THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 515 (LC)
Case No: LP/21/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Modification – land in green belt subject to restriction to be used only for parking vehicles – 13 affordable housing units built prior to application and in the face of objections – adjoining land with benefit of covenant being developed as children's hospice – whether modification appropriate – practical benefits of substantial value or advantage – public interest – injury – offer of compensation – discretion – s.84(1)(aa) and (c), Law of Property Act 1925 – modification ordered on payment of compensation

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

BETWEEN:

(1) MILLGATE DEVELOPMENTS LIMITED
(2) HOUSING SOLUTIONS LIMITED **Applicants**

- and -

(1) BARTHOLEMEW SMITH **Objectors**
(2) THE ALEXANDER DEVINE CHILDREN'S CANCER TRUST

Re: Exchange House, Woodlands Park Avenue, Maidenhead, Berkshire SL6 3LT

Hearing dates: 19, 20 and 22 September 2016

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

Royal Courts of Justice, London WC2A 2LL

Michael Driscoll QC instructed by DAC Beachcroft, solicitors, for the applicants
Emily Windsor instructed by Kenny Shovell, Key IP Ltd, Business Management Consultants for the objectors

The following cases are referred to in this decision:

Re: Bass Limited's application (1973) 2 P&CR 156

George Wimpey (Bristol) Ltd v Gloucestershire Housing Association Ltd [2011] UKUT 91 (LC)

Re: The Trustees of the Green Masjid and Madrasah's application [2013] UKUT 0355 (LC)

Shepard v Turner [2006] 2 EGLR 73

Re: SJC Construction Co Ltd's application (1974) 28 P&CR 200 (LT)

SJC Construction Co Ltd v Sutton LBC (1975) 29 P&CR 322 (CA)

Stockport Metropolitan Borough Council v Alwiyah Developments [1983] 52 P&CR 278

Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798

Introduction

1. By this application, issued on 20 July 2015, the first applicant, Millgate Developments Ltd ("Millgate"), asks the Tribunal to exercise its discretion under section 84 of the Law of Property Act 1925, to modify restrictive covenants which it knowingly breached a year earlier when it commenced the construction of nine houses and four bungalows on land on the southern fringe of Maidenhead ("the application land"). Those 13 properties form part of a development of 23 social housing units on a former industrial site known as Exchange House.

2. Shortly after the commencement of work on the application land Mr Bartholemew 'Barty' Smith, the first objector, asked Millgate to cease building and to comply with the covenants, but it refused to do so. Mr Smith is joined in his opposition to the application by the trustees of the Alexander Devine Children's Cancer Trust ("the Trust") who own land immediately adjoining the application land on which they are currently building a hospice to provide end of life care for terminally ill children ("the hospice land").

3. The covenants currently binding the application land specifically prohibit its use for building or for any purpose other than the parking of vehicles. It is agreed that agricultural land belonging to Mr Smith in the vicinity of the application land and the hospice land gifted to the Trust by Mr Smith have the benefit of the covenants.

4. Millgate maintains that the covenants confer no substantial advantage on the land belonging to Mr Smith or on the hospice land and that the other requirements of section 84(1)(aa) are satisfied. It submits that the amenity of the hospice land is in fact enhanced by the development of the application land, and that there is no good reason for the Tribunal not to exercise its discretion to modify the covenants to permit the use of the new houses for their intended purpose of providing affordable housing for those in housing need. The objectors disagree and maintain that the carefully planned environment of the hospice and the outdoor amenities which they intend to provide there for children and their families are seriously compromised by the presence of new housing so close to their boundary.

5. In May 2015 Millgate entered into a contract for the sale of the whole of the Exchange House site to Housing Solutions Ltd, a registered provider of social housing. Completion of the contract so far as it relates to the application land is conditional upon the outcome of this application, and at the commencement of the hearing it was agreed that Housing Solutions should be joined as an additional applicant. The 13 properties on the application land are ready for occupation but remain vacant pending the transfer of the land. The ten remaining properties on the Exchange House site have already been transferred and are occupied by Housing Solutions' tenants.

6. The applicants were represented at the hearing by Mr Michael Driscoll QC, instructed by DAC Beachcroft LLP. He called Mr Nicholas Jackson, Land and Planning Director of Millgate who gave evidence relating to the acquisition of the land, the planning background and the development process. Mr Malcolm Kempton FRICS, a director of Kempton Carr Croft, Property Consultants of Maidenhead, was called as expert valuation witness.

7. The objectors had originally acted in person but were represented at the hearing by Ms Emily Windsor, instructed by Mr Kenny Shovell of Key IP, Business Management Consultants. Ms Windsor called Mr Barty Smith and Mrs Fiona Devine, the co-founder and chief executive of the Trust who gave evidence relating to the hospice project and explained her objections and concerns regarding the Millgate development. Mr Patrick Eve MRICS, a director of Savills (UK) Ltd and head of the Development Land and Valuation Department at its Oxford office was called to give valuation evidence.

8. After hearing evidence and most of the parties' submissions the Tribunal visited the application land and the hospice, which is in the course of construction. We then reconvened to hear further argument in the light of which both parties made additional submissions in writing.

The covenants

9. The covenants which are the subject of Millgate's application are contained in a conveyance dated 31 July 1972 made between John Lindsay Eric Smith as Vendor and Stainless Steel Profile Cutters Limited ("SSPC") as Purchaser by which the application land was conveyed for a price of £5,000. At the time of the conveyance the application land was agricultural land, as was all the land adjoining it on the eastern side of Woodlands Park Avenue except for the industrial buildings then owned by SSPC and subsequently known as Exchange House.

10. By clause 3 of the conveyance the Purchaser covenanted for the benefit of the owners for the time being of the land then belonging to the Vendor situated within three quarters of a mile of the application land, that at all times thereafter it would observe and perform the following stipulations contained in the First Schedule:

1. No building structure or other erection of whatsoever nature shall be built erected or placed on the [application land].

2. The [application land] shall not be used for any purposes whatsoever other than as an open space for the parking of motor vehicles.

11. The conveyance also recorded at clause 3 that the purchase price had been fixed on the understanding that the application land would not be used for any purpose prohibited by the restrictions in the First Schedule, and that Mr Smith and his successors as owners of the property benefited by the restrictions would not be bound to agree to or accept their discharge, variation or modification except on such terms as they might, in their absolute discretion, think fit, including terms as to payment of money.

12. By clause 5 the Purchaser covenanted with the Vendor and his successors in title that if, within twenty one years, planning permission was granted for the development of the application land for any purpose other than the parking of vehicles, the Purchaser would pay an overage payment calculated in accordance with a separate agreement dated 13 June 1972 and equal to 75% of the uplift in the value of the land. On payment of the overage sum those with

the benefit of the restrictions would execute a discharge to enable the planning permission to be implemented.

13. Mr Driscoll QC suggested that it was clear from the terms of the Conveyance and the overage agreement that the main purpose of the covenants had been to secure a substantial share in any potential future development value for the Vendor, and not to confer a practical benefit on the adjoining agricultural land. When they were imposed the restrictions were not regarded as so important to the enjoyment of the benefited land that their release could not be automatically obtained upon payment of the price determined or agreed for their release, which did not reflect any diminution in the value of the benefited land. That inference seems to us to be a reasonable one, although the magnitude of the share of development value reserved to the Vendor might also suggest that he was not concerned to provide an incentive to the Purchaser to obtain planning permission and was content for the application land to remain in use for parking vehicles.

14. Whatever was in the mind of the Vendor in 1972, the overage provisions expired in 1994 without planning permission having been granted or the covenants released. In considering whether the statutory criteria for a release or modification of the covenants have been made out the Tribunal must focus on the benefits, if any, which they secure for the adjoining land of the objectors in the circumstances which now exist, and not those which pertained in 1972.

Statutory provisions

15. Section 84 of the 1925 Act gives the Tribunal power to discharge or modify restrictive covenants affecting land where certain grounds in section 84(1) are made out. In closing submissions Mr Driscoll QC sought the modification of the restrictions to the extent required to enable the houses and bungalows on the application land to remain and to be occupied. He relied principally on ground (aa) of section 84(1). So far as is material this requires that, in a case falling within subsection (1A), the Tribunal must be satisfied that continued existence of the restriction would impede some reasonable use of the land for public or private purposes. Satisfaction of subsection (1A) is therefore essential to a successful claim under ground (aa); it 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.

16. Ground (c), on which Mr Driscoll also relied, is available where the Tribunal is satisfied that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

17. 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 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 the 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.

The Exchange House development

18. The application land forms part of Millgate's Exchange House development site, which is situated on the east side of Woodlands Park Avenue, Maidenhead about 3 miles from the town centre. The application land is within the green belt and is registered under Title Number BK115371.

19. The Exchange House site is rectangular and approximately 105m by 50m, with the longer side fronting Woodlands Park Avenue. To the west of the site, on the opposite side of Woodlands Park Avenue, is an estate of single storey "prefab" bungalows, and further to the south of that a site for fixed mobile homes. The public highway running down Woodlands Park Avenue has been improved as part of Millgate's development.

20. To the north of the site is the Woodlands Business Park, a small light industrial estate comprising three modern two-storey buildings in a variety of occupations. The hospice land is situated immediately to the east and south of the Exchange House site and was formerly open arable land belonging to Mr Smith. The arable land to the east of the hospice land remains in Mr Smith's ownership.

21. The application land comprises approximately 0.42 ha (1.03 acres) and makes up a little over half of the Exchange House site at its southern end, with the boundary between the two parts running diagonally across the site from close to the north east corner to a point about three quarters of the way along the western side of the rectangle. The north-western part of the Exchange House site, which is not subject to the covenants, has been referred to as the unburdened land.

22. Until its redevelopment by Millgate in 2014 the unburdened land accommodated a collection of light industrial buildings including one of two-storeys (presumably Exchange House) formerly occupied by SSPC. The buildings had formerly been used for manufacturing

processes but this use had ceased and they were unoccupied by not later than 2011 when the Trust first became interested in the hospice land.

23. The application land conveyed to SSPC by Mr Smith's father in 1972 was formerly used for the parking of cars and other vehicles in connection with SSPC's business at Exchange House. It had a tarmacadam surface, with an area of grass separating the parking spaces and the eastern boundary. It was bounded by a post and wire fence on three sides, including along its boundary with what is now the hospice land. From the photographs we have been shown the hospice land was clearly in view from the application land, and vice versa, but not from the windows of Exchange House from which the view was interrupted by single storey sheds.

24. There was some modest encroachment by buildings on the application land. In particular, one building is shown on plans as standing close to the boundary with the hospice land although it is not easily identified on the photographs we have been shown and it may have been demolished by the time they were taken.

25. On 19 July 2013 Millgate applied for planning permission to build 23 affordable housing units on the Exchange House site. Permission was granted on 14 March 2014 notwithstanding that the proposal was contrary to the development plan. Millgate persuaded the local planning authority that although the proposal was, in principle, inappropriate for the green belt, special circumstances existed which justified the grant of permission. Those circumstances were said to be that the development would enhance the character and amenity of the area, was on previously developed land, would improve the access to and relationship with the hospice (for which permission had already been approved) and was sensitive to adjoining uses.

26. Construction of the flats and houses on the Exchange House site began on 1 July 2014 and was completed on 10 July 2015, shortly before the current application to the Tribunal was made. The development comprises five buildings each containing a number of units of accommodation.

27. The largest of these buildings is a block of 10 flats constructed entirely on the unburdened land overlooking Woodlands Park Avenue on the western side of the site. These flats are now occupied.

28. Two pairs of semi-detached bungalows are situated adjacent to each other towards the southern end of the site. Their rear gardens have a boundary to that part of the hospice land which will be used principally to provide access to and from Woodlands Park Avenue. Only the roofs of the bungalows are visible over the timber boundary fence which separates the gardens from the hospice land. To the east of the second pair of bungalows is a corner area of open grassland intended for recreational use or simply as open space. This area is fenced off from the hospice land on its southern and eastern sides.

29. On the eastern side of the site stand two two-storey buildings separated by a narrow passage, one comprising three and the other six terraced houses each with two or three

bedrooms. These nine houses have small rear gardens which are separated from the hospice land by a timber fence. The fence and a number of small garden sheds obstruct the view from the gardens and the ground floor of the houses, but not from the upper floor bedrooms which directly overlook the hospice grounds as we were able to observe on our site inspection. The land on the hospice side of the fence slopes up and away from the fence where the earliest stages of landscaping work have begun.

30. The Exchange House site as a whole gives every appearance of having been well designed and built. The houses and bungalows (which we inspected) are simple and functional and built of traditional materials, but they are neither shoddy nor utilitarian. The homes which are unoccupied inevitably appear somewhat spartan, and the few small trees which have been planted around the areas reserved for parking will make little visual impact for a number of years. We think it likely that, in time, the development will mellow into a modest and not unattractive environment providing decent accommodation suitable for people in different stages of life living in what may become a neighbourly community.

Mr Smith's land

31. The land owned by Mr Smith within the radius benefitting (in theory at least) from the restrictions is extensive; it forms the southern boundary of the Maidenhead conurbation between the hospice land and White Waltham Airfield and stretches almost to the M4. The land is mainly agricultural, and with the exception of a very small rectangular parcel, which is the site of a borehole let on a 99 year lease to South East Water, Mr Smith's retained land no longer directly adjoins the application land, being separated from it by the hospice land.

The hospice land

32. The hospice land is much larger than the Exchange House site, with an area of about 2.4 ha (almost 6 acres). It too was formerly part of the green belt and is surrounded on its eastern and southern side by Mr Smith's arable fields which provide an attractive outlook towards distant woodland and farm buildings.

33. The hospice land is adjoined along half of its western boundary by the Exchange House site and along the remainder of that boundary by a significant triangle of open land within the rear curtilage of the Woodlands Business Park. A number of mature trees on that land screen two of the buildings on the Business Park from the hospice site, but a third light industrial building stands very close to the boundary and is clearly visible from the hospice land. The narrow end of that rectangular building faces the boundary, and at first floor level a set of double doors opens from an office on to a balcony directly overlooking the hospice land.

34. A public footpath runs outside the northern boundary of the hospice land, from which there are now largely uninterrupted views of one end of the hospice building itself, and more limited views of the surrounding grounds. The footpath is bounded by mature trees and hedgerows and leads into open countryside, providing a pleasant route for dog-walkers.

35. Access to the hospice is from a continuation of Woodlands Park Avenue known as Snowball Hill. The access road crosses a narrow tail of the hospice land, adjoining the rear gardens of the bungalows now standing on the Exchange House site, before turning north-east towards the hospice building itself, which stands in the north-east corner of its grounds.

The hospice project

36. Mrs Fiona Devine is the co-founder and chief executive of the Trust. At the age of four her son Alexander developed a brain tumour from which he died four years later. Their own and other families' experiences of the facilities available in Berkshire for terminally ill children led Mrs Devine and her husband John to establish the Trust. Its primary object is to create a high quality children's hospice service with rooms to accommodate six children overnight and a further six as day visitors together with flats for two visiting families. No such facility is currently available in the area.

37. Mrs Devine has been closely involved in every aspect of the project and her enthusiasm, energy and dedication were apparent to the Tribunal in her evidence and on our visit to the hospice. She has a very clear vision of the environment she and her fellow trustees wish to create, which she described as a "home from home for our children over the whole site". The Trust's intention is to provide exemplary specialised care to children in a calm, secure and peaceful setting, where they and their families will be protected, supported and encouraged at the end of their lives.

38. At the time of our inspection the construction of the hospice was very well advanced and we were able to view the building internally, where fitting out had commenced, and externally. It is hoped that the building will be completed in February 2017 ready for fitting out and a phased opening from the summer of 2017. Within the grounds the access road has been laid out but only the rough contours of the intended landscaping have been formed. No planting has yet taken place, but was forecast to commence this autumn.

39. The only buildings on the Exchange House site which are visible from within the hospice building itself are the two blocks in the terrace of nine houses which adjoin the boundary. The bungalows on the application land and the block of flats on the unburdened land are either too distant or are largely concealed by the terrace. The terraced houses themselves are prominent along the boundary, although only the upper floor and roofs are within view over the boundary fence. The industrial building end-on to the boundary is also well within sight. The closest end of the terrace of houses is about 80m away from the closest part of the hospice building (the dining room).

40. Despite the proximity of the houses to the boundary and their visibility from the hospice itself, we think it unlikely that they will make much visual impression on the children being treated there or on staff or visitors while they are within the hospice building itself. That is because the children's and parents bedrooms and the indoor treatment and recreation facilities have been located on the quiet side of the building and look east and south, towards the open countryside, and not west towards the Woodlands Business Park and Exchange House sites.

On the west side are to be found the kitchen, delivery areas, refuse storage and collection and service courtyard; the only significant facility on that side of the building is the dining room.

41. The visual impact of the new and existing buildings on the boundary will be much more apparent when the children residing in the hospice and their visitors make use of the grounds and outdoor facilities provided for them. That opportunity was described by Mrs Devine as fundamental to the project, and great care and imagination has gone into the design of the proposed outdoor facilities. On the north western side of the building there will be a quiet reflective garden. An outdoor dining terrace is to be created on the west side of the building, about 100m from the houses on the boundary. A wheelchair walk will follow a route along the western side of the grounds following the boundary at a distance of about 10m. A tree house will be built adjoining the wheelchair walk and immediately opposite the end of the row of houses. A secluded space designated for teenagers and featuring a fire pit and seating area is to be formed within about 20 metres of the boundary. All of these areas are currently directly overlooked by the upper windows of the nine houses on the application land. On the opposite side of the grounds a play area for younger children is proposed, with specially designed facilities for disabled children which are to be donated by a local theme park.

42. The plans of the hospice include a landscape plan with a planting scheme which was drawn up and approved before the Trustees were aware of the development of the Exchange House site. Mrs Devine told us that she had secured a donation of £50,000 towards landscaping, although she did not know whether this donation would be enough to meet the cost of the original planting scheme. The original scheme sought to make the greatest use of the views from the hospice towards the east, while the western side of the site would be screened using a variety of deciduous native trees planted as saplings with a 12-14cm girth and hedge plants planted as 60cm whips.

43. About half a mile to the west of the hospice site is White Waltham Airfield. On the day of the Tribunal's inspection the noise of light aircraft taking off from the Airfield and flying over the hospice grounds was a regular and moderately intrusive feature. We were therefore a little surprised that aircraft noise had not been mentioned in the evidence, but after raising the issue we were informed in the objectors' final submissions that our experience was atypical and that aircraft generally took off and landed from a different direction. This was consistent with the evidence of Mr Smith, a keen pilot, who had previously told us that his flight path from White Waltham rarely took him over the application land.

The background to the application

44. Planning permission for the creation of the hospice was granted on 2 December 2011, and Mr Smith gifted the hospice land to the Trust in March 2012. Mrs Devine subsequently became aware of Millgate's planning application, although she did not see the plans and appears not to have considered whether she could or ought to object. She told us, and we accept, that she was unaware of the detail of Millgate's proposals and of the covenants which, had they been observed by Millgate, would have prevented its project from going ahead. She became aware of the covenants only after this application was made to the Tribunal. As a result, at no stage in the period of 2 years between Millgate's planning application and its

application under section 84 did Mrs Devine or anyone on behalf of the Trust make any adverse comment concerning the development of the Exchange House site.

45. Mrs Devine first discussed the Exchange House site with a director of Millgate, Mr Graeme Simpson, at a meeting in about July 2013. At that stage Millgate expressed interest in assisting with the hospice project and there was talk of it providing the building shell at cost, but this did not come to fruition.

46. Various explanations were suggested for the subsequent break down in relations between Millgate and the promoters of the hospice. It was important to Millgate that its involvement in work on the hospice land should proceed in tandem with the development of the Exchange House site, but that time scale was not possible for the hospice; nor was Millgate prepared to provide its services under a building contract, which the trustees felt they should insist on. Millgate was sold in February 2014 and its proposed involvement with the hospice may have been a casualty of an impending change of ownership. When the discussions with Millgate came to nothing at the end of 2013 Mrs Devine felt let down, and suspected that the developer's interest had been insincere and designed only to improve its own prospects of securing planning permission (its application was made on 19 July 2013). She contrasted Millgate's illusory contribution to the hospice project with the generosity of many other contractors, suppliers and sponsors whom she has persuaded to become involved.

47. It is neither necessary nor possible for the Tribunal to express a view on the reasons for the break down in relations, but nothing in the evidence we heard suggest that Millgate was not genuine in its desire to help. We did not find that Mrs Devine's obvious disappointment with Millgate's actions in 2013 rendered her evidence on the issues we are required to decide unreliable.

48. Mr Smith told the Tribunal, and we accept, that he had been unaware of the planning application, although Mr Jackson referred to a conversation in 2015 in which Mr Smith had acknowledged that he had not objected to the application (which Mr Jackson took to imply that he had been aware of it). It was not suggested on behalf of Millgate that Mr Smith had been given notice of the application personally, and based on his subsequent actions we are sure that he would have objected had the project come to his attention in sufficient time. We are therefore satisfied that Mr Jackson read too much into his conversation with Mr Smith.

49. Mr Smith first became aware of the Exchange House project when he flew over the site in his light aeroplane on 30 August 2014. He then consulted a solicitor about the covenants and visited the site on 15 September by which time the original light industrial buildings had been cleared and work on the new foundations had commenced. Mr Smith wrote to Millgate objecting to the development on the Exchange House on 26 September 2014. The developer's solicitors, DAC Beachcroft, responded almost 2 months later, on 20 November, requesting an explanation of the benefit said to be secured for Mr Smith's land by the covenants. Mr Smith took the opinion of counsel and replied on 11 December explaining that he, the children's hospice and a number of other local residents had the benefit of the covenants and requesting

an undertaking that work would now cease. No such undertaking was given and Millgate continued to build, completing the development in July the following year.

50. Mr Jackson acknowledged that Millgate had been aware of the covenants when it acquired the application land; they are noted in the charges register of Millgate's title, and a copy of the 1972 conveyance is filed with the Land Registry. Neither DAC Beachcroft's letter to Mr Smith of 20 November 2014 nor any subsequent communication shown to us suggested that Millgate had been unaware before his protest that Mr Smith was entitled to the benefit of the covenants. No evidence was given that unsuccessful efforts had been made by Millgate or its advisers to identify those with the ability to enforce the covenants.

51. We have little doubt that a competent firm of solicitors such as DAC Beachcroft would have had no particular difficulty in identifying at least Mr Smith and through him the Trustees as beneficiaries. Mr Smith is a substantial local landowner whose title is registered and whose address is the same as that of his father which appears in the 1972 conveyance. It is clear on the face of the trustees' registered title that they acquired their land from Mr Smith. Over a number of years Millgate have made use of the services of Mr Kempton for projects in the Maidenhead area, including the Exchange House site on which he wrote reports and negotiated with the local planning authority; Mr Kempton and his firm have managed the Exchange House site for at least 20 years. We infer that Millgate either took no steps to find out who the beneficiaries of the covenants were, or knew the identity of some or all of them and chose not to raise the issue of the covenants before beginning to build in breach of them.

52. Millgate's development of 23 affordable homes at Exchange House is closely connected to another more valuable residential development of 47 units set in parkland at Woolley Hall, Littlewick Green, near Maidenhead. The flats and houses at Exchange House were required by the local planning authority to satisfy the policy obligation to provide a proportion of affordable housing. As a result of a binding undertaking entered into by Millgate on 10 March 2014 it is prevented from disposing of 15 of the valuable Woolley Hall units until all 23 of the Exchange House units have been constructed and transferred to an affordable housing provider. It was to relieve that logjam that Millgate applied to the Tribunal to modify the covenants.

53. Since making the application Millgate has negotiated an alternative arrangement with the local authority under which it is entitled to make a payment of £1,639,904 in return for a release from its undertaking, thus allowing the local authority to provide equivalent affordable housing elsewhere. Millgate would then be free to dispose of the accommodation in the open market, but would presumably require to resolve the covenant issue first before it could find willing buyers.

54. The current position is therefore that the transfer by Millgate to Housing Solutions of the 13 units of accommodation on the application land cannot proceed, nor can Millgate's remaining properties at Woolley Hall be sold, unless either the covenants are modified to permit the units to be occupied or Millgate pays more than £1.6 million to the local authority.

Ground (aa)

55. In presenting the application under ground (aa) Mr Driscoll QC addressed the seven questions identified by the Lands Tribunal (J. Stuart Daniel QC) in *Re Bass Ltd's Application* (1973) 26 P&CR 156 at 158 and 159. In her closing submissions on behalf of the objectors Ms Windsor did not suggest that the proposed use of the application land to provide homes for tenants of the 13 affordable houses and bungalows which now stand there was unreasonable. We agree that it clearly is a reasonable use of the land, and one which is impeded by the covenants. The dispute in this application is over the remaining questions, which we will consider in turn.

In impeding the use of the application land for housing, do the restrictions secure practical benefits to the objectors?

56. It was common ground that when section 84(1A) refers to "practical benefits" secured by the restrictions in question it does not mean pecuniary benefits which can only be realised by the release or modification of the covenants, including the benefit of extracting a ransom or other payment. That is clear from two decisions of the Court of Appeal: *Stockport MBC v Alwiyah Development* (1983) 52 P&CR 278, 281 and 283-4, and *Winter v Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80, [28].

57. Mr Driscoll QC submitted that Mr Smith's land derives no practical benefits from the covenants and that the alleged benefits relied on by Mr Smith and listed in his notice of objection were specious. Ms Windsor did not focus on Mr Smith's land in her submissions and as the same benefits are relied on by the Trustees it is convenient to consider whether they can truly be said to be practical benefits secured for either objector's land by the covenants.

58. Mr Driscoll caricatured the effect of the covenants as conferring only the benefit of having an open vehicle park for cars and lorries of all sizes on the application land which, he submitted, was of no practical benefit to the hospice land. We reject that approach. While it is correct that the covenants prevent any use of the land except as an open space for the parking of motor vehicles, they do not require that that use be continued. The use of the land for parking has ceased and the significance of the covenants is not in what they permit but in what they prohibit. The question is whether in inhibiting the erection and use of the buildings which have been constructed in breach of the covenants they secure any practical benefit for the Trustees and Mr Smith.

59. Seven practical benefits were relied on by the objectors in their notices of objection, although the evidence focused on only three of these: loss of privacy, noise and light.

60. The first benefit relied on was the protection of the open, relatively peaceful and spacious character of the countryside and views of greenery. The second was described as preserving the view and restricting the visual impact of large modern buildings on the periphery of open countryside and preserving its tranquillity. It is not obvious what difference there is between these benefits. The third benefit relied on is freedom from overlooking windows. These three features can be considered together under the general heading of privacy and seclusion.

61. We agree with Mr Driscoll that the only views from the hospice land worth preserving are those to the east and south, which are unaffected by the state of the application land. Preservation of views from Mr Smith's land, if it ever was a practical benefit, ceased to be such when construction of the hospice began, as it separates the application land from his own.

62. But for Millgate's breaches of covenant the view from the hospice land facing west would have been of a largely disused car park which would not have been worth preserving and would have been screened from sight by Millgate's new fence and the boundary planting which the Trust had always intended to provide. While the boundary planting was becoming established, and through the gaps which would have existed, the view above the fence would have been of open sky to the distance, with no buildings in evidence at all. Had it chosen to lay out the Exchange House site differently, it is likely that Millgate could have provided all 23 units in a single larger two-storey block of flats built entirely on the unburdened land. The local planning authority has indicated that it would have approved such a proposal, although whether Housing Solutions would have been content with it is not apparent. If Millgate had decided to comply with the covenants and proceed in that way, the application land would presumably have remained as a car park for the block of flats.

63. As matters now stand the view over the boundary fence is of the two terraced buildings set a little back from the boundary. Being of two storeys these are more visually obtrusive than any previous view across that part of the boundary, and create an immediate need for significant screening if privacy and any sense of seclusion are sought to be achieved. The planting scheme originally proposed was never intended to screen houses adjoining the boundary. In due course if a sufficiently dense scheme of planting of tall trees was implemented these would be capable of concealing the buildings entirely, but until such a scheme is established the presence of the two-storey houses on the application land is a disadvantage.

64. The disadvantage arises from the adverse impact which the buildings make on the general setting of the hospice by their scale and proximity, and more specifically from the impact they make on the recreation areas within the grounds. Rather than providing a relatively secluded and private wheelchair circuit, the route in this part of the grounds will now pass close to the newly constructed houses and their rear gardens. There will be views of the upper windows from the grounds and anyone looking from the windows will observe all that is going on in the adjoining parts of the grounds until they are fully screened. The tree-house and teenagers' area will be similarly overlooked (although the latter was always intended to be enclosed by an earth bund and planting). Users of the grounds will therefore be intruded upon to a much greater extent than would otherwise have been the case had the covenants been observed. The remedial measures which will be required to reduce the extent of the intrusion will need to be much greater than the landscape planting originally planned, and the need to provide screening to counteract overlooking will be immediate.

65. We do not think the presence of the new bungalows close to the access into the hospice site adversely affects the objectors' land. The buildings themselves are single storey and set rather further back from the boundary than the terraced houses. The presence of the close boarded fence prevents any overlooking or visual intrusion. The relatively narrow strip of land

on either side of the driveway will not contribute significantly to the recreation facilities offered to children in the hospice and visitors will pass over it in a few seconds, during which their attention will be drawn to the open land and distant views to the east and south. We agree with Mr Driscoll's suggestion that the close boarded fence and eventually the hedge grown in front of it will present a more attractive aspect than the previous view across the car park.

66. Mr Driscoll suggested that the evidence of Mrs Devine exaggerated the impact which the new buildings would have on the hospice, and we bear in mind that her commitment to the project may understandably make it difficult for her to be wholly objective. We appreciate that in some respects the development of the application land has only added to features which would have been present in any event: parts of the boundary adjoining the business park are already overlooked to some extent, and the wheelchair walk runs parallel and close to the route of the public footpath along the northern boundary from which there are much closer views of the northern side of the building and the area in which the reflective garden will be created; some overlooking might also have arisen if a single house had been built close to the boundary on the unburdened land, as could probably have occurred. Nor do we suggest that the hospice grounds will become unusable or that the experience of those in the hospice itself will be very different. We anticipate that the facilities in the grounds will be used relatively infrequently and for relatively short periods by most users of the hospice. If the hospice land had been used for some different purpose, the disadvantages which we have identified may have been of less significance. But we consider that the very specific nature of the use, the particular facilities which the Trustees seek to provide for children and their families, and the sensitive circumstances in which those facilities will be used are important factors in assessing the impact which Millgate's development will have on the hospice land. We accept Mrs Devine's evidence on the significance of those issues.

67. In summary, therefore, the presence of the terraced houses on the boundary means that families spending time together with their sick children, and children and young people enjoying time together with friends and siblings, will do so in a more urban, less private, less secluded and less attractive environment than would have been the case if the covenants had been observed. We are satisfied that what have been lost are practical benefits in the form of enhanced privacy and seclusion for the hospice land.

68. The fourth benefit mentioned in the notices of objection was freedom from the noise and nuisance created by pets which will be kept by the occupiers of the houses. We discount Mr Eve's suggestion on behalf of the objectors that noise from within the houses will be intrusive, but we appreciate that the ordinary noise from the gardens along the boundary and from the children's recreation space adjoining the bungalows will be audible at times in the hospice grounds. We understand Mrs Devine's fear that this may affect the tranquil environment which the hospice seeks to provide and may be a source of distress for some parents of children in the hospice. We think that noise is likely to be muffled to some extent by the boundary fence and eventually by the maturing trees along the boundary. On any view noise will be less significant than other aspects we have discussed but we accept the objectors' case that in this special context protection from the ordinary and otherwise unobjectionable noise of adjoining gardens and play areas is a practical benefit. We do not think the contribution of pets to these ordinary

levels of noise merits separate consideration and we reject the suggestion that the covenants provide any significant protection from nuisance attributable to pets.

69. The fifth benefit is freedom from light pollution. We do not consider this to be a practical benefit secured by the covenants, and we do not think that the use of ordinary domestic lighting can properly be described as pollution. The upper windows of the nine houses on the boundary will no doubt be lit in the evenings but for the most part these are bedroom or bathroom windows which can be expect to be curtained and illuminated for only relatively short periods. The windows will be lit at times when the grounds of the hospice are not in use for recreation.

70. The sixth benefit is the ability to restrict increased pressure on roads, footpaths and other local infrastructure. We do not think that a covenant restricting the use of land to use as a car park can be regarded as securing these supposed benefits where the number of new houses on the application land is modest and where housing has already been built on the unburdened land.

71. The seventh and final benefit relied on is the prevention of urbanisation and the ability to restrict pressure on farmland which comes with more houses, more people, more cats and dogs and more rubbish. None of these are practical benefits for the hospice land except to the extent we have already identified as a localised consequence of urbanisation on the immediate boundary of the site.

72. We do not regard any of the benefits relied on by Mr Smith as practical benefits for his own land in circumstances where the hospice land provides a buffer between it and the application land. Mr Smith's arable fields are now slightly closer to the closest residential buildings than they were previously, but we do not regard the difference as of any significance.

Are the benefits secured by the covenants of substantial value or advantage?

73. We have concluded that the covenants secure practical benefits for the hospice land by enhancing privacy and seclusion. To succeed under the first limb of ground (aa) Millgate must satisfy us that those benefits were not of substantial value or advantage to the objectors. The evidence of Mr Kempton was directed to that question.

74. Mr Kempton was criticised by Ms Windsor for his failure to disclose in either of his reports to the Tribunal that he and his firm had advised Millgate in the past, including in relation the Exchange House site, and that he had negotiated on Millgate's behalf with the local authority in 2015 concerning the payment of compensation in lieu of the delivery of the social housing units on the application land. The Tribunal would have been unaware of Mr Kempton's dual role if his correspondence with planning officers had not been discovered by the objectors in a search of the local authority's file.

75. Mr Kempton did not accept that he had been acting as Millgate's advocate to the council, but we are satisfied that that was his role. He told us that he understood his responsibilities as an expert witness and that he appreciated that his first duty in giving expert evidence was to the Tribunal. It was clear to us, however, that Mr Kempton had not thought sufficiently carefully about those duties and about the real or potential effect on his judgment and independence of his other instructions from Millgate. Had he done so he would surely not have felt entitled to sign a declaration at the end of his second report (absent from his first report) that he had drawn attention to any matters which would affect the validity of the opinions he had expressed and that his report included all relevant facts of which he was aware, without mentioning his other very recent involvement in negotiating on Millgate's behalf in relation to this site.

76. We should say in Mr Kempton's defence that both Millgate and, he informed us, their solicitors were aware of his other involvement in relation to Exchange House; we assume that his reports were thoroughly vetted before they were submitted to the Tribunal without anyone with this knowledge drawing attention to the omission of a proper account of Mr Kempton's prior involvement. Nevertheless, responsibility for the contents of an expert's report is the expert's alone and we are satisfied that Mr Kempton omitted material information which he ought to have appreciated may have a bearing on the weight the Tribunal would be prepared to give to the opinions he expressed.

77. The opinions which Mr Kempton expressed were not manifestly improbable or obviously partisan and we think that some of Ms Windsor's criticisms to that effect were unjustified. Mr Kempton was well placed by reason of his experience and qualifications to assist the Tribunal. However, where the independence and objectivity of an expert's opinions are undermined as they have been in this case, his evidence is of little value to the Tribunal.

78. Mr Kempton considered that the replacement of the former light industrial buildings and vehicle park on the Exchange House site with Millgate's new housing estate enhanced the enjoyment and value of the hospice land and did not detract from it. There was now likely to be less noise and disruption and fewer vehicle movements than there had previously been. He also considered that the Trust's landscaping scheme would soften any adverse visual impact of the new buildings.

79. Mr Kempton suggested that if Millgate's development of the site had not occurred there was "every chance" that the industrial units would still be in use, refitted for the same or some alternative light industrial activity. His assessment of the value or benefit of the covenant was based on that assumption. He did not consider the alternative hypothesis that, with the cessation of the use of the unburdened land for light industrial purposes by SSPC the unburdened land would be put to its current use as the site of a block of flats (possibly a larger block than the one which has been built), with the application land being restricted to use for parking vehicles.

80. As we have previously indicated we do not consider that it is appropriate to assess the benefit of the covenants by assuming that they secure the continued use of the application land as a vehicle park in conjunction with light industrial use of the unburdened land. Nor do we

consider that it is appropriate to speculate about what different use might have been made of the unburdened land if the covenants had been complied with. By the time the application to modify the covenants was made the unburdened land was the site of a block of flats. The covenants, had they been complied with, would have secured the benefit of preventing the use of the application land otherwise than as a car park. It is the value or advantage of that benefit, in that context, which must be assessed. Mr Kempton did not consider that assessment, although he did express the opinion, with which we agree, that the presence of the block of flats on the unburdened land has no impact on the hospice land.

81. The evidence of Mr Eve on behalf of the objectors was not specifically directed to an assessment of the extent of the "value or advantage" secured by the covenants, as he had been asked to assess the level of compensation appropriate if the covenants were modified sufficiently to permit the buildings to remain and to come into use without a continuing breach. As part of this exercise he considered whether the use made of the application land by Millgate had caused any diminution in value of the objectors' land.

82. Mr Eve concluded first that the construction of houses and bungalows on the application land had had no quantifiable impact on the amenity of Mr Smith's land while it continued in use for the growing of arable crops, nor if its use changed to the grazing of livestock. That assessment accords with our own.

83. Mr Eve did not consider that there was any diminution in the value of the hospice land by reason of the loss of privacy it would experience from the breach of covenants. That was because, if the site was offered for sale in the open market, there would be other uses to which it could be put which would not require the same level of privacy as the hospice. Looking at the hospice use, however, he considered that the achievement of the desired degree of privacy and sense of seclusion would now require a different approach to landscaping from that which had originally been intended. That was the relevant part of his evidence because, in principle, it is appropriate to have regard to the position of the objectors and the impact which the prohibited use would have on their enjoyment of their own land.

84. No expert evidence on alternative landscaping schemes was put before the Tribunal. Mr Eve, who is a valuer and not a landscape designer, had obtained an estimate from a horticultural supplier of the cost of supplying and planting hedge plants to create a thick conifer (Thuja) hedge along the whole of the western and southern boundaries of the hospice land where it adjoins the application land (a distance of 180m). The cost would be £311,184 (including VAT, which the Trustees are unable to recover) for plants which would be 7m to 8m in height when supplied; if 5.5m to 6m plants were supplied the cost would be reduced by about two thirds. If the southern boundary between the hospice land and the gardens of the bungalows were omitted from the calculation the same figures would be reduced by about a third (the north/south section of the boundary is about 105m long, so that a 6m hedge along the north/south section alone would cost in the order of £70,000). Mr Eve added a further £150,000 to reflect "hassle" and the residual impact of noise and disturbance even after this enormous barrier had been installed, to arrive at a total figure of £461,184 as the cost of mitigating the loss of amenity experienced by the hospice land as a result of Millgate's breach of covenant.

85. While we do not criticise Mr Eve for doing his best to answer the questions he had been asked to address in his report, we do not regard the remedial solution on which he based his assessment of diminution in value as remotely realistic. The suggestion gives rise to a number of problems.

86. It would be contrary to the indicative planting scheme for which approval had been obtained from the local planning authority and which required the use of deciduous native species which would enhance the appearance of the site. A landscaping contractor with whom Millgate do business provided a letter commenting on the proposal which suggested that the proposed hedge was unwise, as such large plants would be more difficult to establish and would have a higher failure rate than smaller specimens; they would also require considerably more care and maintenance than trees of more conventional planting size. The contractor also suggested that local planning authorities are not normally happy to approve a tall thick conifer hedge in a semi-rural location.

87. It would be contrary to the trustees' vision for the hospice grounds, which remains a vision to which detailed consideration has not been given but which Mrs Devine explained still contemplated a variety of attractive native and mainly deciduous trees.

88. It would create an incongruous and unappealing green wall along one of the hospice's boundaries which would do nothing to enhance the environment or contribute towards the beautiful grounds which the trustees seek to provide.

89. It would also contradict one of the principles which the Trust seeks to observe, of being good neighbours to adjoining occupiers. Mrs Devine said in evidence that the Trust wished to be considerate to those who would occupy the houses on the boundary and would do research to find an appropriate solution to achieve the required level of privacy. Mr Driscoll suggested that a hedge of the dimensions suggested by Mr Eve would leave the Trust open to a requirement to take remedial action or even a risk of prosecution under Part 8 of the Anti-social Behaviour Act 2003 (which gives local authorities the power to require remedial measures to reduce the size of hedges which adversely affect the enjoyment of domestic property). Whether such action would be taken in practice or not we consider Mr Driscoll's general point that to grow such a hedge within a few feet of the very modest gardens of nine residential neighbours would be grossly insensitive and liable to give rise to justified ill feeling.

90. For these reasons we are quite sure that, whatever remedial steps the Trustees eventually adopt, they will not follow the course suggested in Mr Eve's report of planting an 8m evergreen hedge to completely conceal the existence of the new houses and in doing so to blot daylight from their neighbours' gardens and living rooms.

91. Nevertheless, if there is to be an attempt to express the value of the covenants in monetary terms, we find it instructive to consider the cost of measures which could in theory at least be adopted to mitigate the loss of the benefit. Millgate's contractor suggested that a more modest conifer hedge could be installed using 3.5m to 4m plants at a cost of £37,440 which would grow sufficiently to screen the upper windows of the terraced houses by the end of the

first growing season. If the sort of boundary planting originally suggested by the trustees was installed it would provide what the contractor described as an "adequate screen" within 3 or 4 years and could be supplemented and thickened with perhaps 20 additional conifers at an extra cost of £7,500.

92. Recognising that none of these estimates have been the subject of expert evidence or cross examination the only conclusion we draw is that the cost of planting a sufficient screen immediately to counteract overlooking and loss of privacy from the terraced houses would be in a bracket between about £37,440 to £70,000. We consider that the relevant remedial solution is the more immediate one, rather than a scheme which, though considerably cheaper, would produce the desired benefit only after three or four years. In making that assessment we bear in mind in particular that the use which the trustees wish to make of their land is the provision of an attractive and supportive environment for children with life threatening and life limiting conditions and that many of those children will experience the hospice and its grounds for only a relatively short space of time at the end of their lives. A medium term solution will provide no benefit to them, or for the trustees in seeking to provide for them.

93. A practical benefit the loss of which can be mitigated only by expenditure in the order of £37,000 to £70,000 is properly regarded as a benefit of substantial value or advantage.

94. We are not deflected from that conclusion by our negative assessment of the suggested approach to mitigation on which these figures are based. Whatever measures are taken they are likely to require significant additional planting along the boundary. A screen which relied on large and relatively mature native deciduous trees would be less effective initially but more attractive, practical and acceptable to neighbours and therefore a better solution in the long run. We have no specific evidence of the cost of such additional planting, but trees of that description would be likely to be no less expensive than the hedge discussed in evidence. We are therefore content to rely on the figures put forward by the parties as a crude financial measure of the value of the benefits secured by the restrictions.

95. Despite the attention which was devoted to the issue of remedial measures during the hearing, and despite the over lengthy consideration we have already given it, we are satisfied that there is another much simpler way of addressing the question whether the benefits of privacy and seclusion secured by the covenants are of substantial value or advantage. That is to consider how those lost benefits affect the service which the trustees seek to provide. That service, which is the whole purpose of the hospice, is a service provided to individual children and their families, each of whom is unique and for each of whom, individually, the trustees wish to provide facilities of the very highest quality for a short period as they approach death. Looked at in that light we are entirely satisfied that the contribution which the covenants would, but for Millgate's breach, have made to the privacy and environment within the grounds of the hospice was a real and substantial advantage.

96. Having reached that conclusion we are satisfied that the Tribunal has no power to modify the covenants under the first limb of ground (aa); the same factors cause us to conclude that the application under ground (c) cannot be made out either because the modification will injure the

trustees as owners of the hospice land. The alternative question which remains to be considered under ground (aa) is whether in impeding the use of the application land as the site of nine houses and four bungalows which would otherwise be available as social housing, the covenants are contrary to the public interest.

Is impeding the proposed use contrary to the public interest?

97. Mr Driscoll QC submitted that it was contrary to the public interest to impede the use of land, which has planning permission for 13 affordable houses and bungalows, for its permitted planning use. In support of that submission he referred to the observations of Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Limited* [1974] 1 WLR 798 at 811, and those of Lord Sumption in *Lawrence v Fen Tigers* [2014] AC 822 at [155] to [161].

98. In *Wrotham Park*, in breach of covenant a developer had commenced building the final part of a new housing estate without first securing the approval of the claimant to a lay-out plan. After work commenced the claimant brought proceedings for an injunction to restrain building and to require the demolition of any buildings built in breach of the covenant. The claimant did not seek interim relief so the houses had been completed, sold and occupied by the time of the trial before Brightman J. "Without hesitation" the Judge declined to grant a mandatory injunction requiring the houses to be pulled down and instead awarded damages in lieu, holding that a demolition order would be "an unpardonable waste of much needed houses." Nevertheless, at page 811 C-D, he warned that his decision should not be seen as a charter entitling others to "despoil" adjacent areas of land in breach of valid restrictions imposed by their conveyances:

> "A developer who tries that course may be in for a rude awakening."

99. The decision of the Supreme Court in *Lawrence* did not concern restrictive covenants but was a claim under the common law tort of nuisance for an injunction to restrain noise created by the use of a stadium for motor sports, being a use authorised by planning permission. In his speech Lord Sumption considered how public and private law in the domain of land use ought to be reconciled where they occupy much the same space. At [157] he pointed out that a use may be a breach of a private right yet may at the same time "be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned". He suggested that:

> "The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right."

There are obvious parallels between the approach which the courts should take to the remedies in cases of nuisance sanctioned by planning permission and the approach which the Tribunal should take to the public interest limb of section 84(1)(aa). Both involve balancing the public interest in efficient use of land and private rights over the same land.

100. Lord Sumption went on at [160] to describe as an "unduly moralistic approach to disputes" the traditional reluctance of the court to sanction a nuisance or other wrong by allowing a defendant to pay for the right to go on doing it. The better view, he suggested at [161], may be:

> "that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission."

101. We agree with Mr Driscoll that the existence of planning permission for the use of the application land for housing is a material consideration under ground (aa). It is generally taken to be conclusive that the proposed use is a reasonable one, but it is also of significance in cases where it is suggested that by impeding a proposed use a covenant operates contrary to the public interest.

102. The fact that planning permission has been granted does not mean that private rights can necessarily be overridden, but it does reflect an objective assessment of appropriate land use which fully takes into account the public interest. Section 84(1B) of the 1925 Act specifically requires that when determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal must 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 any other material circumstances.

103. The policy behind paragraph (aa) and its supporting provisions which were added to section 84(1) by the Law of Property Act 1969 was explained by Carnwath LJ in *Shephard v Turner* [2006] 2 P&CR 28:

> "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"

104. The fact that the housing in this case is social housing intended for occupation by tenants who are likely to have been waiting for such accommodation for a very long time is also a highly material consideration. The local planning authority clearly considered that the provision of affordable housing was an important part of the balancing of interests which led to Millgate being granted planning permission for its more profitable residential development at Woolley Hall. The houses which have been built are attractive and well built, and are currently standing empty because of the restriction imposed by the covenants.

105. The objectors' case on this aspect of the application was understandably rather muted. Although he was clearly outraged by Millgate's highhanded and opportunistic behaviour, and thought the new housing estate was "horrendous" (an assessment with which we cannot agree)

Mr Smith acknowledged that it was unlikely that the houses would be pulled down. Mrs Devine was more positive and did not want to see them left empty.

106. It is no answer to the current wasteful state of affairs to say, as Ms Windsor did, that Millgate could have built their allocation of affordable housing on other land, or that it could now buy its way out of the problem by making a payment towards the provision of social housing elsewhere. Whether those would have been sufficient answers to Millgate's case on public interest if we had been dealing with an application before any housing had been built on the site is not a question which arises. The question for the Tribunal is whether in impeding the occupation of the houses which now stand on the application land, and which are otherwise immediately available to meet a pressing social need, the covenants operate in a way which is contrary to the public interest. We are satisfied that they clearly do because it is not in the public interest for these houses to remain empty and the covenants are the only obstacle to them being used.

107. In reaching that conclusion we are mindful of the Tribunal's early jurisprudence in public interest cases, and in particular of the dictum of Douglas Frank QC in *Re Collins' Application* (1975) 30 P&CR 527, 531 that for an application to succeed on the ground of public interest it must be shown that that interest is "so important and immediate as to justify the serious interference with private rights and the sanctity of contract". Whether that restrictive gloss remains the correct approach may require reconsideration in light of Carnwath LJ's explanation of the policy underlying ground (aa) in *Shephard v Turner* and Lord Sumption's observations on the reconciliation of public and private rights in *Lawrence v Fen Tigers,* but it is not necessary to pursue that thought further at this time. We are satisfied that the public interest in play in this case is sufficiently important and immediate to justify the exercise of the Tribunal's power under section 84(aa) to override the objector's private rights.

108. Before we have jurisdiction to make an order on that basis we must first be satisfied that money will be an adequate compensation for the loss or disadvantage which the trustees will suffer as owners of the hospice land as a result of a modification to permit the retention and use of 13 houses on the application land.

Would money be an adequate compensation?

109. Neither Ms Windsor nor Mr Eve suggested that the disadvantages experienced were incapable of monetary compensation and we can deal with this issue quite briefly.

110. We have already covered much of the relevant ground in making an assessment of the cost of planting a sufficient hedge to provide immediate mitigation of the loss of the benefit of enhanced privacy and seclusion provided by the restrictions. We have also explained why we do not consider that such a hedge is likely to be an appropriate solution, but why nevertheless its cost is a rough proxy for the value of the benefit secured by the restrictions. Although the provision of significant additional boundary planting would not insulate the hospice land entirely from all adverse consequences of the use of the application land for housing, we are satisfied that in principle an award of the money, such as would be required to provide that additional planting, is capable of providing adequate compensation to the trustees.

111. As we are satisfied that the restrictions do not secure any benefit of substantial value or advantage to Mr Smith as owner of his land, there is no need to consider whether money would be adequate compensation for him in that capacity. We appreciate that Mr Smith's main interest as objector is to protect the environment of the hospice, of which he is a strong supporter and which is built on the land he donated for that purpose, but his position with regard to that interest is no different from that of the trustees.

112. We are therefore satisfied that we have power under section 84(1)(aa) to modify the restrictions as requested by Millgate. The next question is whether we should exercise that power in the circumstances of this case.

Discretion

113. Section 84(1) provides that "the Upper Tribunal shall have power" to discharge or modify a restriction on being satisfied on one of the prescribed grounds. In his opening submissions Mr Driscoll QC rightly acknowledged that whenever it is asked to make such an order the Tribunal has a discretion; it may refuse a modification even where one of the grounds is made out. Nevertheless, he submitted that there was no good reason for refusing a modification if we were satisfied that there was at least one ground to do so.

114. We do not agree that there is as little in the issue of discretion as Mr Driscoll suggested. We refute any suggestion that a landowner who is in deliberate breach of covenant, but who can show one of the statutory grounds, can confidently assume that the Tribunal's discretion will be exercised in favour of modification or discharge. We do so for two reasons. The first is the reason the Tribunal (Mr N J Rose FRICS) gave in *re: George Wimpey Bristol Ltd's Application* [2011] UKUT 91 (LC). Having found that the applicant had knowingly breached a covenant against building, the Tribunal said this at paragraph 35:

> "It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flout their legal obligations in this way."

115. The second related reason is that too great a readiness on the part of the Tribunal to exercise its powers under section 84 in cases where a development has already taken place in breach of covenant would be liable to undermine the protection which restrictive covenants afford. If it was thought to be easier to secure a modification in favour of a completed development than for one which had not yet commenced the contract breaker would have a real incentive to press on even in face of strong objections by the beneficiaries of a covenant. Any developer who thinks in that way should think again or risk the rude awakening threatened by Brightman J in *Wrotham Park*.

116. Nevertheless, the discretion conferred on the Tribunal is to be exercised judicially, and not with a view simply to punishing a covenant breaker. That is clear from the decision of the Tribunal (Mr A J Trott FRICS) in *Re: The Trustees of Green Masjid and Madrasah's application* [2013] UKUT 355 (where, in breach of covenant, a building had been brought into use as a place of worship while an application to the Tribunal was pending):

> "Having satisfied me on the facts, and on the law as applied to those facts, that the Tribunal has such jurisdiction in this case, I am loath to exercise my discretion so as to deny the applicants the relief that they seek. Where jurisdiction has been established I consider that the discretion of the Tribunal to refuse the application should only be cautiously exercised. It should not be exercised arbitrarily and, in my opinion, should not be exercised as, effectively, a punishment for the applicants' conduct unless such conduct, in all the circumstances of the case, is shown to be egregious and unconscionable. On balance I do not consider that the applicants' conduct was so brazen as to justify my refusal of their application."

117. In other cases relied on by Mr Driscoll the Tribunal has been willing to exercise its discretion in favour of an applicant who has built in breach of covenant. In *Re: SJC Construction Company Ltd's application* (1974) 28 P&CR 200 the Lands Tribunal (Douglas Franks QC, President) accepted that the applicant had acted in good faith and without any intention to force the hand of the beneficiary of the covenant in question. The same cannot be said in this case as Millgate's state of knowledge and its intent are at best unproven. In *Winter v Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80 the applicant had been unaware of the objectors' right to enforce the covenant until the works were nearing completion. There is no evidence to that effect in this case.

118. Ms Windsor emphasised that, unlike the applicants in *Green Masjid*, Millgate had acted with professional advice and suggested that its behaviour was so egregious and unconscionable that relief should be refused. We have taken into account all of the matters of conduct which she relied on in reaching our conclusion.

119. We are also influenced in exercising our discretion by an open offer made by Millgate after the conclusion of the hearing and after the Tribunal had encouraged the parties to continue to seek some practical solution satisfactory to them both. In an open letter to the objectors dated 27 September, without conceding any part of its case, Millgate offered a contribution of £150,000 towards the Trust and to pay the trustees' costs in return for their consent to the modification of the covenant. That figure was based on Mr Eve's assessment of the cost of the taller hedge over the length of the north south boundary, together with an additional sum to reflect "hassle" and other intangible factors. We regard Millgate's proposal as constructive and it is regrettable that it appears not to have elicited a positive response from the objectors.

120. Had we been persuaded of Millgate's case for modification only under the first limb of ground (aa) we would have found the exercise of our discretion much more difficult than in fact we do. But the ground on which we are satisfied is the alternative public interest limb, and our decision will have an effect not only on the parties but also on 13 families or individuals who are waiting to be housed in these properties if, and as soon as, the restrictions are modified. We consider that the public interest outweighs all other factors in this case. It would indeed be an unconscionable waste of resources for those houses to continue to remain empty.

121. Our decision is, therefore, that we will exercise our discretion in Millgate's favour for the reasons we have given.

Compensation

122. We come finally to the issue of compensation. Section 84(1) provides that an order discharging or modifying a restriction may direct the applicant to pay by way of consideration to any person entitled to the benefit of the restriction such sum as the Tribunal may think it just to award either (a) to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification, or (b) to make up for any effect which the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it. An award may not be directed under both heads.

123. It follows from our conclusion that the benefit of the covenant is of substantial value or advantage to the trustees that an award to them under head (a) is appropriate. Such an award is intended as compensation for the loss or disadvantage suffered by the trustees so far as the relevant practical benefit is concerned, and is not designed to transfer to them some share in the profit which Millgate may make as a result of the development of the application land. The authorities to which we have already referred in paragraph 54 above make that clear. The principle is encapsulated in the judgment of the Court of appeal in *Winter v Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80 at [28] where Carnwath LJ said that:

> "… authorities binding on us establish that compensation under section 84 is based on the impact of the development on the objectors, not on the loss of the opportunity to extract a share of the development value."

124. Most of the evidence of Mr Eve overlooked that principle. He provided a speculative valuation of £528,000 which represented 33% of what he thought likely to be Millgate's profit from the development at Woolley Hall for which the Exchange House site provided the affordable housing contribution required by planning policy. The percentage which he has adopted is 33%. That approach was wrong in principle and we reject it.

125. We have already considered Mr Eve's assessment of the value of the amenity lost to the trustees and Millgate's response which caused us to value the benefit of the restrictions in financial terms in the bracket £37,000 to £70,000. We repeat our misgivings about the underlying remedial scheme on which those figures are predicated and our acceptance, nonetheless, that they represent a permissible approach to quantifying the loss to the trustees. Both parties made submissions on compensation by reference to mitigation measures and Millgate's offer of £150,000 made on 27 September was based on the adoption of the higher figure plus a generous allowance for hassle and intangible consequences.

126. In quantifying the sum we award as compensation we take three factors into account. First, Millgate has been prepared openly to offer £150,000 to compensate the trustees for the loss suffered. Secondly, that offer was shown to the Tribunal with the clear intention of influencing our decision in Millgate's favour and has been taken into account by us in exercising our discretion. Thirdly, Millgate has sufficient experience and resources to assess an appropriate level of compensation and could have designed an alternative and more appropriate remedial landscaping scheme had it wished to, which could then have been costed to provide a firmer foundation for the assessment of compensation. Having chosen not to do so

(when the burden was on Millgate to persuade the Tribunal to exercise its discretion) we are entitled to place weight on the figure Millgate was openly prepared to offer when considering the just award of compensation. For those reasons, and because we consider that a six figure sum is likely to be required to fund the design, implementation and additional future maintenance of a proper remedial scheme of extra planting, we direct that Millgate pay the sum of £150,000 to the trustees as a condition of the modification.

127. This decision does not, of course, resolve what precisely the revised planting scheme should consist of to alleviate the problems we have described. We have expressed our concerns over Mr Eve's proposals and are confident that when a final decision is made the trustees will also bear in mind the potential impact that a very high screen would have on their neighbours living in the new properties.

128. We agree with Mr Eve that Mr Smith will sustain no loss by the discharge of the covenants and is not entitled to compensation under head (a). He was not the original vendor in 1972 and while we do not consider that that need necessarily rule out a payment under head (b) of a sum to make up for any effect which the restriction had, in 1972, in reducing the consideration then received by his father for the land affected by it, there is no evidence to support the conclusion that there was any such effect. The 1972 agreement provided for a very advantageous share of development uplift in Mr Smith's favour for a period of 21 years. In those circumstances it does not go without saying that the land would have been worth more had it been sold without the benefit of the restrictive covenants and subject to the overage arrangement, and there is no evidence that it would.

Disposal

129. We order the modification of the restrictions sufficient to permit the occupation and use of the application land as the site of the houses and bungalows now in existence. That order is conditional on Millgate confirming within 3 months that they have paid the sum of £150,000 to the trustees.

130. This decision is final on all matters other than costs. If they cannot agree the appropriate order the parties now have 21 days within which to make submissions on costs.

Martin Rodger QC,
Deputy Chamber President

Paul Francis FRICS,
Upper Tribunal member

18 November 2016