, whether or not they have objected to the application.

30. Mr Kynoch pointed out that even if the County Council's position is to be considered, the covenant secures no "practical benefits" in the sense of protecting any amenity, or a view, or privacy or any other proprietary interest which might form the basis of a legitimate objection to discharge or modification. The evidence showed that the benefit which the County Council had hoped to secure by the imposition of the covenant was a purely financial one. On the basis of the email from the County Council's agent proposing the negotiation of a price for the release of the covenant immediately after planning permission was obtained, we think that submission is well-founded. Mr Kynoch therefore relied on the well-known observations of Eveleigh LJ in *Stockport v Aliyah Developments* (1983) 52 P&CR 278, 281, rejecting a submission that the opportunity to bargain for the discharge of a covenant was a benefit of substantial value to the covenantee:

> "The benefit envisaged must be a practical one as opposed to a pecuniary one, that is the practical benefit which is afforded by the observation of the covenant. The subsection exempts from discharge or modification those covenants whose preservation will secure a practical benefit. Bargaining power is only a benefit when it results in the receipt of the price upon the covenant being discharged. Such a benefit cannot be of the kind contemplated by the sub section for it results from the discharge and not the continuance of the covenant."

31. In response to a request from the Tribunal the County Council has confirmed that it owned no land other than highway land adjoining the application land when the covenant was created. On that basis we agree with Mr Kynoch's submission that, in impeding the construction of an additional building in the grounds of Ivy House, the covenant does not secure a "practical benefit" to the County Council in the sense in which that expression is used in section 84(1A)(a).

32. Mr Kynoch also submitted that impeding the intended use of the land was contrary to the public interest in that it was preventing a development which would eventually include two units of affordable housing. As we are satisfied that the other limb of ground (aa) is made out, it is not necessary for us to express any view on the significance or otherwise of the requirement to provide those affordable housing units. The facts of this case are very different from *Millgate Developments Ltd v Smith* [2016] UKUT 515 (LC) to which Mr Kynoch referred. In any event, where the County Council has offered to release the covenant for a payment (as appears always to have been its intention), our conclusion would not be different whichever of the alternative limbs of ground (aa) was made out.

33. We therefore accept the applicants' case that each of the components of ground (aa) has been made out. As for ground (c), which permits a modification which will not "injure the persons entitled to the benefit of the restriction" it was held by the Lands Tribunal in *Re: Bennett's and Tamarlin Ltd's Applications* (1987) 54 P & CR 378 that (consistently with the position under ground (aa)) the loss of a bargaining position was not an injury capable of being taken into consideration. It follows that the County Council will suffer no relevant injury by the discharge of the application, and the Tribunal therefore has a discretion under both grounds, (aa) and (c), to discharge the covenant.

34. The real issue in this application is how that discretion should be exercised.

The Tribunal's discretion

35. Section 84 provides that "the Upper Tribunal shall have power" to discharge or modify restrictions on being satisfied of the statutory grounds and, as Mr Kynoch acknowledged, once the necessary grounds have been made out the Tribunal therefore has a discretion, which must be exercised judicially, whether to make an order or not. Examples of the Tribunal exercising its discretion in cases where a restriction had been deliberately breached were discussed in *Millgate Developments Ltd v Smith* at [114]-[117]. The context in which the discretion falls to be considered in this case is rather different, but it is also one on which guidance is available.

36. When it gave directions for the hearing of this application the Tribunal indicated that it was troubled by two specific questions:

(a) whether, if satisfied that grounds for the discharge of the restriction were made out, the Tribunal should exercise its discretion to discharge the restriction having regard to its very recent origin and to the fact that it was entered into by the applicants personally; and

(b) whether, if the Tribunal was prepared to exercise its discretion to discharge the restriction, it should do so on terms that the applicants pay to the County Council 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.

37. Section 84(1B) requires that the period at which and context in which the restriction was created are both to be taken into account. When exercising its discretion the Tribunal has always regarded the fact that a restriction is of recent origin, and the fact that the applicant is the original covenantor who voluntarily assumed the restriction, as contextual factors entitled to weight. Carnwath LJ explained in *Shepherd v Turner* that the policy behind ground (aa), on which the applicants principally rely, is to provide "a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights." The authorities show that the more recent the private contractual rights are, and the more immediate the applicants' role in their creation, the greater the weight the Tribunal will give to them when undertaking that balancing exercise.

38. There was a time when covenants of very recent origin were treated almost as sacrosanct. The judgments of the Court of Appeal in *Cresswell v Proctor* [1968] 1 WLR 906 (in particular those of Harman and Danckwerts LJJ) regarded with revulsion a "startlingly prompt" application by an original covenantor for the release of a covenant entered into only three years earlier. While it was not doubted that the Tribunal had the power to release a covenant recently entered into by the applicant, it was suggested by Danckwerts LJ that the exercise of the power in those circumstances was "not within the true intention of section 84" and by Harman LJ that in the absence of a material change of circumstances it would be "shocking" and "quite out of the question."

39. A more temperate approach has become established since the decision of the Court of Appeal in *Jones v Rhys-Jones* (1974) 30 P&CR 451 in which it was explained that there is no general principle that the shortness of the time between the imposition of a restrictive covenant and an application for its modification is a decisive factor against granting the application. If the language of the Court of Appeal in *Cresswell* had appeared to lay down any such principle it had gone further than was required for the decision in that case. The true principle is that the shortness of the time since the imposition of the covenant and the closeness of the applicants' connection to the original covenantor are factors which can be taken into account as justifying a refusal of an application. Stephenson LJ's explanation at page 459 has subsequently been taken to represent the correct approach:

> "Without the assistance of authority I would have thought that the shortness of the 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 (and when it would weigh more) or by a subsequent purchaser (when it would weigh less). The older the covenant, however, the more time there would have been for other factors such as changes in the property benefited by the restriction to come into the reckoning in favour of modification and the easier it may be for the Tribunal to relieve an applicant of a burden which he has recently shouldered."

40. The approach taken by the Court of Appeal in *Jones* was followed by the Lands Tribunal (Judge Marder QC) in *Re: Beech's Application* (1990) 59 P & CR 502 in which the Tribunal refused to discharge a covenant imposed in January 1987, less than 3 years before an application made by the original covenantor. The Tribunal held that none of the statutory grounds had been satisfied, but said that if any had been, it would nevertheless have refused to exercise its discretion in favour of the applicants in those circumstances (see pp. 510-511).

41. On the other hand, in *Re: Graham's Application*, a decision of the Lands Tribunal (A J Trott FRICS) of December 2007 (LP/83/2005), the fact that a covenant had been entered into only a little over 5 years before the application for its release, was not regarded as sufficient, in the circumstances of that case, to justify a refusal to discharge the restriction.

42. To enable the second of the issues raised by the Tribunal when it gave directions to be addressed, it gave permission for expert evidence dealing with the question whether the incorporation of the covenant had had any effect in reducing the consideration paid by the

applicants for the land in 2013. That opportunity was not taken up by the applicants who relied only on the sequence of events, as disclosed by exchanges of emails, in support of their submission that the value of the land, unrestricted by the covenant, was no greater than the sum they had agreed to pay for it and for which they had negotiated before becoming aware of the intention to include the restrictions.

43. Mr Barter is clearly experienced in the property market and Mr Kynoch did not invite us to find that he was naïve, unsophisticated, or easily taken advantage of. It is true that the greater part of his property portfolio comprises what he described as "oven-ready" buy-to-let properties rather than development opportunities, but in his communications with the County Council he identified three other properties which he explained had been development projects. None of those ventures had included restrictive covenants or any provision for the payment of overage or sharing in development value, but we have no reason to think that Mr Barter was less familiar than any other modest property developers with such standard techniques for sharing development value when planning permission has not yet been obtained at the time of a sale.

44. If, as he claims to have been, Mr Barter was unfamiliar with the purpose or effect of a restrictive covenant in these circumstances, he had solicitors advising him who specifically drew his attention to the proposal that the covenant should be included in the contract before he and his wife signed it. As he acknowledged, he was free at that time to withdraw from the contract race or to reduce the price he was prepared to pay but chose not to do so.

45. The price of just under £250,000 which the applicants agreed to pay for Ivy House was therefore made binding in the knowledge on the part of the applicants (or at the very least with access to advice) that the intended development of the grounds for up to 20 additional flats with a combined value of up to £1.7m could be obstructed by the County Council.

46. Although it did not participate in the proceedings it is clearly suggested by the stance taken in correspondence by the County Council's agent and by Mr Field, its estates manager, that it considers the restriction to be of financial value. There is no reason to suppose that the Council insisted on the inclusion of the covenant with any other motive, and its agent has positively asserted to Mr Barter that its intention was to "ensure that any increase in value of the property is shared." We therefore have no doubt that, had the Council been prepared to negotiate a sale of the property without the covenant, it would have required a greater sum.

47. Despite the opportunity being available to the applicants to provide expert evidence to assist the Tribunal in making an objective assessment of what sum might reasonably have been negotiated, no relevant evidence has been provided – either expert or lay. We had hoped to be provided with a development appraisal, or evidence of comparable situations, but none was forthcoming.

48. We are not prepared to accept the submission of Mr Kynoch that, in the absence of any other evidence, the sum of £5,000 which the applicants' themselves were prepared to offer for the release of the covenant, on a take it or leave it basis, was a proper measure of the sum which it would be appropriate to award to make up for the effect which the restriction had in 2013 in

reducing the consideration then received by the County Council for Ivy House. That seems to us to be an improbably low sum given the factors which Mr Barter says he had in mind about the suitability of the site for development and the anticipated value of the completed units. Given that the covenant does not restrict the opportunity to divide the house itself, but only to erect an additional building on the land, we are satisfied that the price paid fully reflected the open market value of the existing house and its grounds, including the development potential of the house, but not the potential to build a valuable additional building in the grounds.

49. The Tribunal is therefore unable, on the evidence, to modify the covenant on terms that the applicants make a payment to reflect the effect which the restriction had in 2013 in reducing the consideration then received for the land, because there is no evidence to enable that payment to be quantified. We appreciate, of course, that the County Council could have joined in the proceedings to provide that evidence and has chosen not to do so. But on the other hand, the County Council is entitled to say that it is for the applicants to persuade the Tribunal to exercise its discretion to discharge the restriction, and that no burden of proof falls on it.

50. Were the Tribunal to discharge or modify the restriction without compensation it would deprive the County Council of part of the benefit which the Transfer was intended to confer. The applicants would undoubtedly receive a significant windfall, as we have no doubt that the share of the development value which, in a reasonable negotiation, they would be prepared to pay to the County Council would be much greater than their final offer of £5,000. That windfall would be at the expense of the public.

51. We have no reason to doubt that the site is capable of profitable development, or profitable onward sale to a developer, now that planning permission has been obtained. Mr Barter suggested that the cost of converting the Victorian building would be high, but gave no details; in any event, it is not the conversion of the existing building, but the development of the additional building, which is restricted by the covenant. If the application is refused, the achievement of that development will of course be delayed until an agreement is reached to release the covenant in return for a negotiated sum, but there is no reason to believe that it will be prevented altogether. The County Council, after all, approached the applicants with a request to negotiate a release. We therefore do not think the weight to be given to the public interest in development, and in the implementation of the planning permission, is a sufficiently important factor to tip the balance in the applicants' favour.

52. Had there been sufficient material which the Tribunal could have used to make an assessment of the value of the covenant in 2013, we would have been inclined to do so and to discharge the restriction on the basis of a payment of an appropriate sum in compensation. In the absence of such evidence we are faced with a choice either to release the covenant without compensation (or on payment of the £5,000 offered by Mr Barter) or to leave the parties to negotiate an appropriate sum for a contractual release, taking into account all the information they consider relevant. That was the process which they must be taken to have intended in 2013, since it is the effect of their contract. We can see no unfairness to the applicants in the agreement they reached taking its intended course. In this case and in view, in particular, of the very recent origin of the covenant and the applicants' status as original covenantors, we are satisfied that the respect due to the parties' contract outweighs other factors and we dismiss the application.

53. This decision determines the issue before us. The question of costs, in this unopposed case which in any event the applicants lost, does not arise and the decision is therefore final.

Martin Rodger QC
Deputy Chamber President

Paul Francis FRICS

22 November 2017