IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 264 (LC)
Case No: LP/28/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – Modification – proposal for two houses on plot - covenant restricting development to one house – whether practical benefits of substantial value or advantage – whether injury to objectors - application partly allowed under ground (c), and partly under ground (aa) subject to the payment of compensation– s84(1), Law of Property Act 1925

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

BETWEEN:

BROADWAY HOMES (CAMBRIDGE) LTD **Applicant**

- and -

MR BRUCE MARSHALL AND OTHERS **Objectors**

Re: 38 Almoners' Avenue,
Cambridge,
CB1 8PA

His Honour Judge Bridge and Peter D McCrea FRICS

Royal Courts of Justice, London WC2A
13 June 2018

Shomik Datta, instructed by Barr Ellison LLP, for the Applicant
Professor Rick Livesey, for himself and other objectors

The following cases are referred to in this Decision:

Re Bass Ltd's Application (1973) 26 P. & C.R. 156

Re Dolphin's Conveyance [1970] Ch. 654

Elliston v Reacher [1908] 2 Ch. 374

Gilbert v Spoor [1983] Ch. 27

Re Martin (1988) 57 P. & C.R. 119

Martin v David Wilson Homes Ltd [2004] EWCA Civ 1029; [2004] 3 E.G.L.R. 77

Shephard v Turner [2006] EWCA Civ 8; [2006] 2 P. & C.R. 28

Re Snaith & Dolding's Application [1995] 71 P. & C.R. 104

Stannard v Issa [1987] A.C. 175

Stockport BC v Alwiyah Developments (1983) 52 P. & C.R. 278

DECISION

Introduction

1. A property development company purchases a detached dwelling-house with a large garden on a residential estate in the full knowledge that the land is subject to a covenant preventing use of the land otherwise than as a single private dwelling-house. Having sought and obtained planning permission for the demolition of the current house and the erection of two new dwellings in its place, the company, which we assume stands to make a substantial financial gain from developing the site, seeks modification of the restrictive covenant so that it can unlock the potential of its investment. A number of local residents, all of whom have lived on the estate for years, and have themselves faithfully abided by identical covenants burdening their properties, object. Should the Tribunal grant the company's application?

2. The applicant in this case, Broadway Homes (Cambridge) Limited, seeks modification of a restrictive covenant burdening land at 38 Almoners' Avenue Cambridge CB1 8PA ("the application land") to permit the construction of two detached residential dwellings and garages on that land, in accordance with outline planning permission granted on appeal (ref: APP/Q0505/W/14/3001638) on 20 April 2015. The modification is sought to what is, in simple terms, a "one house per plot" restrictive covenant. Initially, application was also made for discharge of the covenant, but in the course of the hearing before the Tribunal counsel for the applicant withdrew that application. The application to modify relies upon paragraphs (aa) and (c) of section 84(1) of the Law of Property Act 1925.

3. The material restriction relating to the application land (which is registered at the Land Registry under title number CB335524) was imposed by a Conveyance dated 24 June 1969 between the vendors, the Board of Governors of St Thomas's Hospital, of the one part and the purchasers, Gillian Toynbee-Clarke and Eileen Frances Haywood, of the other part. The Conveyance was of the freehold, the purchasers at that time already occupying the land pursuant to a 99 year lease, and was expressed to be subject to (inter alia) the stipulations and conditions specified in the Fourth Schedule. It is there that the relevant restriction is to be found:

> "1. Not to convert use or occupy the premises or suffer the same or any part thereof to be converted used or occupied into or for a shop warehouse public house or place for the sale of beer ales or wines or other spirituous liquors or into or for a place for carrying on any art trade manufacture or business whatsoever or otherwise than as a single private dwellinghouse only in one occupation with garage the latter which shall be used as a private garage for the purposes of the said dwellinghouse only."

4. The land benefitting from the restriction was identified in clause 2 of the Conveyance as:

> "… the adjoining and neighbouring property of the Governors known as Cherryhinton Estate and every part thereof…."

5. The objectors comprise the owners of nine households forming part of the benefitted land in the locality of the Cherry Hinton Estate, as well as the Guys and St Thomas's Charity, which owns land in the vicinity. Each objector gave notice and set out a brief statement of their response to the grounds for application for discharge or modification. One objector (Dr Scraggs) produced a witness statement. The objectors (and, in respect of those who are resident in the vicinity, their properties), are:

1. Bruce Marshall, 24 Almoners' Avenue.
2. Anne Taylor & Colin Bruce, 30 Almoners' Avenue.
3. Raymond & Betty Thompson, 20 Topcliffe Way.
4. David Blake, 21 Bowers Croft.
5. George & Elizabeth Shields, 51 Almoners' Avenue.
6. Peter Swallowe, 73 Beaumont Road.
7. Josephine Brearley, 14 Topcliffe Way.
8. Alan Williams & Patricia Meakin, 18 Topcliffe Way.
9. Guy's and St Thomas' Charity.
10. Emily Scraggs & Rick Livesey, 36 Almoners' Avenue.

6. On 14 June 2018, we carried out an accompanied inspection of the application land and its immediate surroundings, in the course of which we viewed the gardens of the adjacent plots at 36 Almoners' Avenue and 14 Topcliffe Way, and walked along Almoners' Avenue and the surrounding roads.

7. Mr Shomik Datta of counsel appeared for the applicant, calling expert evidence from Mr Mark Catley FRICS who had provided three reports. Witness statements were filed with the Tribunal by Mr William Godsell, a director of William King Homes Limited (the planning applicant), who gave evidence in support of the application and Mr Robin King. The objectors did not require these witnesses, both of whom attended the hearing, to be called.

8. The individual objectors were not legally represented and did not call any expert evidence. Mr Marshall, Mr Blake, Mrs Brearley, Mr Williams & Ms Meakin and Professor Livesey attended the hearing, and Professor Livesey presented their case, although others did ask questions and make points in the course of the hearing. Professor Livesey gave sworn evidence, adopting the witness statement of his wife Dr Emily Scraggs which he explained had been jointly composed, and he was cross-examined by Mr Datta.

9. The ninth objector was represented by solicitors but decided not to participate in the hearing to conserve the charity's resources. We have treated the charity as having maintained its objection, albeit not being actively involved in the oral argument, and we set out below the basis upon which it objected in its notice served in response to the application.

The application land

10. Almoners' Avenue is part of the Cherry Hinton Estate. It is a pleasant cul-de-sac situated off Queen Edith's Way about two miles south of the city of Cambridge and to the north of the suburb of Cherry Hinton. The immediate "Queen Edith's" area, a largely owner-occupied part of the city, is populated by predominantly detached houses built between the 1950s and the 1970s, a number of which have been extended and updated since their original construction. Other roads lead off Almoners' Avenue of which Topcliffe Way is one. The application land is at the hammer-head which is formed at the very end of Almoners' Avenue. The hammer-head provides vehicular access to a number of properties, with the application land and 36 Almoners' Avenue (owned by Professor Livesey and Dr Scraggs) sharing a drive at the very end of the hammer-head. Immediately adjoining this drive is a public cycle/footpath which connects Almoners' Avenue to Bowers Croft, such that its users cross the land over which vehicular access to the application land (and No 36) is maintained.

11. The application land is presently the site of a detached house – 38 Almoners' Avenue. Built in the early 1960s, it was occupied as a single dwelling until it was purchased by the applicant in 2013 and it is currently tenanted. It is a two-storey brick and tile detached house. Internally, the house has an entrance hall, living room, dining room, kitchen and WC downstairs with four bedrooms and a bathroom upstairs. There is off-road parking on an area of hard-standing immediately in front of the dwelling for two cars, and there is a single flat-roofed brick garage. The gross external area of the house (excluding the garage) is 154.5m^2.

12. To the side and rear of the house is a garden, described by Mr Catley as "unusually large", and by the planning inspector as "anomalously larger" than the average Almoners' Avenue plot - the total area of the site including house and garden being just over a third of an acre. The garden has a number of large trees, some of which are protected by tree preservation orders, and at the time of our visit there was very high, and very thick, vegetation around the perimeter of the garden which effectively screens it from the adjacent properties. The garden is fenced, and behind the single garage there is an electricity sub-station which can be accessed from the cycle/foot path which runs along the south aspect of the garden and which connects Almoners' Avenue to Bowers Croft.

13. The plots adjoining the application land are as follows. To the north-east of the application land is 36 Almoners' Avenue, a similar two-storey detached dwelling owned and occupied by Dr Scraggs and Professor Livesey. To the north, at the point of its garden furthest away from the house, the application land abuts 14 Topcliffe Way, a two-storey detached house owned and occupied by Mrs Brearley. To the south-east, separated from the application land by the cycle/foot path, is 59 Almoners' Avenue, another two-storey detached house. No objection has been made by the owners of this property, nor has there been any objection by the owners of 7 Bowers Croft or 12 Topcliffe Way, similar properties to the south-west and north-west respectively of the application land and which both have relatively large gardens adjacent to that of the application land.

The proposed development

14. The applicant specialises in residential development. It was incorporated on 12 March 2013 and completed the purchase of the application land on 28 March 2013. An initial application for planning permission was made on its behalf (reference 13/0891/FUL) by William King Homes to the Cambridge City Council ("the Council") on 6 June 2013. This application was to demolish the existing house, and to erect three dwellings in its place. It was refused by the Council on 16 August 2013 on a number of grounds: it was out of character; the private amenity for future occupiers would be poor; there would be an impact on existing trees; and no provision was made for open space, community development facilities or waste facilities. The applicant appealed this decision, and while the appeal was pending (it was dismissed on 19 June 2014), made a fresh planning application to the Council on 13 February 2014.

15. The second application (reference 14/0208/FUL) again sought permission to demolish the existing house, but to substitute it with two rather than three dwellings. The position of the proposed dwellings was changed so that they were further back from the highway as well as from 36 Almoners' Avenue. The application was refused by the Council on 11 December 2014 on the ground that it would result in harm to the residential amenity of the occupiers of 36 Almoners' Avenue due to a loss of afternoon sunlight. On appeal, however, permission was granted (ref: APP/Q0505/W/14/3001638), the Planning Inspector not being satisfied that there would be any significant adverse effect on the living conditions of the occupiers of 36 Almoners' Avenue.

16. In the view of Mr Catley, the architects have "deliberately considered very carefully the design concepts of the proposed development to ensure that the style of the new dwellings "fit in" with the existing houses in Almoners' Avenue".

17. In the proposed scheme, the two houses are set back further into the site, so as to be broadly level with the garage of 36 Almoners' Avenue, whereas the existing house is in line with the house at no.36. Plot 1, to the left-hand side when viewing the site from the front, and therefore furthest away from no.36, would comprise a two-storey house, with a large kitchen/diner, lounge, snug, study, utility room, with four bedrooms, one ensuite, and family bathroom. It would have a separate detached single garage.

18. Plot 2, to the right-hand side, would be a two-storey detached house, having a large kitchen, snug, living/dining room, and again four bedrooms, one ensuite, and a family bathroom. There would be a single garage attached to the north-east elevation.

19. Both buildings feature ground floors somewhat larger than their first floors. Of relevance to this application, the single storey element of plot 2 comprises the north-eastern section of the building, closest to the garage and garden of no.36. The distance between the building on plot 2 and no.36 would be just over 1 metre.

Shadowing

20. The planning inspector's decision turned on whether the adjoining properties were affected by shadowing, and it is convenient to set out in brief our understanding of the evidence on this subject.

21. We were provided with a copy of the Council planning officer's report to the Committee which was to consider the second application at its meeting of 18 August 2014. At that point the recommendation was to approve the application. A decision had been deferred from the Committee's meeting of 23 June 2014, pending the commission of a daylight and sunlight study, which had been submitted to the Council on 17 July. At the time of the officer's report, the study had been sent out to the neighbours for comment, but since it was "heavily statistical and quite difficult to interpret", a diagrammatical study had been requested. The officer confirmed that she would report the neighbours' comments and observations on an amendment sheet, together with an updated analysis of the impact of over-shadowing. We were not provided with a copy of any updated officer's report.

22. Planning permission was refused on 11 December 2014, but we are not aware that this resulted from the updated information causing the officer's advice to alter from recommending approval, or whether there remained a recommendation to grant which the Committee declined to give.

23. In any event, as we indicate above the refusal was appealed to the Secretary of State. In his decision dated 20 April 2015, the planning inspector considered the main issue in the appeal to be the effect of the proposed position of plot 2 on the living conditions at 36 Almoners' Avenue, with particular reference to sunlight. He noted that there had been several iterations of the shadow analysis, none of which were dated or identifiable by a reference, and while comparison between them was difficult, he had cautiously assumed a worst-case scenario (as far as no 38 was concerned).

24. The parties had agreed that the latest version, which analysed shadowing on 21 March, 21 June and 21 December[1], but unlike the earlier versions included the existing garage at no.36, was the final analysis for the purpose of the planning appeal, which allowed the inspector to compare the effect on no.36, with and without the proposed scheme, at various times in the year. He concluded that that there would not be any significant difference in shadowing at the summer solstice owing to the height of the sun, nor at the winter solstice owing to the low sun and shadowing from existing buildings. At each equinox, however, there might be significant potential change. The inspector was not persuaded that in the morning or early afternoon the scale, bulk and position of plot 2 would materially affect shadowing at the rear of no.36. However, he found that from mid-late afternoon, plot 2 would cast shadowing over certain parts of no.36: the rear garden, gable end (albeit with no openings) and rear façade of no.36. However, some parts of the rear façade would remain shadow-free, and whilst there would be a moderate increase in shadowing, the effect would not be dominant or result in an overbearing loss of sunlight to the affected parts of no.36, the north-west facing windows of which would remain focussed on the sizeable rear garden and largely uninterrupted views of visible sky.

[1] The autumnal equinox in September being the same, in terms of daylight and angles, as the vernal equinox in March.

25. In summary, the planning inspector did not consider that the proposed position of plot 2 would have a significantly adverse effect on the living conditions of Dr Scraggs and Professor Livesey and concluded that the amenity considerations of the local plan remained uncompromised.

26. Before us, the objectors continued to doubt the accuracy of the shadow analysis reports, but they did not adduce any expert evidence (on this or indeed on any other topic) to counter it.

The statutory provisions

27. The grounds upon which the application is made are set out in section 84 of the Law of Property Act 1925 which provides, so far as is relevant, in its amended form:

> "(1) The Upper Tribunal shall… have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction… on being satisfied-
>
> …
>
> (aa) that in a case falling within sub-section (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes… or, as the case may be, would unless modified so impede such user; or
>
> …
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this sub-section may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either-
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> (1A) Sub-section (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.

(1B) In determining whether a case is one falling within sub-section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition."

The case for the objectors

28. It is convenient to outline the case for the objectors before we turn to the applicant's proposals.

29. The objectors did not call any expert evidence. Only one objector, Dr Emily Scraggs, made a written statement containing a declaration of truth. However, the applicant did not require objectors to be called, and was content for the objectors' written responses to be treated as read. It was accepted by the applicant that each of the objectors had standing to object to the application being made.

30. Mr Bruce Marshall has lived with his wife at 24 Almoners' Avenue for 25 years. They own the freehold of that property, which is situated on the same side of Almoners' Avenue as the application land albeit with six other dwellings in between, and it is subject to a covenant in identical terms to the restriction burdening the application land. Mr Marshall's response emphasises that the purpose of the covenant is to maintain the pleasant character of the neighbourhood in every part of the Cherry Hinton Estate for the benefit of neighbours, a benefit which he and his wife have enjoyed and of which they were aware when they bought the property. Any change to the covenant would open the gate for developers to change the neighbourhood without regard to the existing community who have been able to rely on this covenant to protect the environment. There is no need for development to take place on the application land, the council having already released land so that 430 new houses can be built, presumably at high density, on Worts Causeway. Mr Marshall contends that the applicant cannot claim that the restriction is unreasonable as they bought the property subject to the restrictive covenant "shared with 57 other properties" and that nothing has changed since the purchase to make their claim any more reasonable. He does not seek compensation, but he argues that the covenant is of substantial value to him as it maintains the housing density of the

community of which he has been a part since 1992 and the value of his house would be adversely affected if the area became one of high value density housing.

31. Ms Anna Taylor and Mr Colin Bruce have owned 30 Almoners' Avenue since 2007. The property is situated on the same side of Almoners' Avenue as the application land and there are three other dwellings in between. The freehold is subject to a covenant in identical terms to the restriction burdening the application land. Ms Taylor and Mr Bruce contend that the terms of the covenant should be respected, and 38 Almoners' avenue retained as a single private dwelling house, and put forward as reasons for their opposition (1) noise and disturbance of construction; (2) it would worsen the already congested parking in the cul-de-sac; and (3) it would place more strain on the inadequate sewer system.

32. Mr Raymond Thompson and Mrs Betty Thompson have been the owners of 20 Topcliffe Way since 1980. The property is situated some three doors up Topcliffe Way from the property of Mrs Brearley whose garden at no.14 borders the application land, and the freehold is again subject to the same covenant as burdens that land. Mr and Mrs Thompson contend that discharge of the covenant will allow application for further development in contravention of the Fourth Schedule thus changing the character of the area. They add that due to the rising nature of the land further development will allow lower properties to be overlooked and destroy their privacy.

33. Mr David Blake purchased the freehold of 21 Bowers Croft jointly with his wife in 1991. He is the only objector who lives in Bowers Croft, a road accessed from Almoners' Avenue by the cycle/foot path which runs next to the application land, and his property is further away from the application land than all the other individual objectors' properties with the exception of that of Mr Swallowe. Mr Blake's property is however subject to the same covenant as burdens the application land. Mr Blake contends that changes to the covenant would impact on his property and potentially others on the estate. He opposes the application because of its potential to lead to excessive development across the estate.

34. Mr George Shields and Mrs Elizabeth Shields are the owners of 51 Almoners' Avenue which they purchased in 1982, the freehold being subject to the same covenant as burdens the application land. Their property is on the opposite side of Almoners' Avenue from the application land, immediately across the road from 36 Almoners' Avenue, the home of Dr Scraggs and Professor Livesey: there are some four dwellings between them and the application land. Mr and Mrs Shields emphasise that the restrictive covenant was extracted specifically to benefit the whole neighbourhood and to protect the community from developers seeking to gain profit by building multiple dwellings on a single piece of land and thereby fundamentally changing the character of the entire neighbourhood. They note that the property is on a corner site adjoining a pathway which is heavily used by pedestrians, cyclists and young children, and that the proposed development would inevitably increase traffic in the neighbourhood thus posing a threat to the safety of the many users of the pathway. They remark that it was the expressed wish of the previous owners that the property should be retained as a family dwelling and not sold to a developer and that would appear to have been ignored.

35. Mr Peter Swallowe and his wife are the owners of 73 Beaumont Road, a property which is some distance away from the application land, albeit still on the Cherry Hinton Estate. This property is burdened by a covenant extracted in 1960, when the plot was as yet undeveloped, not without consent to erect any buildings other than semi-detached or detached private dwellinghouses, any such dwellinghouse containing two storeys with a minimum floor area of 1,000 square feet. It does not appear that there is a restriction on the number of dwellings burdening the property. Mr Swallowe, who makes a claim for compensation in the sum of £100,000, contends that the restrictive covenant burdening the application land was to protect the affected neighbourhood from developers seeking to convert individual family homes into multiple dwelling, and that if discharge or modification were granted everyone in the neighbourhood, including the linked roads of Rotherwick Way and Bowers Croft, would become susceptible to approaches that include inappropriate development. Families had purchased homes in the full knowledge of the covenant and in full expectation of benefiting from the protection it provides, seeing the covenant as intrinsic to the value of their purchase. If the neighbourhoods were to be turned into the sites of multiple dwellings, the resulting density and pressure of traffic (and parking) would alter their nature irremediably. The area is already heavily congested by traffic from Addenbrooke's Hospital and any further development would be impossible to accommodate.

36. Mrs Josephine Brearley is the joint owner, with her husband, of 14 Topcliffe Way the garden of which is adjacent to the north boundary of the application land. Mr and Mrs Brearley purchased the property in 1976 and it is burdened by the same covenant as binds the application land. Mrs Brearley contends that the reasons for the restrictive covenant being extracted in 1969 are as relevant today as they were then: the original owners of the land, the Governors of St Thomas' Hospital, wanted the purchasers of the dwellings to have space around them, with sufficient land and air so that they could enjoy living on the estate. Should the covenant be discharged or modified, that space would disappear, and the wishes of the Governors should continue to be respected and upheld. In the event of the application being granted, the whole area known as the Cherry Hinton Estate would be jeopardised and the flood gates would be open for future over-development of the neighbourhood to the detriment of all its residents. Mrs Brearley does not consider that money could provide adequate compensation, but suggests that if discharge were granted the developers should pay £10,000 per dwelling for all the 64 properties for which the original application was made by the Governors of St Thomas' Hospital to the Cambridge City Council in 1961.

37. Mr Alan Williams and Ms Patricia Meakin have been the owners of 18 Topcliffe Way since 1993. Their property, two doors up the road from that of Mrs Brearley, is burdened by a covenant identical to that burdening the application land. Their objection is based firmly on the effect of any modification on the estate as a whole, which they describe as the land sold by the Hospital lying beneath "at least" Topcliffe Way, Almoners' Avenue, Maners Way, Bowers Croft, Field Way and Rotherwick Way, and probably parts of Beaumont Road and Nightingale Avenue. They contend that all the houses in this estate were constructed at about the same time, give or take two or three years, and would have been, they expect, subject to the same restrictive covenant as their property. The estate was laid out and designed in such a way that all the houses were of a good size by the standards of the 1960s and placed on substantial plots protected by the restrictive covenant preventing sub-division. However, an additional factor in the design was the creation at various places of significant areas of contiguous green land way

from roads, interlinked for the benefit of pets and wildlife, and the garden of the application land was one of the largest of these areas. The layout, protected by the restrictive covenants, was designed to create a "look and feel" unimpeded by trade and in-filling, and any modification even on a single property would alter the "intended, accepted and greatly appreciated character" of the "estate" as well as bringing immediate and continuous issues such as traffic and noise to the properties closest to the application land. Modification would set a precedent: it would risk a "snowball effect" that would "irrecoverably damage the entire character of the whole estate."

38. Mr Williams and Ms Meakin emphasise the effect of any development on the environment, notably the fauna (great crested newts, bats, hedgehogs, rabbits, foxes, muntjacs and domestic animals as well as a number of bird species some of which are threatened) and flora (plant species which are rarely found in towns and cities).

39. Mr Williams and Ms Meakin explain that the existence of the restrictive covenant had encouraged them to purchase their house, that they had assumed that it would apply to other properties in the area, and that they would regard the loss of such a covenant on any relevant property as severely damaging to their enjoyment of their property and as diminishing its value considerably. In the event of modification, they claim compensation but do not feel able to make any sensible assessment as the loss sustained would depend on a number of factors none of which is currently capable of calculation.

40. Dr Emily Scraggs and Professor Rick Livesey are the owners of 36 Almoners' Avenue which is the property next door to the application land. They purchased the house in 2010: it is burdened by a covenant identical to that which the applicant seeks to modify. In their notice of objection, Dr Scraggs and Professor Livesey addressed each of the grounds upon which the application was being made in turn. They denied that the use of the land for two detached dwellings each with a garage was a reasonable use, referring to the developer's desire to gain maximum return on their investment with no regard for the impact of that development in removing the benefit of the existing covenant to the other owners of properties in the area, and noting that the developer should have taken account of the existence of the covenant in formulating its business plan. They asserted that when they purchased their house, they did so in the full knowledge of the covenant and the protection it afforded them, and they considered the covenant to provide "tremendous value to us by conferring the benefit of preventing an increase in housing density and associated people flow and traffic, thus preserving the character of the neighbourhood and prohibiting nuisance development." Discharge or modification of the covenant would establish a principle for the entire community and enable unfettered increases in housing density: money would not be an adequate compensation, and no such claim was therefore made. In terms of their own property, it would be materially devalued by having multiple houses built next to it, in a plot intended for one dwelling; the increase in vehicular traffic would negatively affect the safety of many pedestrians and cyclists, including school-children; and the effect on the environment would be significant, protected species such as bats and newts in their own garden being negatively affected.

41. Dr Scraggs expands upon the notice of objection in her written statement dated 27 March 2018, explaining her understanding that the houses which make up the development in Almoners' Avenue were originally comprised in land held by the Governors of St Thomas'

Hospital, that they were conveyed to individual purchasers around 1969 and that they were all held subject to broadly similar restrictive covenants including a covenant that each property may be used only as a single private dwelling house in one occupation. She sets out the background to the current application, including the applications for planning permission, emphasising how the community in the neighbourhood of Almoners' Avenue and the surrounding streets were united in its strong opposition to the development, a large number of objections being consistently made, and stating that in her opinion the applicant had made no effort whatsoever to engage with local concerns. She gives as their object that there should be "no development whatsoever", that the amenity of their own garden and house should continue undisturbed, and that the present extent of space, light and peace and quiet surrounding their house should be preserved. She refers to the effect of the process of construction in the sense of the "unpleasantness and nuisance" on their doorstep for a year or so.

42. Dealing specifically with their property, she considers that they would be especially damaged: their sun-light would be affected, their property would be over-shadowed, the loss of light being significant and unacceptable, and it is clear that she does not accept the assessment made of loss of light in the course of the planning process. The visual impact of the new dwellings would be significant on looking out from their kitchen window and upper floor windows: there would be "a building in the line of sight instead of greenery and sky."

43. Finally, she refers to the environmental impact of the proposed development: that bats and great crested newts in the garden would be negatively affected, casting doubt on the bat assessment commissioned by the applicant in 2013 on the ground that it assessed the house and garage only (we assume that "garden" at line 5 of para.15 of Dr Scraggs's statement should read "garage") and failed to assess the extensive garden to 38 Almoners' Avenue which includes large areas of thick bushes and tall trees, and noting that no impact assessment was undertaken in relation to great crested newts which are present in the garden.

44. Guy's & St Thomas' Charity is the registered proprietor of two substantial tracts of land in the vicinity of the application land, being referred to as "land to the north of Worts Causeway Cambridge" (title numbers CB369183 and CB369184). It entered a notice of objection on 15 November 2017: it was not however represented at the hearing of the application as we have explained above.

45. The charity contends that the doubling of property density on the land is not a reasonable use of the land, and that the restriction continues to secure to the charity a practical benefit of substantial value or advantage. The estate retains its original character, and as long as it does that confers a benefit on the charity as the owner of adjacent land which may itself be subject to future development. The charity contends that over-development of the applicant's land may prejudice the prospects for the development of the charity's own land, and that modification would establish a de facto precedent which would lead to a loss of character and to an increase in housing density: money would not be an adequate substitution for the loss or disadvantage resulting. The charity comments, as do other objectors, on the failure on the part of the applicant to make any approaches prior to the application in an attempt to establish consensus suggesting a "high-handed appraisal of the restrictions that appear on its title."

Summary of objections

46. The one consistent theme throughout the objections is the potential effect of the proposed development upon the character of the neighbourhood, of the "estate." With the single exception of Mr Swallowe, all the individual objectors purchased their own properties subject to a covenant identical to that which the applicant seeks to modify, and a number of them recall the significance when they came to purchase their own houses of what appeared to them to be a scheme of mutually enforceable covenants - a local law - which would enable them to ensure that there was no excessive development of the estate in terms of additional dwellings being built. They relied upon the scheme, it gave them comfort and reassurance, and it provided the means of maintaining what they saw as the essential character of the estate: a pleasant green environment conducive to wildlife with plenty of open space, fresh air, and an absence of high density building such as is found in more modern estates.

47. The current application is opposed partly on its merits, and because the applicant is a speculative investor with no prior connection to the estate whose sole motive is financial gain, but also because there is a common belief among the objectors that to allow this applicant to modify would be to give the green light to others, including current owners, to apply for planning permission to build a second dwelling on their land in the expectation that this Tribunal, having accepted in principle that the "one house one plot" restriction may be modified, is likely to come to similar decisions in the event of similar applications on this estate in the future. The grant of modification in this case would therefore encourage others to apply, and there would be an ultimately corrosive effect on the scheme as a whole.

48. Concern is expressed by a number of objectors about the effect of the proposed development on traffic, and parking, within the estate. The houses on the estate have their own drives, and in most cases garages, but one feature which was apparent in the course of our site visit is the large number of cars parked on the roads. It was explained to us by the objectors, and this was not disputed by those representing the applicant, that most of these vehicles would belong to those working on the nearby Addenbrooke's Hospital site, the bio-medical campus which employs in excess of 10,000 people as well as attracting large numbers of out-patients, visitors, and a wide range of contractors and suppliers on a daily basis. Cars are parked on the estate roads throughout the day during the week, their owners driving them away in the evening. It is clear when one looks at the topography of the estate that the cycle/foot path passing alongside the application land and connecting Almoners' Avenue to Bowers Croft is likely to be used extensively, consistent with the objectors' evidence, as pedestrians and cyclists commute from home to school or work or move from one part of the estate to the other in the course of the day.

49. The environmental impact of the proposed development was considered on the planning application, but the objectors continue to emphasise the likely impact on local wild-life, specific mention being made of protected species such as bats and great crested newts.

50. Specific to Dr Scraggs and Professor Livesey are the natural concerns of the next-door neighbours: the long-term effect of the proposed dwellings on their own property in terms of the potential loss of sun-light to their house and garden; in terms of their privacy, whether they

will be overlooked, in particular in their garden, by the new dwellings; and in terms of their outlook, the extent to which their current views of greenery will be replaced by bricks and mortar.

The case for the applicant

51. The applicant sought to meet the objections by calling Mr Mark Catley FRICS, a highly experienced chartered surveyor. Having qualified in 1981, he has been practising for over 35 years. Between 2001 and 2007 he was District Valuer for the East of England being responsible for the assessment and valuation of residential and commercial property across six counties for taxation, compulsory purchase and asset purposes; and between 2007 and 2011 he was Listing Officer for Cambridgeshire, Bedfordshire and Hertfordshire. Since then, he has acted as a Consultant with Cheffins in Cambridge. He has considerable experience as an advocate and as an expert witness before courts and tribunals.

52. Mr Catley prepared three expert reports in this matter. His first report, prepared in June 2017, examined the effect on, specifically, 36 and 51 Almoners' Avenue, but also (unnamed) "surrounding properties" in Almoners' Avenue as a result of the possible "lifting" of the restrictive covenant burdening the application land. He considering within that report the development history of the Cherry Hinton Estate as a whole, the development of plots in rear gardens of dwellings in the area surrounding the application land, and the effect on the immediate area of those plots. His conclusion was that the discharge of the covenant to allow the planning permission to be implemented would have no effect on the value of any of the properties in Almoners' Avenue.

53. His second, supplementary, report prepared in April 2018 examined the effect on dwellings owned by other objectors to the application (14, 18 and 20 Topcliffe Way; 73 Beaumont Road; and 21 Bowers Croft) and on the land owned by the ninth objector as a result of the possible lifting of the restrictive covenant. He also considered the effect of the proposed development on traffic within Almoners' Avenue, whether the development would result in a loss of character of the area, and considered its potential impact on the environment.

54. His final report, dated May 2018, concerned the effect of the proposed development on two parcels of land owned by St Thomas' Charity, each parcel comprising Green Belt land which has been allocated for eventual development, the assumption being that 430 dwellings will be built there.

Effect of proposed development on value of objectors' properties

55. In his first report, Mr Catley dealt succinctly with the effect of the proposed development on 36 and 59 Almoners' Avenue, the two closest dwellings to the application land: that having "looked at the effect on value of new dwellings on the value of surrounding dwellings in other locations in Cambridge, I have concluded that the change in asking price and eventual sale price of such dwellings is nil." Indeed, his view was that "the corollary is probably true", that as the dwellings concerned would be high value properties commanding sale prices of at least £1 million (by the date of the hearing, he reduced this estimate to

£950,000 as the market had "hardened" over the last twelve months), the likelihood is that the surrounding properties would have an enhanced value.

56. When asked why he had come to this view, Mr Catley told the Tribunal that he had spoken to the residential development team at his firm and their view was that having a new smart house in the neighbourhood would increase the value of property. He added that in Almoners' Avenue there was evidence of refurbishment to some houses which had brightened the outlook of the estate as a whole, thereby adding to the value of all houses within the estate. He did not therefore think that there would be any negative impact to the surrounding properties.

57. We were slightly troubled by some aspects of Mr Catley's evidence. We were surprised that a surveyor of his experience was so ready to rely on the opinion of others, rather than form his own view, on matters such as these. Indeed, when asked for his professional opinion of the value of no.36 he was reluctant to give one, although he eventually suggested a sum between £750,000 and £800,000. On our site visit we noticed that Mr Catley's firm had sold a property near to the application land, on the opposite side of Almoners' Avenue, which we thought might have been a useful comparable transaction, but again somewhat to our surprise he was unaware of his firm's dealings with it. In his "planning history" of the application land, he failed to mention that fact that the previous application for three houses had been refused, on the basis that it "wasn't relevant". Finally, his report was not compliant with the RICS Practice Statement for Surveyors acting as Expert Witnesses, in that it did not confirm that he was not instructed on any form on incentivised fee – he confirmed orally that he was not. Taking his evidence as a whole, we formed the impression that Mr Catley, while not consciously biased in favour of the applicant and genuinely striving to be objective in addressing the issues, was inclined to be more supportive of the applicant's position than that of the objectors.

58. In his second report, Mr Catley considered the effect of the proposed development, in the event of the covenant being modified, on other properties of objectors: 14, 18 and 20 Topcliffe Way, 73 Beaumont Road and 21 Bowers Croft. He concluded, having looked at the effect on new dwellings of the value of surrounding dwellings in other locations in Cambridge, that "the change in asking price and eventual sale price of such dwellings is nil." Nor would the proposed development have any effect whatsoever on the land owned by the ninth objector, St Thomas' Charity, Mr Catley noting that part of that land, although currently in the Green Belt, has been allocated for eventual development and it was therefore to be presumed that it would in due course be developed rather than preserved. This conclusion he confirmed in his third report.

Effect on estate as a whole

59. Mr Catley was of the view that the proposed development would not negatively affect the existing character of the area, and that, on the contrary, it would enhance it. In his first report, Mr Catley explained how he had traced the history of the Cherry Hinton Estate by considering the ages of properties picked at random over the estate south from Queen Edith's Way, noting (as was evident on our inspection) that there have been successive changes and additions to many dwellings on the estate since development began in the late 1950s. He

described how the estate seemed to have started on Queen Edith's Way towards the end of the 1950s, some of Almoners' Avenue being built at the same time, and then how it spread south and south east in the early 1960s when Kinnaird Way, Topcliffe Way, Maners Way, Nightingale Avenue, Rotherwick Way, Bowers Croft, Field Way and the southern 80% of Almoners' Avenue were constructed. The eastern part of the estate, including Beaumont Crescent, Netherhall Way and Beaumont Way, was built in the later 1960s and early 1970s.

60. Mr Catley was of the opinion that the Cherry Hinton Estate did not have a "building scheme" as such, presumably due to the incremental development of the estate as a whole, and he noted in his report that planning permission had been granted by the Cambridge City Council where it was considered that existing dwellings had significantly large gardens to accommodate additional development. He added that, in those instances where development had taken place, "it is clear that there has been no deleterious effect to the surrounding dwellings and, in my view, the effect has been positive": it has made a significant improvement to the "feel" of the area as a location. Dealing specifically with the application land, he noted that the garden of 38 Almoners' Avenue was sufficiently large to accommodate two dwelling most adequately without any disbenefit to surrounding dwellings.

61. In the course of its application, the applicant made reference to five specific properties in the vicinity of the application land where a second dwelling had been erected on the plot. Despite the evidence of Mr Catley to the effect that there is no building scheme as such, it is notable that all of these properties are burdened to some extent by covenants identical to or analogous with that which burdens the application land. Mr Catley took the Tribunal through each of these developments which were illustrated by a number of photographs.

62. 29 Nightingale Avenue is a dwelling on the estate built in the 1950s. Following the grant of a 99 year lease in 1959, the freehold was purchased by the leaseholder on 17 February 1970, at which time the purchaser covenanted in identical terms to the restriction sought to be modified in this case. On 29 April 2008, permission was sought, and granted, for the erection of a two-storey courtyard house with a bin and bicycle store and forecourt parking following demolition of the double garage. On 14 January 2013, the then owners of the dwelling entered into a deed of release with the original covenantee whereby for a consideration of £13,000 the covenant was relaxed to the extent of permitting "the development of not more than one additional dwelling… and use of it as a single family residence." This deed of release was effective as the covenant extracted in 1970 was a covenant with the covenantee (the Board of Governors of St Thomas' Hospital), no reference whatsoever being made to any successors in title: put simply, the benefit of the covenant did not run to other owners of properties on the estate. The dwelling was subsequently built: it is on a corner site where Nightingale Way joins Topcliffe Way, and access to the new dwelling was gained using the drive which formerly gave access to the double garage.

63. 37 Kinnaird Way is a dwelling on the estate built in the late 1950s. The freehold of this plot, as yet undeveloped, was conveyed by the Board of Governors of St Thomas' Hospital on 13 January 1956, the purchaser covenanting, in this case "with the Vendors and their successors in title", "not to erect any buildings upon the property otherwise than one private dwellinghouse containing not less than two storeys (with a garage thereto if required by the Purchaser)…" Plans were to be submitted for approval prior to work being commenced and the floor area was

to be not less than 600 square feet. On 3 December 2015, planning permission was granted for "a proposed new dwelling to land rear of 37 Kinnaird Way with associated landscaping and access arrangements following demolition of existing garage." The dwelling was built: it is also on a corner site (where Kinnaird Way meets Almoners' Avenue) and it seems that access has been gained using the drive to the former garage. It appears that this dwelling was built in breach of the covenant in the 1956 conveyance.

64. 39A Almoners' Avenue is a recent development at the end of another cul-de-sac off Almoners' Avenue. There the similarity with 38 Almoners' Avenue ends, as it seems to have been built on what were two plots of land. The first such plot, which included a dwelling, was conveyed on 2 September 1969, the purchaser covenanting in identical terms to the covenant burdening 38 Almoners' Avenue not to convert use or occupy otherwise than as a single private dwellinghouse only in one occupation. The second plot, which was unbuilt upon at the time, was conveyed on 20 June 1979, the purchaser covenanting "not to erect more than one dwellinghouse on the land". Each of these covenants was expressed "to benefit and protect each and every part of the Vendor's Estate". On 4 August 2016, planning permission was granted for "the erection of 2.no dwellings with associated access, parking and gardens". It is clear from the plans that the plot is of a substantial size, and the dwellings built are on the very edge of the estate, adjacent to open fields. It appears that the dwellings were built in breach of covenants in the two conveyances.

65. 96 Queen Edith's Way is similar to 37 Kinnaird Way in that it was built in the 1950s and covenants extracted when it yet to be built on. A plot of undeveloped land was purchased by Crown & Cox Limited on 7 July 1950, the purchaser covenanting with the Vendors (the same Board of Governors of St Thomas' Hospital) their successors and assigns "not to erect any buildings upon the property otherwise than five private dwellinghouses each (a) containing not less than two storeys and (b) with not less than forty feet frontage to the property (with a garage to each dwellinghouse if required by the company)", with a minimum area stipulation and appropriate provision for submission of plans. Mr Dudley Brian Spalding, a University Demonstrator, purchased one of the five plots on 29 May 1953, and on the same day he entered into a deed with the Board of Governors whereby the Governors covenanted with him and his successors in title that they would maintain the road to be built alongside his house until its dedication as a public highway; and in turn Mr Spalding covenanted that he would not "break or make any access from his land into the said road." This appears to have marked the beginning of the construction of what became Almoners' Avenue. On 19 August 2016 planning permission was granted for "the erection of a dwelling and new access" at 96 Queen Edith's Way, the development being in apparent breach of the covenant not to erect more than five dwellings on the land in question. The dwelling is, like those built on 29 Nightingale Avenue and 37 Kinnaird Way, on a corner site at the junction of Queen Edith's Way and Almoners' Avenue.

66. 42/44 Queen Edith's Way has a much older root of title, going back to the 1930s. The two dwellings are on plots which were each conveyed by the Governors (no 42 on 4 April 1938; no 44 on 18 June 1937) subject to a similar covenant "not to erect any building other than a private dwellinghouse only upon the property thereby conveyed" (no 42); "to erect a private dwellinghouse only upon the property hereby conveyed" (no 44). There does not seem to be a record in the documents with which the Tribunal was provided of planning permission

being granted in respect of the dwelling that has now been erected at the rear of these properties. It is a corner site at the junction of Queen Edith's Way and Nightingale Avenue. Whether the building of this dwelling was in breach of covenant is, however, something of a moot point, as it depends on a true construction of the covenant itself: is it a prohibition restricting the use of the land (only private dwellings can be built on the land); or does it (also) restrict the number of such dwellings (no more than one private dwelling can be built)?

67. The applicant has therefore made reference to five properties on the Cherry Hinton Estate which, it says, have been developed without objection from neighbouring properties in such a way as to impinge upon the terms of the "one house one plot" covenants.

Effect on environment: traffic and wild-life

68. Mr Catley was of the view that the increase in traffic numbers resulting from two new dwellings replacing the existing dwelling at 38 Almoners' Avenue would be marginal. If there were one additional car as a result of the additional house, that would increase traffic, on his figures, by 0.28%; if there were two additional cars, by just over half of one per cent. In answering questions from us, he accepted that this nominal increase related to the whole of Almoners' Avenue, whereas the percentage increase experienced by the collection of houses at the end of the cul-de-sac, close to the application land, would be significantly greater.

69. Responding to the concerns of objectors about the effect of the development on the local bat population, a report was commissioned from Skilled Ecology Consultancy Ltd. Entitled "Bat Assessment of the House and Garage at 38 Almoners' Avenue Cambridge", that report (from August 2013) satisfied the relevant planning conditions. The authors having examined the house and garage and found no bats roosting there, indicating, in the view of Mr Catley, that the demolition of the single dwelling and the construction of two new dwellings on the site would not adversely affect the bat population. Precautionary measures were recommended to minimise any residual risk of impact to bats, and the certain "enhancements" were suggested (although not required) in the interests of biodiversity to increase the value of the development for local wildlife.

Submissions

70. Mr Datta expanded upon his helpful skeleton argument in the course of his oral submissions . The applicant had been granted planning permission for the development, which was recorded by the Planning Inspector to be "an acceptable form of development within the built-up area of the City": the use proposed was clearly a "reasonable use" which would be impeded by the continued existence of the covenant. Mr Datta conceded, in the course of the hearing , that the covenant secured practical benefits to the beneficiaries, but submitted that these were not of "substantial value". On this point, he referred to the stance of Dr Scraggs in particular, that there should be "no development whatsoever", observing that development was not in itself prevented by the covenant, and that it was only development involving the construction of an additional dwellinghouse that was material. He submitted that neither the temporary noise or disturbance associated with construction work nor the access of vehicles to

and from the application land were of themselves capable of prevention by invocation of the existing covenant.

71. Insofar as the issue was one of housing density, Mr Datta made reference to the examples cited by Mr Catley of additional dwellings being built upon individual plots in the vicinity of the application land. However, the "crux of the application" was the unusually large size of the plot, a plot much larger than the majority of plots in the locality, as a result of which development as proposed would not affect either the neighbouring properties or the locality in any significant or substantial way, indeed, on the basis of Mr Catley's evidence, development would only increase the value of the objectors' properties.

72. Mr Datta accepted that the integrity of a scheme of covenants was a factor that the Tribunal could take into account but contended that in view of the inroads made by the developments which had taken place without apparent objection it was no longer a significant factor. He asserted that no loss or damage would be caused by modification of the covenant, that the objectors had provided no expert evidence to challenge that of Mr Catley, and that accordingly the question of compensation does not even arise: if, contrary to his submissions, there were any loss or damage it may be compensated by a relatively small or nominal payment. Moreover, there being no injury to the persons entitled to the benefit, the applicant had made out its case under ground (c) as well as ground (aa).

73. Responding to Mr Datta, Professor Livesey stated that he appreciated the importance of planning permission in the context of the application as a whole and acknowledged that there was a substantial need for well-managed development within the City. He pointed out that the grant of planning permission following an appeal to the Inspector indicated that it was "a close-run thing", and in terms of the effect of the proposed development on his own property, 36 Almoners' Avenue, he questioned the suitability of the proposed vehicular access to the application land, the validity of the results of the shadowing survey, and the extent to which the new houses would overlook his own property.

74. Professor Livesey did not accept that in impeding the proposed use of the land the covenant did not secure practical benefits of substantial value or advantage. He advanced the argument that to modify this covenant would be the "thin end of the wedge": that the number of developments where a second dwelling had been built was not large, that some of those developments were clearly distinguishable from this one, and that this was therefore the test case. He submitted that to allow modification would be to encourage a wave of development which would be contrary to the interests of residents of the estate: to build a second house on a plot was not the same thing as extending or refurbishing an existing property.

Discussion

75. We deal first with the application under ground (aa).

Does the covenant impede some reasonable user of the land?

76. The first two questions we have to decide is whether the proposed use is reasonable, and if so, whether the existence of the restriction impedes that use. The objectors challenged the reasonableness of the applicant's conduct, questioning how it can be reasonable to purchase the land fully aware of the restriction and then seek to remove that restriction in order to realise its investment potential. These arguments, which it should be said have not been adopted by Professor Livesey in his careful and measured submissions to the Tribunal, proceeded on a misunderstanding of the provision: it is clear that the use to be considered is the use to be made of the land in the event of the covenant being modified and the Tribunal is not concerned at this stage with the reasonableness of the applicant's conduct. It is necessary only to ask whether the restriction that there is impedes the use which is proposed: see *Re Bass Ltd's Application* (1973) 26 P. & C.R. 156 at [158].

77. While we do not doubt for a moment the genuineness of the objectors' concerns about the noise and nuisance that would be associated with and ancillary to construction works on the application land, it is important to understand that the use which must be considered is the long-term use of the land, not what may occur during the period of construction or development. We take into account, in this respect, the words of Carnwath LJ in *Shephard v Turner* [2006] EWCA Civ 8; [2006] 2 P. & C.R. 28 at [58] where he explains the policy underlying section 84(1)(aa):

> "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. "Reasonable user" in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project."

78. As to the reasonableness of the proposed use of the application land, we note that planning permission has been granted permitting such use, and we accept that that is a consideration to which significant weight should be given: *Re Bass*, above at 158. We have not ignored the fact that the permission was obtained on appeal, and that (despite this being omitted from the applicant's chronology and Mr Catley's planning history) a previous application had been refused by the Council. However, the prior refusal is of little weight, and the previous application was for a different development. Planning permission is not in any sense decisive of the issue of reasonable use where application is being made under section 84. It is a circumstance which the Tribunal must consider when exercising its jurisdiction (see *Re Martin* (1988) 57 P. & C.R. 119, 125).

79. However, Cambridge is currently undergoing substantial growth and is being expanded by the provision of a large number of new homes, many of which are to the south of the city. The development accords with the City plan and its vision for the future: it cannot be said that it would not be in the public interest in the widest sense. The proposal is to use the land for housing, and the land is situated on a residential housing estate. The applicant has satisfied us that what is proposed is a reasonable use of the land for private purposes.

80. The restriction clearly impedes the reasonable use being proposed: if the application land continues to be burdened by a covenant restricting it to a single private dwelling-house, any development involving the demolition of the existing house and its replacement by two new dwellings would be in breach of that covenant, as a result of which those with the benefit of that covenant would be entitled to seek remedies from the court including injunctive relief.

Does the covenant secure practical benefits of substantial value or advantage?

81. These are the central questions the answers to which ultimately determine this case. It is for the applicant to satisfy us, on the balance of probabilities, that the covenant, in impeding the reasonable user of the land, does not secure to the objectors any practical benefits of substantial value or advantage. If the applicant fails to satisfy us in this regard, the application must be dismissed. If we are of the view that the covenant secures practical benefits but that they are not of substantial value or advantage, and that money will be an adequate compensation for the loss or disadvantage suffered in the event of modification, we may order modification and the payment of compensation.

82. Mr Datta accepted that the covenants secured to the objectors practical benefits, but submitted that those benefits were not of substantial value or advantage.

83. "Practical benefits" is to be given a generous construction, not confined to purely financial factors, such as to include an outstanding view of the surrounding landscape, although not visible from the objectors' properties themselves but from their immediate vicinity: *Gilbert v Spoor* [1983] Ch. 27, Eveleigh LJ making the important point (at 32):

> "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 effect upon a broad basis."

84. It is essential to consider the covenant itself and to ask, in impeding the reasonable user of the land, what benefits it secures and what benefits it does not secure. This covenant prevents use of the land "otherwise than as a single private dwellinghouse only in one occupation with garage". It does not prevent development of the land as such. It would not therefore be a breach of covenant for the owner of 38 Almoners' Avenue to extend the house substantially, or indeed to demolish the house and build another much larger dwelling in its place. Any venture of such a kind, while it would require planning permission, would be consistent with and would not breach the terms of the covenant. When Dr Scraggs states, then, that "our object is that there should be no development whatever", the applicant's response is that that is an object which the covenant does not promote or protect. We agree with the applicant.

85. We should briefly deal with an issue raised in the course of Mr Catley's evidence. He appeared to accept that those entitled to the benefit of the covenant could contend that the value of their property was enhanced by their ability to demand a premium (some might say ransom) from any person seeking to develop the land burdened by the covenant. That is not, however, a "practical benefit" within the terms of section 84(1)(aa): see *Stockport BC v Alwiyah*

Developments (1983) 52 P. & C.R. 278. Loss of bargaining power consequent upon the discharge or modification of the restriction is not therefore relevant.

86. The covenant seeks to limit the density of development on the application land, as identical covenants seem to have done all along Almoners' Avenue and Topcliffe Way - and perhaps Bowers Croft as well, although we only have evidence concerning a single property. Each plot of land is to have its single house, and a second house is not to be built. The likely effect of such covenants, if imposed across the estate as a whole, is to maintain the same level of density of development which was apparent when the estate was in the course of its construction. The objectors make the point that this reflects the intention of the Governors of St Thomas' Hospital when they were selling the freeholds to ensure that there was adequate space between the houses and that there were substantial gardens, providing a pleasant environment accommodating to local wildlife for the benefit not only of individual residents but also of the estate as a whole. That may be so, but the initial or original intentions of those who imposed the restriction are not in any sense determinative: it may be said to be the case that if they were, restrictions would rarely if ever be modified.

87. The focus of the Tribunal must be on the present day with an eye to the foreseeable future, asking whether the restriction achieves some practical benefit, and if so, whether that benefit is of sufficient weight to justify its continuance without modification: *Stannard v Issa* [1987] A.C. 175 at 187. There is no doubt that as a matter of principle a covenant limiting the number of dwellings to be built on a piece of land is capable of conferring practical benefits, but that is not enough: we must ask ourselves whether, on the facts of this case, this covenant actually secures such benefits to those entitled to enforce it. It is important to emphasise that we are deciding this case on its own facts, and that, in this area involving as it does the invocation of judicial discretion based on findings of fact, the results of previous decisions are not likely to assist: see *Shephard v Turner*, above, at [57].

The estate as a whole

88. The question we are invited to address by the objectors is whether, when one considers the estate as a whole (by which we mean the Cherry Hinton Estate, however that is defined) or the more immediate environs of Almoners' Avenue, Topcliffe Way and Bowers Croft, the maintenance of the integrity of the scheme of covenants is itself a practical benefit of substantial value or advantage to those who are party to it. The applicant, relying upon the evidence of Mr Catley, denies that there is any "building scheme" as such in relation to the Cherry Hinton Estate, although at the same time it seeks to undermine the objectors' contentions by making specific reference to some four properties where a second dwelling (and in a fifth case, a sixth dwelling) has been built in breach of covenant and there has been no objection, or at least no successful objection, by those entitled to enforce it.

89. We accept that when one considers the requirements of a building scheme as explained in cases such as *Elliston v Reacher* [1908] 2 Ch. 374 at 384 and *Re Dolphin's Conveyance* [1970] Ch. 654 at 663, the criteria there laid down are not met. It has not been established that title to the relevant properties is derived from a common vendor, or that prior to sale the estate was laid out with a view to the mutual enforceability of covenants by and/or against any

purchasers of all the plots within the estate. The building scheme concept is usually relied upon to establish that a person claiming to enforce a covenant has the benefit of that covenant, but there is no issue here as far as the parties to this application is concerned: all objectors, it is accepted by the applicant, are beneficiaries of the covenant who are entitled to enforce the covenant currently burdening the application land. The point being made by the objectors is that, while there may not be a building scheme as such, there is within the Estate (and if not throughout the entire Cherry Hinton Estate, at least within Almoners' Avenue, Topcliffe Way and Bowers Croft) a system imposed through the mechanism of restrictive covenants which regulates the extent to which properties can be developed in order to maintain the degree of density of housing. That system relies for its efficacy upon the covenants being mutually enforceable between those owning and occupying the properties in question.

90. The applicant's successful demonstration of the extent to which the pattern of covenants has been broken by in-fill development serves to illustrate that there is some kind of scheme of covenants in operation, albeit one that may not have all the features or consequences of a building scheme. What the applicant is saying is that insofar as there was some kind of scheme, it has become a scheme more honoured in the breach than in the observance. That being the case, it is said that it should be given little weight, and while, as Mr Datta concedes, it may confer a practical benefit on those entitled to enforce the covenants, that benefit is not of substantial value or advantage to the persons in question.

91. We do have reservations about the five example properties tendered by the applicant as exemplifying inroads being made into the integrity of such scheme as there is.

92. 29 Nightingale Avenue was subject to a "one house one plot" covenant, but the owners sought and obtained a deed of release from those entitled to enforce the covenant, as a result of which the building which ensued was not in breach.

93. 42/44 Queen Edith's Way is subject to a covenant in significantly different terms, and it is strongly arguable that the covenant restricting building to "a private dwellinghouse" limits the use to which the land can be put but does not limit the number of private dwellings that can be built: see *Martin v David Wilson Homes Ltd* [2004] EWCA Civ 1029. We do not have to decide this definitively, but we are not satisfied, on the evidence we have, that the second dwelling was erected in breach of covenant.

94. 39A Almoners' Avenue concerns a very large plot (in fact two conjoined plots) on the very edge of the estate adjoining open land.

95. We accept that 37 Kinnaird Way and 96 Queen Edith's Way are truly comparable: each property being subject, in substance, to a "one house one plot" covenant, and, following the grant of planning permission, a house being built in breach of that restriction. But as it stands, those are two apparent breaches, each being a corner plot where access to the public road can be easily obtained using a drive already available.

96. In this single respect, 38 Almoners' Avenue is somewhat different. In order to access the two dwellings which are proposed to be built on the land, it will be necessary for all vehicles to use the current drive: there is no obvious means whereby it can be widened.

97. We accept that there are traffic and parking issues in 38 Almoners' Avenue, but we do not accept that by building one further house on the property those issues would be substantially or significantly worsened. Access to the houses would be on a single drive, and the drive joins the public road at a point which is commonly passed by cyclists and pedestrians using the path between Almoners' Avenue and Bowers Croft. Reliance upon a single drive would be a departure from the norm throughout the remainder of the estate, but we do not accept that that is so significant that it can be referred to as the loss of a practical benefit to the estate as a whole. Parking is problematic on Almoners' Avenue and its environs, particularly during the day, but there will be parking available on the property itself, and no obvious need for the owners or their visitors to park on the street.

98. Reference was made by the objectors to the effect on the environment, and on the local fauna and flora, of the proposed development. The applicant's survey of the property as a bat habitat concludes that there are no bats currently roosting in either the house or the garage. The objectors counter this by saying that bats may be roosting in the garden, and no survey has been conducted in that regard. The difficulty with that contention is one we have already mentioned with reference to the issue of noise and nuisance during construction- the covenant does not protect the garden as such: the covenant would not prevent the owners of 38 Almoners' Avenue from removing all vegetation, shrubs and trees (although TPOs might) and transforming the garden totally, subject to any conditions imposed on the grant of planning permission. The "one house per plot" covenant is therefore of limited effect as far as the bats are concerned. Although mention has been made of great crested newts, there is no evidence other than anecdotal evidence from objectors that they are in the vicinity or that they have been seen in the garden of 36 Almoners' Avenue. In the circumstances we do not consider that the fate or otherwise of the newts is something we can fairly take into account in our determinations.

99. In *Shephard v Turner*, the Court of Appeal considered an application under section 84 to modify a "one house one plot" covenant to permit a second dwelling to be built. The applicants' house was situated in a cul-de-sac of eight two-storey houses, all of similar construction although with different layouts and sizes and some had been extended and altered since being built in the early 1950s. The applicants' proposed development, which had obtained planning permission, included breaching the boundary wall at the front and thereby have an adverse effect on the character of the close by disturbing its otherwise largely unbroken façade.

100. Upholding the decision of the Lands Tribunal (Mr Norman Rose FRICS) to modify the covenant such as to enable the applicants to develop their property in accordance with the planning permission, the Court of Appeal considered the argument that to allow modification in such a case may "open the way to further developments which taken together will undermine the efficacy of the protection afforded by the covenants." It approved the approach of the President of the Lands Tribunal (HH Judge Bernard Marder QC) in *Re Snaith & Dolding's Application* [1995] 71 P. & C.R. 104, that any future application under section 84(1) must be determined on its own facts and its own merits, the Tribunal being "unable to bind itself to a particular course of action in the future in a case which is not before it… It is however

legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme." However, it is important to realise that the effect of granting discharge or modification, as a result of which the scheme is broken, may be that the context in which possible future applications would be considered could be materially altered.

101. This is the argument, referred to by one objector as "the snowball effect", and sometimes called "the thin end of the wedge". It is a relevant argument, as the Court of Appeal accepted in *Shephard v Turner*, but the issues it raises are issues of fact not of law. Answering the question of fact in relation to this case is not straightforward: it seldom is. We take into account that each of the objectors, and we do not doubt a number of others purchasing dwellings on the estate, bought their property aware that a "one house one plot" covenant applied to it, that similar covenants applied to their neighbouring properties and that they would as a result be able to take steps to prevent those seeking to build a second house.

102. The applicant makes much of the point that the plot it has purchased is substantially larger than most of those to be found on the estate, and that it should not be assumed that, if the Tribunal grants modification in its favour, other owners will make applications for planning permission to build a second house, to be followed should consent be granted by another application under section 84. We accept that the plot is a large one, and we accept, as did Cambridge City Council, and the Planning Inspector on appeal, that to have two houses on that plot would not significantly increase the density of development. There are in fact two substantial plots in the immediate vicinity of 38 Almoners' Avenue, both just over the garden fence, and neither owner has objected to the current application: 7 Bowers Croft and 12 Topcliffe Way.

103. Our inspection of the estate made very clear to us that, despite the comfort that the scheme of covenants has apparently accorded to those living there, the estate has changed incrementally over time. Owners have refurbished their houses, they have extended, they have improved, and as a result the estate is in a far from a homogenous state; some houses, such as that on the application land, have changed little in their physical appearance since their construction 50 or 60 years ago, whereas others have been significantly altered and expanded, and those that have been worked upon have no doubt increased in value more than the others. There has been a degree of acquiescence in those houses built in breach of covenant, but more significant in our view has been the effect of extensions and alterations to existing properties on the appearance of the estate as a whole.

104. Taking all the matters into account , we are satisfied that the covenant does not secure practical benefits of any substantial value or advantage to the estate as a whole (whether we refer to the Cherry Hinton Estate as a whole, or to the houses in the more immediate vicinity).

Effect on individual properties

105. We turn to the individual properties of the objectors listed in paragraph 5 above, and in doing so also consider the application under ground (c).

106. In our view, having inspected the vicinity of the application land and considered the evidence and submissions, any effect from the modification of the covenant on the properties owned by Mr and Mrs Thompson, Mr Blake, Mr Swallowe, Mr Williams & Ms Meakin, or the land owned by the charity, can be considered in the same light as our comments above regarding the estate. We are not persuaded that modification of the covenant as proposed by the applicant would cause any injury to them, and accordingly as far as those objectors are concerned the application under ground (c) is successful.

107. As regards Mrs Brierley's property at 14 Topcliffe Way, we are satisfied from our site inspection and from the evidence that the effect of the proposed development would be insignificant. We agree with the views of the planning officer that 14 Topcliffe Way sits on a relatively spacious plot, with a mature rear boundary between the plot and the application land. The distance between the rear of the proposed houses and Mrs Brierley's house would be 31 metres. In all the circumstances, we do not consider the modification of the covenant would cause injury to Mrs Brierley. The application under ground (c) is again successful.

108. That leaves the properties on Almoners' Avenue, where in our view the situation is somewhat different. Mr Catley accepted that the effect of the development (that is, by the addition of one more house) on the properties in the immediate vicinity of the cul-de-sac would be more pronounced, in terms of increased traffic, than on the remainder of the estate. In our judgment, the properties owned by Dr Scraggs and Professor Livesey, Mr Marshall, Ms Taylor and Ms Bruce and Mr and Mrs Shields, would all be affected in this respect, but to differing degrees. For these objectors, the application under ground (c) is not made out.

109. It is accepted by the applicants that the restriction secures to these objectors a practical benefit. In our judgment, in the case of the objectors named in the previous paragraph that practical benefit is not of substantial value or advantage and can be compensated by a monetary award.

110. The amount of compensation varies, since the closer the objectors' property is to the application land, the more pronounced the effect of the proposed property, but we do not consider the variation to be a linear one. In the case of Mr Marshall at No 24, there would be something in the order of 25 properties beyond his own (i.e. properties attracting traffic which would have to pass his house in order to access), where there are currently 24. The effect is marginal, and we award him compensation of £1,000. In the case of Ms Taylor & Mr Bruce at No 30, the difference would be more marked, with 11 properties instead of 10. We award them the sum of £2,500. In the case of Mr and Mrs Shields, at No 51, their property is situated at the end of the cul-de-sac, facing the hammer-head, and indeed the application land. No 51 is in this sense one of what are currently seven properties, which would, as a result of the development become eight. We award them £7,500.

111. The effect of the development would, however, be felt most keenly by Dr Scraggs and Professor Livesey at No 36. In their case, its effect is not restricted to pedestrian and vehicular traffic. In our view, contrary to that of Mr Catley (whose evidence we found entirely unpersuasive), there must be a significant (but not substantial) effect on the value of their property should the development of the application land proceed. This is partly owing to

shadowing, albeit not to a significant degree, and partly owing to there being two houses next door, when at the moment there is only one. As we have indicated earlier, we are not blind to what could happen without modification, for instance a very large extension or demolition and erection of a very large house, but in our judgment adding one further house to a cul-de-sac hammerhead serving the application land and 36 Almoners' Avenue must have an effect on value. Having inspected the application land and 36 Almoners' Avenue, as an expert Tribunal we estimate that the effect of modification of the covenant on the latter's value would be in the order of 3%.

112. Mr Catley's view of the value of No 36 was £750,000 to £800,000. Given that he thought the two proposed houses would each be worth £950,000 we consider £800,000 to be appropriate. A 3% reduction would equate to £24,000, which we award to them.

113. Accordingly, as regards the objections by Mrs Brierley, Mr and Mrs Thompson, Mr Blake, Mr Swallowe, Mr Williams and Ms Meakin and the charity, the application succeeds under ground (c) of section 81(1), since no injury is caused to them. As regards the other objectors, the application succeeds under ground (aa), subject to the payment of compensation.

Disposal

114. The following Order shall be made, subject to the prior payment of the following sums:

£1,000 to Mr Marshall

£2,500 to Ms Taylor and Mr Bruce

£7,500 to Mr and Mrs Shields

£24,000 to Professor Livesey and Dr Scraggs

115. The entry in the charges register for the application land shall be amended to include a new paragraph to read as follows:

> "Notwithstanding anything in paragraph 1 of the Fourth Schedule above, two detached dwellings may be constructed in accordance with the planning permission granted on 20 April 2015 under reference APP/Q0505/W/14/3001638 or any renewal of that permission and any other matters approved in satisfaction of the conditions attached to that permission."

116. An Order inserting this clause as above shall be made by the Tribunal provided, within three months of the date of this substantive decision, the applicant shall have paid the compensation sums referred to in paragraph 114.

117. This decision is final on all matters other than costs. The parties may now make submissions on costs, and a letter giving directions for the exchange of submissions on costs accompanies this decision. It might assist the parties to refer to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010. We should add that the Tribunal's

provisional view is that none of the objectors has acted unreasonably in mounting their objections to the application.

Dated: 4 September 2018

His Hon Judge Stuart Bridge

Peter D McCrea FRICS