UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case No: LP/29/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge – modification – proposed development of chalet bungalow on garden land surrounded by houses – whether reasonable user – whether practical benefits of substantial value or advantage – whether exceptional disruption likely due to construction works – application refused – section 84(1)(aa) and (c) Law of Property Act 1925 .

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

BY

MR KEVIN WILLIAMS **Applicant**

Re: Land to the rear of 5 Leazes Terrace,
Hexham,
Northumberland
NE46 3DL

Before: A J Trott FRICS

Sitting at: North Shields AIT, Kings Court, Royal Quays, Earl Gray Way, North Shields, NE29 6AR
on
9 August 2017

Mr Kevin Williams (applicant) in person
Mr Andrew Bunten and Ms Sasha Skentelbery (objectors) in person

The following cases are referred to in this decision:

Re Davies' Application (2008) LP/25/2006 (unreported)

Winter v Traditional and Contemporary Contracts Limited [2007] RVR 353
Re Bass Limited's Application (1973) 26 P&CR 156
Re Laav's Application [2015] UKUT 0448 (LC)
Re Lloyd's Bank Limited's Application (1978) 35 P&CR 128
Re Nichols' Application [1997] 1 EGLR 144
Gilbert v Spoor [1983] 1 Ch 27
Re Perkins' Application [2011] UKUT 219 (LC)
Shephard v Turner [2006] 2 P&CR 28
Perkins v McIver [2012] EWCA Civ 735

DECISION

Introduction

1. The applicant, Mr Kevin Williams, is the joint freehold owner of an area of garden land to the rear of 5 Leazes Terrace, Hexham, Northumberland, NE46 3DL (the "application land").

2. On 9 March 2016 conditional planning permission was granted for the development of the application land with a detached 2 bedroom chalet bungalow. The development is impeded by the following restrictive covenant contained in a conveyance of the application land dated 3 May 1939:

> "The Purchaser for himself and his successors in title to the intent that this covenant shall be binding so far as may be on the owner for the time being of the land hereby conveyed but upon the Purchaser only so long as he is the owner thereof hereby covenants with the Vendors and their successors in title owner or owners for the time being of the adjoining property coloured round with red on the said plan that (a) no building or other erection (other than a greenhouse, garage or a summerhouse to be used in connection with a private dwellinghouse only) shall be erected on the land hereby conveyed…"

3. The land with the benefit of the covenant comprises 1 and 2 Burland Villas, 1 Leazes Terrace and an area of garden land which lies between the application land and the rear gardens of 1 and 2 Burland Villas. 1A Leazes Terrace also had the benefit of the covenant but its owners, Mr and Mrs Brass, signed a deed of release on 5 April 2013.

4. Mr Williams applied for the discharge or alternatively the modification of the restrictive covenant on 21 November 2016 relying upon grounds (aa) and (c) of section 84(1) of the Law of Property Act 1925.

5. There are three objections to the application: Mr and Mrs Kitcatt of 1 Burland Villas; Ms Sasha Skentelbery of 1 Leazes Terrace; and Mr Andrew Bunten and Ms Elizabeth Moss of 3 Leazes Terrace who own the garden land between the application land and Burland Villas. The owner of 2 Burland Villas did not object.

6. Mr Williams, Mr Bunten and Ms Skentelbery all appeared in person. Mr and Mrs Kitcatt did not appear and were not represented. Mr Williams called Mr Derek Toes BSc, MRICS, an Associate Director of Rook Matthews Sayer, Chartered Surveyors, as an expert witness.

7. I made an accompanied site inspection of the application land, the objectors' property (external only) and the surrounding area on 10 August 2017.

Facts

8. The application land is located in an established residential area in north west Hexham within the Hexham Conservation Area. The site lies between Windsor Terrace to the west, Burland Terrace to the east and Leazes Terrace to the south. There is a brick wall to the north, west and south of the site and a 2 metre high close boarded wooden fence to the east adjoining Mr Bunten's garden. The present access is from a narrow cobbled footpath at the south west of the site which also provides pedestrian access to the rear of the houses in Leazes Terrace. Vehicular access is available from a narrow access road that runs north to south behind the houses in Windsor Terrace and the rear of the gardens in Burland Terrace. The application land slopes down from north to south.

9. The area of the application land is 440m^2 (0.108 acres). It is currently unkempt garden land with ancillary outbuildings. There are mature apple trees close to the boundary of Mr Bunten's garden land to the east.

10. The site was purchased by the then owners of 5 Leazes Terrace in 1939 since when it appears to have been used as a garden. It has not been developed previously. The proposed development for which planning permission was granted comprises a detached chalet bungalow with a lounge and kitchen/diner at ground floor level and two bedrooms on the first floor. There is a detached garage to the north. The property is designed, so far as possible, to avoid overlooking neighbouring properties. The two dormer windows at the front of the house (which serve the two bedrooms) face south west towards Alexandra Terrace. The single dormer at the rear (which is on the landing) and the ground floor lounge window look across the rear gardens of Burland Terrace. The window to the kitchen/diner looks directly towards Mr Bunten's adjoining garden and 1 and 2 Burland Villas beyond. There are no windows in the north west elevation. Two full length (2 metre) windows in the south west elevation of the lounge face the rear of 6 Leazes Terrace. At its closest point the proposed chalet bungalow is 5 metres from 6 Leazes Terrace (which does not have the benefit of the covenant) and 8.5 metres from Mr Bunten's garden.

11. The height of the proposed chalet bungalow is approximately 6.1 metres to the roof ridge. The detached garage has a single sloping roof with a maximum height of 4.2 metres.

12. The planning permission dated 9 March 2016 was subject to a number of conditions requiring the approval of reserved matters including materials, boundary treatment, car parking and vehicular turning details, a construction method statement, vehicular access, surface water treatment, landscaping and finished ground floor levels. The applicant has not sought approval for any of these reserved matters.

Ground (aa)

13. The principal tests under ground (aa) are contained in section 84(1A) and are conveniently referred to as the "limited benefit test" and the "public interest test"[1]. The limited benefit test is concerned with whether the restriction, by impeding some reasonable use of the application land, secures to persons entitled to its benefit any practical benefits of substantial value or advantage. It is not necessary for the restriction to secure substantial benefits to *all* of the persons with the benefit of the covenant; it is sufficient to defeat an application under this ground if it does so for any one of them. The public interest test, which is not relied on by the applicant in this instance, asks whether, by impeding some reasonable use of the application land, the restriction is contrary to the public interest.

14. The limited benefit test requires consideration of a number of issues:

(i) Is the proposed use reasonable?

(ii) Does the restriction secure any practical benefits to persons entitled to the benefit of it?

(iii) Are such practical benefits of substantial value or advantage?

(iv) If the practical benefits are not substantial will money be an adequate compensation for any loss or disadvantage suffered by the discharge or modification of the restriction?

Issue (i): Is the proposed use reasonable?

15. Mr Williams said the proposed development was a reasonable user of the land because it had detailed planning permission.

16. Mr Bunten said the proposed user was not reasonable. The fact that it had planning permission was not determinative of the issue. The original planning application had been withdrawn in the face of numerous objections and the revised proposal had also been strongly opposed by local residents and also the Town Council. The lack of approval of reserved matters under the planning permission meant that there was no certainty about several key issues when looking at the effect of the proposal on the amenity of the objectors.

17. Mr Bunten relied on *Re Davies' Application* (2008) LP/25/2006 (unreported) in which the Tribunal, Mr N J Rose FRICS, said at paragraph 40 that in the absence of detailed planning permission, there was insufficient information available in that case for the Tribunal to reach a clear conclusion as to the effect of the proposed development on those entitled to the benefit of the restrictions.

[1] See *Winter v Traditional & Contemporary Contracts Limited* [2007] RVR 353, per Carnwath LJ at 355 [6]

18. The Tribunal has long accepted the importance of planning permission when considering whether the proposed user is reasonable. In *Re Bass Limited's Application* (1973) 26 P&CR 156 the Tribunal, J Stuart Daniel QC, said at paragraph 159 that planning permission was "very persuasive in this connexion" although he went onto say:

> "I would not like it to be thought that [this question] could always be concluded in the affirmative by the production of a planning permission …"

19. The reasonableness of the user is to be considered on the assumption that the restriction does not exist (otherwise the question is begged) and only in relation to the application land. I am not concerned about whether the user is reasonable from the viewpoint of the objectors; the effect of the proposed user on them is considered under issues (ii) and (iii).

20. It is not the function of the Tribunal to second guess the decision of the local planning authority even where, as in *Bass*, the Tribunal is surprised at the grant of planning permission. In the present application there were numerous objections to the grant of planning permission for the proposed development, even in its revised (reduced) form, and the fact that no approval has been sought by the applicant for any reserved matters means that many detailed aspects of the proposal remain uncertain. The facts of this case are not the same as those in *Re Laav's Application* [2015] UKUT 0448 (LC), relied on by Mr Williams, where the proposed development would have completed an uninterrupted façade of residential development. The present proposal is for an isolated detached dwelling to be located in the middle of a quiet area used for gardens, backyards and access. It is in a conservation area. But these factors were considered by the local planning authority when determining the planning application and the planning officer found the design of the proposed building to be of "high quality" which could preserve and enhance the conservation area and was otherwise in accordance with the relevant planning policy (which I must take into account under section 84(1B)).

21. Nor is this application similar to *Re Lloyd's Bank Limited's Application* (1978) 35 P&CR 128 where the Tribunal, Mr J D Russell-Davis FRICS, said at 130 that the application failed on ground (aa) because "the applicants have failed to show a definite, or indeed, any project." In the present case the applicant has obtained detailed planning permission and the basic parameters of the proposed development are established, e.g. its size, height, location and layout of the accommodation, including the position of the garage and the vehicular access.

22. The Tribunal has not always found it necessary for an applicant to have full planning permission including the approval of reserved matters in order to establish some reasonable user of the application land. In *Re Nichols' Application* [1997] 1 EGLR 144, where the application was allowed under ground (aa), the revised proposal was for the modification of a covenant to permit the erection of a detached bungalow and garage subject to conditions regulating height, siting, overlooking and landscaping. But planning permission for the revised proposal had not been granted (or applied for) at the time of the hearing.

23. On balance, and with some reservations, I find that the proposed development is a reasonable use of the application land. There is no dispute that the restriction impedes this use.

Issue (ii): Does the restriction secure any practical benefits?

24. Mr Williams thought the restriction, by impeding a reasonable user, did not secure any practical benefits to Ms Skentelbery but did secure such benefits to Mr and Mrs Kitcatt and to Mr Bunten and Ms Moss.

25. Mr Williams said that Ms Skentelbery had a very restricted view of part of the application land from the first floor of 1 Leazes Terrace. Her dominant view from that window was to the north towards Burland Villas. She could not see the application land at all from ground floor level nor would she see the development as she walked down the cobbled lane to the rear of her house since it would be screened by the existing boundary wall which would be retained.

26. Mr Toes gave expert evidence for the applicant and said there would be a minor loss of amenity to the objectors (including Ms Skentelbery) because the proposed development would be slightly visible from their properties, particularly from first floor level.

27. Ms Skentelbery emphasised that the application land was and always had been a garden area and should remain so. The proposal if allowed would mean the permanent loss of open land in a conservation area. She appreciated the openness of the site, its wildlife and trees. Ms Skentelbery was concerned the noise from the proposed development would disturb her use and enjoyment of her backyard and her bedroom at the rear of the house. She acknowledged that she could not see the application land from the ground floor of her house or her backyard and only had a limited view of it from the first floor. Ms Skentelbery was also concerned about the difficulties likely to be caused by construction traffic during the construction period and resulting congestion to an already busy street.

28. I agree with Mr Williams that the restriction does not secure practical benefits to Ms Skentelbery. There is no direct view of the application land from the first floor of her property. Any such view is oblique and marginal and contrasts with the outlook from the first floor windows of 1 and 2 Burland Villas which face directly towards the application land. Ms Skentelbery accepts that she cannot see the application land from her ground floor or backyard. I am not persuaded that she would be materially affected by any occupational or traffic noise from the proposed development.

29. Ms Skentelbery also referred to the enjoyment she derived from the views across the application land when walking her dog and her appreciation of the diversity of wildlife she said was to be found there. But that, in so far as it is a practical benefit at all, is not one which is secured to Ms Skentelbery through her ownership of the land which has the benefit of the covenant (1 Leazes Terrace).

30. Mr Bunten referred to *Gilbert v Spoor* [1983] 1 Ch 27 in which Eveleigh LJ held that the phrase "any practical benefits of substantial value or advantage" was wide and continued at 33B:

> "An estate can easily loose its character when buildings obstruct the views. It seems to me to be perfectly reasonable to say that the loss of a view just around the corner from the [benefited] land may have an adverse effect upon the land itself for the loss of the view could prove detrimental to the estate as a whole."

Unlike the present application *Gilbert v Spoor* concerned a building scheme of reciprocal rights and obligations amounting to local law. The existence of such a building scheme is something to which the Tribunal will give weight.

31. Ms Skentelbery also said she was concerned about increased on-street parking arising from the proposed development since she had no off-street parking. But I accept Mr Williams' argument that the proposed development will have off-street parking for two vehicles and that any increase in on-street parking, for instance for visitors, would not be material.

Issue (iii): Are such practical benefits of substantial value or advantage?

32. Both Mr Williams and Mr Toes said that the practical benefits were not of substantial value or advantage to the beneficiaries of the restriction.

33. Mr Williams referred to the planning officer's report to committee about the proposed development which concluded at paragraph 8.2:

> "The proposals could achieve an acceptable and sustainable form of development in a suitable location that would deliver new housing well related to existing development in the locality. The proposed development is not considered to result in any significant or unacceptable impacts upon the character and appearance of the site, immediate locality or the wider Conservation Area, or the amenity of adjoining residents and land uses. In this respect, the principle of the development fully complies with the objectives of NPPF and relevant policies of the Tynedale Core Strategy and Tynedale District Local Plan."

34. The current proposal, for which planning permission had been obtained, reflected a response to objections against a previous planning application for a three-bedroom, two-storey house made by Mr Williams in April 2015. That application had been withdrawn in June 2015. The latest proposal was for a reduced scale of dwelling that had been carefully designed to minimise the impact on neighbouring properties. The planning officer's report acknowledged this at paragraph 7.9:

> "The building has been carefully designed to be sited at an angle within the plot to negate any potential amenity issues with neighbouring properties."

35. One of the beneficiaries of the covenant, Mr Simpson of 2 Burland Villas, had not objected to the application. Mr and Mrs Kitcatt's property at 1 Burland Villas was separated from the application land by Mr Bunten's garden and they would only see the roof of the proposed dwelling from ground level. It would be possible to see the chalet bungalow from the first floor

windows of 1 Burland Villas but it was shielded by the mature apple trees which Mr Williams said he intended to keep.

36. Mr Williams said that the proposed development would be located on the lowest part of the application land and would not overlook Mr Bunten's garden given the presence of a 2 metre high close boarded fence. The development had been carefully designed to avoid overlooking and the upstairs accommodation faced north east with only high level Velux bedroom windows at the rear with a dormer window to the landing. Mr Williams offered to install obscure glazing if this would be more acceptable. The car parking and turning area would be at the front of the house, away from Mr Bunten and shielded from him by the detached garage. The rear garden of the proposed development would separate Mr Bunten's property from the new building. Mr Williams acknowledged a certain amount of noise would be associated with the use of the new dwelling but he felt this had been overstated. The mere existence of the proposed dwelling would not necessarily cause a loss. Mr Williams relied on *Re Laav's Application* at 82:

> "Nor do I accept that the restrictions secure as a practical benefit the prevention of an increase in domestic activity on the application land. This is already a developed residential area and the addition of a further house to the rear and side of No.148 in accordance with the general layout of the neighbourhood will not make a material difference."

37. The north west perimeter wall would be removed to gain vehicular access. Heavy construction machinery would not be required and levelling of the site would not be necessary to gain access. No access would be required from the cobbled lane to the rear of Leazes Terrace. The lane to the rear of Windsor Terrace was already used by several properties for vehicular access, including the garage immediately north of the application land and the bed and breakfast business at Burncrest House, 3 Burland Terrace which had off-street parking for three vehicles with the entrance onto the rear lane.

38. Mr Williams acknowledged that on-street car parking could be difficult and that Leazes Terrace was particularly busy at school times but he said the situation would not be exacerbated by the proposed development since it provided off-street parking.

39. Mr Bunten said the lack of approval for reserved matters under the planning permission meant there was no clarity about several matters that were key to determining the effect of the proposal on the amenity of the objectors. He relied on *Re Perkins' Application* [2011] UKUT 219 (LC) where the Tribunal identified the facts of the case as being exceptional in terms of potential disturbance during the construction period and which justified giving special weight to that factor. Mr Bunten submitted the likely problems of constructing the proposed development in this application should command similar weight.

40. Mr Bunten said the application land had a boundary of over 60ft with his garden and the proposed development would have a serious impact upon its use and enjoyment as a respite and relief "from the busy world outside". He emphasised the difference between the very busy road in front of his house and the peace and quiet that he enjoyed when in his garden to the rear. He

considered the proposed development would obliterate the feeling of space and openness that currently existed. There would be new traffic noise at the rear of the property and occupational disturbance in what was currently a delightful retreat. Money would not be an adequate compensation for the loss of the amenity arising from the proposed development.

41. Mr Bunten was concerned about the effect of the completed development and also the problems likely to be caused during the construction phase. The application land was a constrained site with vehicular access from a busy road that already had problems with parking and where there had been accidents involving buses trying to manoeuvre past other vehicles. These problems were exacerbated by the Methodist Hall opposite Leazes Terrace and the presence of a bus stop opposite the access lane to the rear of Windsor Terrace.

42. Mr and Mrs Kitcatt did not attend the hearing and were not represented. In their witness statement they said the restrictive covenant protected an established garden area which had poor access for residential development. The application land provided a buffer between the houses and allowed for privacy and quiet enjoyment of existing gardens. The proposed development would overlook 1 Burland Villas and would be much closer than the houses in Windsor Terrace. The proposal would adversely effect the enjoyment of their garden and would mean the loss of privacy, amenity and view.

43. I deal firstly with Mr Bunten's argument that there are special circumstances in the present application that justify giving weight to the disruption likely to be caused during the construction period. Mr Bunten relied upon *Re Perkins' Application* where the Tribunal considered *Shephard v Turner* [2006] 2 P&CR 28 in which Carnwath LJ said at 629 [58] that although the general purpose of the policy behind ground (aa) was to facilitate the development and use of land in the public interest and that the primary consideration was the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherit in any ordinary construction project:

> "There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."

44. The exceptional facts identified by the Tribunal in *Re Perkins' Application* were concerned with the impact of delivery and contractors' vehicles on the use of the access road to the site. The decision was successfully appealed; see *Perkins v McIver* [2012] EWCA Civ 735. The Court of Appeal held that the Tribunal had started its analysis in the wrong place, having overlooked the fact that the restriction was against the construction of more than one dwellinghouse and that it anticipated there would be *some* residential development. The relevant transfer gave specific rights of way over the access road "at all times and for all purposes".

45. Unlike *Perkins* the restriction in the present application impedes the development of anything other than a garage, greenhouse or summerhouse. The restriction did not anticipate that *any* dwellinghouse would be constructed on the application land and therefore there was no expectation of construction traffic or construction disturbance of a type and degree commensurate with the building of a residential property.

46. The planning officer's report says the council's highways officer assessed the impact of the proposed development on the highway network both during construction and once the development was completed. The highways officer found the proposed access to be acceptable in highway safety terms and said the parking provision and turning area could be accommodated within the site, subject to relevant conditions. The proposed access was said to be similar to that of the existing garages to the north while the provision for refuse collection and emergency access would be no different to that for the existing houses and which was an acceptable arrangement.

47. This is a constrained site where construction traffic would either have to use the narrow lane behind Windsor Terrace, park on-street in Leazes Terrace or use (if possible) the cobbled pedestrian lane adjoining 6 Leazes Terrace. The details of how the proposed development would be constructed are not known since Mr Williams has not yet applied for approval of a construction method statement under condition 7 of the planning permission. I anticipate that some aspects of this statement may prove problematic but I am not satisfied that any such problems would be such as to justify giving special weight to this factor.

48. Turning to the practical benefits secured to the owners of 1 and 2 Burland Villas, I think the view from the first floor is masked to an extent by the apple trees on the application land and which Mr Williams says he intends to retain and by Mr Bunten's garden and the fences which lie between Burland Villas and the application land. The existing view from Burland Villas is towards the rear of the properties in Windsor Terrace and in my opinion it will not be materially affected by the proposed development. I do not consider the restriction secures a substantial practical benefit by protecting the view from the rear of Burland Villas.

49. The remaining practical benefit relates to the use of the gardens at Burland Villas and, in particular, the area of garden owned by Mr Bunten adjoining the application land to the east. Mr Bunten's garden has a boundary of over 60ft with the application land and a depth of approximately 50ft. The garden is established and well tended. It includes the area of land which is the subject of a vendor's covenant under the 1939 conveyance:

> "that no building or other erection (other than a greenhouse, garage or summerhouse to be used in conjunction with a private dwelling house only) shall be erected or built within 12 yards of the boundary between the land hereby conveyed and the said adjoining property of the Vendors."

The land subject to this covenant is the entirety of the land which had the benefit of the purchaser's covenant which Mr Williams is seeking to discharge. So the purchaser and vendor under the 1939 Conveyance made mutual covenants to limit any development of the identified parcels of land to uses ancillary to a dwellinghouse. This is consistent with Mr Bunten's assessment of the original purpose of the covenant as being to keep the application land as undeveloped garden land. The restriction still fulfils its original purpose and the application is not made under ground (a), i.e. that it is obsolete.

50. Although Mr Bunten's garden is close to Burland Villas and 4 Leazes Terrace I accept Mr Bunten's description of it as being quiet and peaceful and as having a feeling of space and

openness. The open and undeveloped character of the application land contributes significantly to these characteristics. In my opinion the construction of the proposed chalet bungalow some 8.5 metres (9 yards) to the west of Mr Bunten's garden boundary would have a significant impact upon the setting and ambience of Mr Bunten's garden and his enjoyment of it. The vendor's covenant in the 1939 conveyance required there to be no residential development within 12 yards of the boundary of the application land, presumably to protect the amenity of the application land for garden use. The proposed development would be well within that distance from Mr Bunten's garden.

51. The proposed chalet bungalow is backland development located in an area otherwise used as gardens, backyards and ancillary residential accommodation such as garages and sheds. There are no other dwellings in the area enclosed by Windsor Terrace, Leazes Terrace and Burland Terrace. I accept that Mr Williams has done his best to minimise the impact of the proposed development on the surrounding properties but it is nevertheless an intrusion into an undeveloped part of this residential area and one which was strongly opposed by local residents. Moreover the local planning authority seems keen to ensure that the new building should contrast with its traditional brick built neighbours. The planning officer's report states at paragraph 7.9:

> "The modern appearance of the building is one of the main reasons for objection to the proposals, as it is considered that this will be out of keeping with the traditional character of the Conservation Area. It is not disputed that the new building would be a contrast to the surrounding area, which is characterised by brick terraces. However, it is considered that a modern approach to the new building is much preferable to a pastiche of a more traditional building. To try and copy the surrounding terraces would be impossible on this site and the incorrect approach in this instance… The building will be of its time, and provide a complementary contrast to the more traditional neighbouring buildings."

52. In short the local planning authority wants the proposed development "to make a statement" and in so doing it does not consider that the amenity of its neighbours would be adversely affected. But the Tribunal's jurisdiction does not mirror that of the local planning authority and the Tribunal's consideration of amenity is to be made within the statutory context of ground (aa). By impeding the proposed development the restriction secures the practical benefit to Mr Bunten of a peaceful back garden within a built-up area. Mr Williams accepts as much. The question is whether that practical benefit is substantial, which means "considerable, solid, big" per Carnwath LJ in *Shephard* at 621[23]. In my opinion it is a practical benefit of substantial advantage. The development of the proposed chalet bungalow so close to, and directly overlooking, Mr Bunten's boundary would completely alter the setting and ambience of Mr Bunten's garden and his enjoyment of it. I have taken into account the existing fence and apple trees but I am not persuaded that they, or the careful design of the proposed building, will sufficiently ameliorate the presence of a new and deliberately distinctive dwelling and its associated occupational disturbance.

53. The applicant has therefore failed to establish ground (aa) in respect of Mr Bunten and Ms Moss. That being so it follows that the application on ground (c) must also fail since there would be injury to them.

Issue (iv): If the practical benefits are not substantial will money be an adequate compensation for any loss or disadvantage suffered by the discharge or modification of the restriction?

54. Since I have found that the restriction secures practical benefits of substantial advantage to Mr Bunten and Ms Moss the question of compensation does not arise and it is therefore not necessary for me to consider Mr Toes' valuation evidence.

55. But it is important that I highlight one significant problem with such evidence. Mr Toes adopted the negotiated share of development value approach to the assessment of compensation. In doing so he reviewed a number of relevant authorities but did not cite, and acknowledged that he was unaware of, *Winter v Traditional and Contemporary Contracts Limited* [2007] RVR 353. That decision considered all the authorities relied on by Mr Toes and his ignorance of it meant that he was unaware of the important guidance it contains, particularly the Court of Appeal's view that there is no established practice of awarding a share of development value, although it remains a possible approach in circumstances where a simple estimate of the diminution in the value of the objectors' properties is unlikely to be a fair reflection of their subjective loss. Had it been necessary for me to do so I would have rejected Mr Toes' reliance on the negotiated share approach since a simple estimate of the diminution in the value of the objectors' properties was possible and to be preferred in this case.

56. It is usual in cases before the Tribunal for valuation experts to be guided on legal issues by either the party's solicitor or by counsel. In this application all the parties were litigants in person and none of them had any legal representation. In those circumstances it is particularly important that a valuation expert does not err by inadvertently straying outside the area of his expertise and basing his evidence on an incomplete and inaccurate knowledge and understanding of the law.

Determination

57. I am not satisfied that grounds (aa) or (c) have been established and the application is therefore refused.

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

Dated: 23 August 2017

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)