IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 16 (LC)
Case No: LP/40/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – garden land with extant planning consent for one additional dwelling, and with a positive pre-planning assessment regarding a second – restriction preventing any further development – whether restriction obsolete – whether it secures substantial practical benefits – whether proposed development will cause injury to objectors - Law of Property Act 1925, section 84(1)(a), (aa) and (c) - application granted

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

BETWEEN:

(1) SUSAN HANCOCK **Applicants**
(2) STEPHEN HANCOCK

- and -

(1) KENNETH HAROLD SCOTT and OTHERS

(2) THE ENGLISH COURTYARD ASSOCIATION LIMITED

Respondents

Re: Brindles, Kidmore End Road, Emmer Green, Reading RG4 8SH

Hearing dates: 29 & 30 October 2018

Before: Paul Francis FRICS

Royal Courts of Justice, London WC2A 2LL

Andrew Sheriff instructed by Parkinson-Woollatt, solicitors, for the applicants
Andrew Francis instructed by Hedges Law, solicitors, for the 1st respondent
The remaining respondents, listed below, were not represented.

The following cases are referred to in this Decision:

Re Bass Limited's Application (1973) 26 P & CR 156
Re Truman Hanbury Buxton & Co Ltd's Application [1956] 1 QB 261
Re Marcello Developments Application [2002] RVR 146
Re Vertical Properties Ltd's Application [2010] UKUT 51 (LC)
Zenios v Hampstead Garden Suburb Trust Ltd [2011] EWCA Civ 1645.
Crest Nicholson v McAllister [2004] EWHC Civ 410
Gilbert v Spoor [1983] Ch 27
Broadway Homes (Cambridge Ltd) v Marshall & Others [2018] UKUT 264 (LC)
Shephard v Turner [2006] P & CR 28, [2006] EWCA Civ 8
Re Snaith and Golding's Application [1995] 71 P & CR 104
Re Perkins v McIver [2002] EWCA Civ 735

DECISION

Introduction

1. This is an application, filed on 6 November 2017, under grounds (a), (aa) and (c) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act") by Susan Hancock and her brother, Stephen Hancock ("the applicants"), for the modification of a restrictive covenant currently burdening land at Brindles, Kidmore End Road, Emmer Green, Reading RG4 8SH. The applicants are the freehold proprietors of Brindles (registered at the Land Registry under Title number BK84649 and a further parcel of land adjoining and lying immediately to the west of Brindles (of which it previously formed part and continues to be used as part of Brindles' garden but which is now registered at the Land Registry under Title number BK451271).

2. The application, if granted, would allow a proposed development of two residential dwellings on the gardens to the west of the existing house with vehicular access obtained to the rear over an extension to the existing driveway. Plot 1, furthest to the west, on the land now in Title No. BK451271, has the benefit of full planning permission (subject to conditions) for a detached four bedroom, two-storey house with attached double garage, granted by Reading Borough Council on 30 October 2008 (Application No: 08/00161/FUL). It is acknowledged by the Council that works undertaken to create the footings of the dwelling constitute commencement, and the permission therefore remains extant despite no further construction having occurred. Plot 2, which would lie between Brindles and the consented plot is intended to be identical in design. A planning application has yet to be submitted, but in response to a formal enquiry made in July 2017 by M D Howlett and Associates Ltd, Architects for the applicants, the Council concluded in a Pre-Application Response (171125/Preapp) dated 15 August 2017 on a without prejudice basis (whatever that may mean in this context) that "On the basis of the information submitted, a dwelling in the location proposed is likely to be considered to be acceptable in principle" subject to comments set out in the preceding text. Together, the two proposed plots constitute the application land.

3. The restriction, the subject of this application (and which appears in the Schedule of restrictive covenants on both titles), is contained at paragraph 2 of the Second Schedule to a Deed dated 24 March 1947 made between (1) The Church of England Children's Society, (2) George Richard Mager (3) Thomas Douglas Sellman. It reads:

> "That no building or other erection of any kind other than two private detached dwelling houses or professional residences of Doctors, Architects or Surveyors with the usual outbuildings shall be built on the […]land coloured red on the […] plan and that no person using any dwellinghouse for his profession of a medical man shall be allowed to have patients to reside on the premises or use the same for the business of a Veterinary Surgeon"

4. It will be helpful, and indeed in my view necessary, to an understanding of the application and the nature of the objections if the historical background is set out in some detail. This

information follows under 'Facts' below. A site plan is also attached for reference at Appendix 1.

5. The benefit of the covenant attaches to Lyefield Court, Kidmore End Road, Emmer Green, the freehold title in which is registered to English Courtyard Association Ltd ("ECA") under Title No. BK182369. Lyefield Court is a retirement complex of 31 residential units, each with a garage, held on long leases (150 years) and was constructed between 1982 and 1983 on land which was formerly occupied by St Benet's Boys' School. It lies immediately to the east of the application land which has vehicular and pedestrian rights to pass and repass at all times over Lyefield Court's access off Kidmore End Road.

6. Adjacent to, and accessed via Lyefield Court, is another retirement complex known as The Conifers comprising nine residential units and garages built in 2005 on the site of a property formerly known as Cedarcot and which was also a part of the burdened land under the 1947 deed. It is agreed that The Conifers, which is registered under Title No: BK397162, does not have the benefit of the restriction and its site is immediately south of and adjoining the application land.

7. The respondents (objectors) are:

(01) Kenneth Harold Scott, long-lessee of 14 Lyefield Court, Kidmore End Road, Emmer Green RG4 8AP

(02) The English Courtyard Association Limited, Pipe House, Lupton Road, Wallingford, Oxon OX10 9BS, reversionary freeholder owner of Lyefield Court

(03) Clyde & Maureen Garrett, 8 Lyefield Court

(04) Bernard & Marion Stratford-Way, 4 Lyefield Court

(05) Phyllis Beryl Clinton, 2 Lyefield Court

(09) Barbara Eileen Tee, 32 Lyefield Court

(10) Sheilah Higginson, 9 Lyefield Court

(11) Gwenyth Joan Higgins, 5 Lyefield Court

(12) Sadie Smith, 10 Lyefield Court

(13) Dorothy Colverson, 11 Lyefield Court*

(14) Ann Norma Pickard, 16 Lyefield Court*

* Despite the Tribunal's file having recorded that Mrs Cooke and Mrs Colverson had withdrawn their objections, letters from each of them dated 26 and 27 October 2018 respectively were presented at the hearing confirming that they remained as objectors.

8. Mr Andrew Sheriff of counsel appeared for the applicants and called Miss Susan Hancock who had prepared a comprehensive witness statement and a short supplementary

statement on behalf of herself and her brother. Mr Richard Adrian Jones FRICS, Chartered Surveyor, was called to give expert evidence. Subsequent to the hearing, the Tribunal was saddened to learn of the unfortunate and untimely death of Mr Sheriff which occurred over Christmas 2018, prior to the publication of this decision.

9. Mr Andrew Francis of counsel appeared for the second objector, and called Mr John Lavin, Managing Director and Mrs Susan Moira Wills, Estate Manager of ECA who each gave evidence of fact, and Mr Ruaraidh Adams-Cairns BSc (Est Man) FRICS who gave expert evidence.

10. Of the remaining objectors, Mrs Higginson and Mrs Higgins appeared for themselves.

11. I made an accompanied inspection of Brindles, the application land, Lyefield Court, The Conifers and the immediate environs on 24 October 2018.

Facts

12. Brindles is an imposing detached two-storey dwelling house constructed in about 1947 of traditional materials and is located in Emmer Green, some 3 miles to the north of Reading. It is approached off Kidmore End Road via a short section of adopted road serving Bell Court, a small modern (2001) development of 7 terraced houses, and thence a private driveway owned and maintained by ECA serving Lyefield Court and The Conifers (see below). Brindles' house is situated at the eastern end of a large plot and has extensive gardens and some outbuildings to the west (including the land in Title No: BK451271). Together the house and gardens currently extend to about 0.556ha (1.37 acres). The two plots constituting the application land extend to approximately three quarters of an acre.

13. With Brindles' house facing generally north-north west, its east flank and the eastern boundary of its rear garden abut the southern wing of Lyefield Court. The rear, southern boundary of Brindles' immediate rear garden and the application land abut the land occupied by The Conifers. Views of both those properties are obscured by substantial boundary hedging. The whole of the northern boundary of Brindles and the application land faces onto Reading Golf Course and includes a private gate giving pedestrian access onto it. The western boundary of the application land is adjacent to Emmer Green Primary School and its playing fields.

14. The wider area, which is on the northernmost fringe of the Reading conurbation, includes a recreation ground and children's play area fronting Kidmore End Road south of the Bell Court development with terraces of Victorian cottages on the opposite side of the road, and more modern residential developments in St Benet's Way and Chalgrove Way almost opposite the entrance to the application land. Local shops and other facilities are nearby and there is a large area of allotment gardens to the west of the recreation ground along Grove Road which itself runs into Kidmore End Road.

15. The historical background to the 1947 restriction, the subject of this application, and what has happened since are important to a consideration of the issues and arguments before me. Prior to 1921, what is now the application land formed part of a parcel of agricultural land extending to some 2.25ha (5.577 acres) owned by the Church of England Incorporated Society for Providing Homes for Waifs and Strays "CEIS", upon which it constructed St Benet's Home for Boys. That home opened in 1905.

16. By conveyances in 1921, CEIS sold off two parcels from the original 5.577-acre site:

a) On 22 November 1921 what now comprises Brindles and the application land together with the land now occupied by The Conifers retirement complex lying immediately south of it was conveyed to one F H Mager. That land lies to the west of the Boys' School and the conveyance included the grant of a right of way in favour of the conveyed land over the retained land (what is now Lyefield Court) to the main highway together with certain restrictive covenants that were superseded by the 1947 Deed (below). That area of land extended to 0.88 ha (2.183 acres)

b) The land which became known as Bell's Yard adjoining Kidmore End Road was conveyed to the Bell family on 25 October 1921. The transfer retained a right of way at all times and for all purposes to the vendor, CEIS, to allow it access to its retained land (the Boys' Home) from Kidmore End Road. It also included a restriction that precluded any development on the conveyed land other than the erection of "one private dwelling house or professional residence with the usual lodges, stables, coach houses or motor garage…". That land extended to about 0.38 ha (0.935 acre)

The remainder, including the Boys' Home was retained.

17. On 24 March 1947, CEIS which, by then, had changed its name to The Church of England Children's Society ("the Society"), G R Mager (the successor in title to F H Mager) and his mortgagee, T D Sellman, entered into a Deed ("the 1947 Deed") by which existing covenants imposed on the land described in paragraph 16(a) above by the 1921 conveyance were released and replaced with new covenants. These new covenants included the restriction that is now the subject of this application. Then, on 19 June 1947, G R Mager and T D Sellman sold the parcel of land that now comprises The Conifers (Title No. BK397162) to Hoyland Petts ("the 1947 conveyance").

18. In 1980, the Boys' School was closed. The land it occupied, which was all the land that had been retained by the Society, was then sold to Geometer Developments Ltd which later became English Courtyard Developments ("ECD"). This land became Title No. BK182369. ECD then demolished the Boys' Home and this part of the site was developed into 32 retirement cottages and flats (including the Estate Managers' flat and a flat for the use of visitors) with garages, communal courtyards, gardens and grounds now known as Lyefield Court. The access track that led to the Boys' Home and now leads to the application land and The Conifers now consists of a properly tarmacadamed surface.

19. Having purchased the land for the construction of Lyefield Court in 1980, Geometer Developments entered into a Deed dated 24 December 1982 ("the 1982 Deed") with Henry Bell by which Mr Bell granted them a wider right of way over Bell Yard together with the right to lay pipes and services to serve the proposed Lyefield Court development in return for the sum of £20,000 and release from the restriction that prevented the development of more than one house on his land. Mr Bell later sold his land to Elegant Homes (Reading) Ltd who built a small cul-de-sac development of 7 houses and garages now known as Bell Court.

20. The freehold title to Lyefield Court was, on completion and sale of the last unit, later transferred from ECD to ECA which acts as a not-for-profit management company for the development. It is responsible, amongst other things, for the upkeep and maintenance of Lyefield Court.

21. On 19 March 2007, ECA entered into a Deed of Grant ("the 2007 Deed") for a consideration of £1.00 with the then owner of what was to become The Conifers, ECD. Clause 2.2 of that Deed granted a right of way:

> "To pass and repass across the drives, accesses and common circulation areas (including the Works once constructed) to gain access to the Grantee's Land and the highway known as Kidmore End Road for all purposes in connection with the construction of the scheme of residential development on the Grantee's Land authorised by the Planning Permission and for the purpose of access to and egress from the New Dwellings."

Thus, access to both Brindles and The Conifers is over the roadway serving Lyefield Court.

22. The Conifers, following its completion in 2011, was also transferred to ECA. As has been explained, The Conifers was built on land which was burdened by the restriction in the 1947 Deed, the subject of this application. With Brindles and the nine dwellings now on The Conifers therefore, there are now 10 dwellings on what was the original burdened land which restricted the number of dwellings to two. Thus, assuming it could still be enforced, the restriction prevents the construction of any further dwellings on the application land.

Issue(s)

23. The applicants rely on grounds (a), (aa) and (c) of section 84(1) of the 1925 Act. They argue that due to the significant changes that have occurred to the character of the area the restriction should be deemed obsolete and that, therefore, ground (a) is satisfied. Further, or in the alternative, ground (aa) is said to be satisfied because the proposed use of the land is reasonable and the continuance of the restriction impedes that use; there will be no detrimental effect upon value, enjoyment or amenity for the objectors' properties; nor does the restriction secure to them any practical benefits of substantial value or advantage; the proposed development is also not contrary to the public interest. Ground (c) is said to be satisfied because the proposals will not cause any injury.

24. I propose to consider the evidence and arguments under each of the grounds relied upon in turn.

Statutory provisions

25. Section 84(1), (1A), (1B) and (1C) of the Law of Property Act 1925 reads as follows:

> "The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—
>
> > (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or
> >
> > (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes . . . or, as the case may be, would unless modified so impede such user; or
> >
> > (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, … have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified…; or
> >
> > (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
>
> > (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
> >
> > (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> (1A) 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.

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

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

Ground (a) – is the restriction obsolete?

Applicants' case

26. Miss Hancock and her brother own the freehold interest in Brindles and approximately 50% of the garden to the west under Title No: BK84649 as joint tenants. That land was gifted to them by their father, Peter, in 2016 when he bought and moved into one of the units on Lyefield Court following the death of their mother. The rest of the garden (Title No: BK 451271) ("the adjoining land") had already been gifted to them in August 2012) to allow their parents to remain in the house for the remainder of their mother's life and to release them from the stress associated with the potential disposal of the application land.

27. Brindles had been purchased by Miss Hancock's parents as the family home in 1969, when she was 9 years old; she had grown up there before leaving to live locally. During this time, and ever since, she has been a frequent visitor and still stays at Brindles on a regular basis. She has almost 50 years' experience of the property and in her view the locality has changed significantly. When she lived there as a child it was quiet and peaceful, with little traffic and no development within the immediate vicinity. What is now The Conifers was a single, privately owned 'Hansel and Gretel' like cottage known as Cedarcot; Lyefield and Bell Court did not exist and with the golf course to the north and the allotments and recreation ground to the south and west, the whole ambience was very different to what it is now. With Lyefield Court and The Conifers comprising between them some 40 units of accommodation, along with the seven units at Bell Court, there is now considerable traffic on the access lane which has been widened and made up by ECA to accommodate the extra usage. There is now accommodation for 48 vehicles on the Lyefield/Conifers developments. Whilst acknowledging that small properties occupied by couples or single persons would be expected to create less traffic and noise than larger family houses, she pointed out that it was not just residents' cars, but service, contractors and delivery vehicles, comings and goings by carers, medical staff and

others that all add up to considerable extra traffic giving the feel of a much more urbanised environment.

28. When she was a child, all that was immediately adjacent to Brindles was the Boys' School, set in about 2.5 acres, Cedarcot and Emmer Green Primary School, the buildings of which have now been extended to provide further classrooms nearer the application land. Kidmore End Road has also been subject to residential development and all in all therefore, it was her view that the whole nature of the area has changed beyond recognition. The golf course, school playing fields and allotments still exist nearby, but the immediate vicinity of the application land has been the subject of extensive modern development. Whilst the neighbourhood was unquestionably semi-rural in 1947 when the restriction was applied, and the inner gardens and courtyards of Lyefield Court today appear relatively peaceful, the area surrounding, and the access road/parking areas create much more disturbance than would hitherto have been the case. Miss Hancock suggested that the restriction, which she believed was to limit development on the Boys' School site as it was in 1947, is clearly now obsolete. With Lyefield having been built, along with Bell Court and The Conifers (with the consent and acquiescence of the owners of Lyefield Court) the area can only realistically now be described as suburban.

29. Miss Hancock acknowledged that the creation of two large family houses on the application land will inevitably add to the amount of traffic using the access road and passing Lyefield Court but anticipated daily vehicle movements would add little to the existing traffic flow. She did not agree with the suggestion by Mr Lavin that noise from children playing in the gardens would create an unacceptable level of disturbance to the residents of Lyefield Court. It should be remembered, she said, that immediately adjacent to The Conifers is a children's playground which would create far more noise and disturbance than any occasional noise from the new houses which will in any event be shielded from the benefitted land at Lyefield Court by the existing house (Brindles) and the high hedges between the application land and The Conifers.

30. Miss Hancock also provided a comprehensive resumé of the contact which first her parents and then she and her brother have had with ECA. In 1998, the family approached ECA to see if they would agree to release the restriction to enable them to build a house in Brindles' garden for their mother. Miss Hancock and her father met with Mr Charles Clayton of ECA on 27 November 1998. He seemed receptive to their request and confirmed by letter of 23 June 1999 that ECA was agreeable, and solicitors would accordingly be instructed to prepare a draft Deed of Release. Negotiations were, to say the least, spasmodic but eventually they received, in September 2001, an engrossed Deed for her parents to sign, which was duly executed and promptly returned to ECA's solicitors. Nevertheless, despite regular chasing on the Hancocks' part, the matter was never finalised.

31. Miss Hancock went on to explain the discussions that took place with ECD over its purchase of Cedarcot and its the proposal to develop The Conifers. Construction commenced in March 2007 and the project was completed in 2010 by Beechcroft Developments Ltd which is associated with ECA's present holding company, Cognatum.

32. ECA had, on 26 June 2007, entered into the Deed granting ECD permission to undertake the Conifers development, gain access over Lyefield Court, lay services through it and effect improvements to the driveway and parking arrangements. The Deed, allowing 9 dwellings in accordance with the planning consent, was executed notwithstanding the terms of the restriction that is now the subject of this application. Miss Hancock pointed out that, when the development was complete, all of the land originally owned by The Church of England Children's Society had been developed with the agreement of ECA except the application land.

33. It is Miss Hancock's view that ECA wishes to develop the application land, and that their objection to the application is to force a sale at a reduced price. ECA has, at various times over the past 12 years, expressed an interest in Brindles either to erect 4 detached family homes, or to provide an extension to Lyefield Court, leaving the adjoining land which now has planning consent as the site for one detached house for Mr & Miss Hancock.

34. Miss Hancock's witness statement set out in considerable detail the discussions that had ensued with ECA and associated companies within the Cognatum/Beechcroft group. The evidence was backed up by extensive correspondence which suggested that ECA was receptive to pursuing an option agreement "at an agreed price" but considered that the valuation that the family had received was far too high.

35. It was put to Miss Hancock that the applicants had themselves engaged developers (Elegant Homes) who had produced a plan showing a development of seven houses on the garden to the west of Brindles and the 'additional land'. She acknowledged that this was a route which had been considered, but that it had not been necessary, and they would be quite satisfied with the proposal that was before the Tribunal; there is already planning consent for one house and a positive indication from the planners for a second, whereas the Elegant Homes proposal carried much greater planning risk. Further, Brindles would remain and, in her view selling the house for development of its plot alone would not be economically viable.

36. Mr Adrian Jones, who is a Chartered Surveyor specialising in restrictive covenant matters, considered that the 'neighbourhood' relevant for ground (a) was somewhat wider than that suggested by Mr Adams-Cairns and should in his view include Bell Court, the golf course, recreation ground, the allotments and Kidmore End Road as far as its junction with Grove Road, Grove Road itself, Chalgrove Way, Emmer Green Primary School, School Lane, Unity Close, Grove Mews, Oak Grove and St Benets Way.

37. In addition to the ECA developments, the Primary School had been built and further extended since 1947, part of the recreation ground is now the school playground and playing fields which are adjacent to the application land and The Conifers, and there have been residential developments in St Benets Way and the other roads he said should be included. There had also been sporadic developments in Kidmore End Road and Grove Road.

Objectors' case

38. Mr John Lavin is managing director of the second objector, The English Courtyard Association Ltd, which he explained is a not-for-profit company and owner of 37 private sheltered housing schemes including Lyefield Court and The Conifers. In his witness statement he described ECA's position as "guardian" for the estate and the land enjoying the benefit of the restrictive covenant [Lyefield Court] as reversionary freeholder, landlord and estate management company. The estate management role extends to the maintenance, repair and general upkeep of all the communal areas including the access road, parking areas, gardens, courtyards and amenity buildings together with the external structures of the individual residential units. Further they provide an emergency alarm service and act as 'first responders' should any of the residents activate their alarm.

39. The estate managers are also specifically responsible for monitoring CCTV, ensuring residents and visitors drive and park responsibly and generally providing a safe, secure and tranquil environment for all the occupants.

40. Mr Lavin stressed the importance of being able to monitor comings and goings onto or through the Lyefield Court and The Conifers estate. There is currently only one private house using the drive (Brindles), but if the application succeeds there will be at least two further family houses with the resultant increase in vehicle movements. Family houses have a very different character to retirement homes, and in his view the asynchronistic lifestyles are mutually incompatible. The estate is currently very quiet and private, but the proposed two new family homes so close by would result in noise and disturbance from children playing in their gardens and other factors such as outdoor parties and the like.

41. Mr Lavin said research has confirmed that retirement developments create less residents' vehicle movements than unrestricted sites. At Lyefield Court and The Conifers only 22 of the 40 residents have cars whereas it could be expected that each new property on an unrestricted site would have at least one car. For large family houses that could easily be two or more. Further, the roadway is designed only for light use and increased traffic will ultimately cause damage and potholes. There are no road markings or identified pedestrian crossing points and whilst visitors to the retirement development will normally be aware of the nature of the residents, third-party traffic may not, and this could lead to danger to life.

42. All in all, Mr Lavin regarded the ability to be able to restrict or control usage of the estate driveway as a distinct benefit and the covenant is thus, he said, far from obsolete.

43. Mr Lavin said that ECA and ECD were separate but closely associated companies with shared directors but said that ECA was purely the estate management group and was never involved with the development side – other than at planning stages when its views would be sought on management aspects.

44. Mr Lavin did not agree that visiting doctors, carers, family and friends alongside normal day to day deliveries and service calls meant the Lyefield Court and The Conifers developments already created a large number of vehicle movements. He deferred to Mr Adams-Cairns traffic assessments which reflected the additional use that two new family homes would create. He acknowledged that with the seven houses on Bell Court, which also used the section of drive between Kidmore End Road and Lyefield Court, and with Brindles, there were already some 48 units using the road.

45. As to The Conifers, Mr Lavin accepted that when it granted ECD a right of way to enable that development to proceed there was no evidence to suggest that ECA had concerns over the additional traffic passing Lyefield Court that would be generated. The Design and Impact statement that was lodged with The Conifers' planning application said that: "Traffic generation, as in the existing scheme [Lyefield] is expected to be very low, about 20 vehicle movements per day in total, and impact on existing residents will thus be very low." It was put to him that even with low vehicle usage by elderly residents, the extra traffic accessing The Conifers would be more significant than was to be expected to be generated by just two new houses and that his description of "school runs, an outdoor lifestyle (weather permitting) with the family and children's friends visiting and playing in the garden, pets, bikes and motorbikes, noisy and lively family get togethers" was overstated. Mr Lavin did not agree.

46. Mr Lavin said that ECA would like to buy the application land purely to secure control and prevent any further development occurring. On being reminded of ECD's clear interest in buying the application land for development, he said ECA and ECD were not connected and although it was before his time with ECA, thought it was unlikely they would have been involved. Whilst he acknowledged that Cognatum might be interested in acquiring the land, that would be, he thought, for the purposes of maintaining the restrictions and controlling boundaries. His own position was that as guardian of the interests of the occupiers of Lyefield Court (and The Conifers) he wanted to control the application land for their protection. If the application land were sold for development, ECA would have no control over the comings and goings or extent of use to which the land might be put.

47. Mrs Wills and her husband David are the estate managers for both Lyefield Court and The Conifers. She confirmed that there were 48 residents with an average age of 84 years. 22 residents have cars and there is thus little traffic during the day other than occasional contractors' vehicles, visits by carers (up to four times a day) to six of the properties and ambulances. There is virtually no traffic during the evening or overnight.

48. In response to Mrs Wills' statement, Miss Hancock said she did not agree that Lyefield Court and The Conifers are particularly quiet and relatively traffic free. Parking provision had long been a concern and despite each property having its own garage, further parking provision had to be made during the construction of The Conifers. Her father, who resides in one of the units is extremely active, plays golf, drives and goes out in the evenings. He is typical of many of the occupiers who still enjoy active lifestyles. Indeed, as Mrs Wills makes clear in her statement, only 8 of the residents actually need mobility assistance.

49. Most residents expressed similar concerns principally relating to the potential loss of the current peaceful and tranquil environment, the impact of additional traffic and the loss of control over the road. Some were concerned about the impact of the proposed development upon the values of their own properties, security aspects and the risk of further applications. Several said that in their view the restriction was not obsolete, and whilst the majority did not seek compensation, two of objectors did, although no evidence was provided in support of their demands of £10,000 and £100,000 respectively.

50. Mrs Higgins of No. 5 Lyefield Court said that her safe and tranquil life would be totally destroyed by the increased traffic. She acknowledged that ECA's expert estimated that the increased traffic would be in the region of 10% and agreed that that was not vast. Nevertheless, the additional noise generated by families' cars and their children's motorcycles at all times of the day and night would be an annoyance. She was also concerned that further development would have the effect of decreasing the values of the residents' properties.

51. The concerns of Mrs Higginson of No. 9 Lyefield Court mirrored those expressed by Mrs Higgins and she was also worried that the footpath from Lyefield Court to Kidmore End Road cannot be widened. It is frequently used by the residents, many of whom use mobility scooters, wheelchairs or wheeled walkers. The additional traffic created by the new properties and particularly by heavy construction traffic during the building period would completely change the environment.

52. Mr Ruaraidh Adams-Cairns is a Chartered Surveyor and a director of Savills (UK) Ltd. He specifically addressed the relevant neighbourhood for the purpose of ground (a) and how it has changed since the imposition of the restriction in 1947. He was also asked about the purpose for which the restriction was imposed.

53. He concluded that a prospective purchaser arriving at the application land would regard its neighbourhood as comprising its immediate surroundings - the Lyefield Court/Conifers/Bell Court and Brindles "enclave", together with the wider surroundings including the approach along Kidmore End Road (say 150 yards in each direction from the entrance to the enclave), with the mainly Victorian properties on the opposite side, the Golf Club, recreation ground and allotments. He would not include the Primary School within the relevant area.

54. Mr Adams-Cairns did not agree that in 1947 the area was agricultural, referring to the golf course and St Benets Boys' School. It should more fairly be described as suburban or semi-rural, and such a description applies today. The only real difference now is that the application land is within a residential enclave, but it is still flanked on both sides by open ground used for recreation.

55. He acknowledged that the Emmer Green Primary School was built after the restriction was imposed and has recently been extended bringing the buildings nearer to Brindles and the application land. Nevertheless, what he described as the outer neighbourhood (beyond the enclave) has changed remarkably little, an opinion with which the applicants did not disagree.

56. Mr Adams-Cairns assumed the purpose of the original covenant was to control, for the benefit of St Benets, the extent of development that could occur in the immediate area, restricting it to residential, and to maintain a degree of calm, tranquillity and security appropriate to the Boys' Home. He accepted that the restriction allowed quasi-commercial use of the two residential units (as a doctor's surgery).

Submissions

57. For the objectors, Mr Francis submitted that the restriction served its original purposes of controlling density of housing and preventing over-intensive use of the land. It enabled ECA, as "guardian" of the interests of the residents of Lyefield Court, to maintain calm, tranquillity and safety over the benefitting land and to control traffic volumes.

58. Such material changes as there may have been since 1947 do not prevent the original purposes from being carried out. In *Re Truman Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261 Romer LJ explained, at 272:

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

59. Mr Francis submitted that such changes as have occurred do not mean that the need to protect the ECA land has gone away. Outside the enclave that comprises Lyefield Court, The Conifers and Bell Court, apart from the provision of the primary school to the west of the application land and some modern developments on the other side of Kidmore End Road, the majority of the land remains much the same. The golf course, recreation area and allotments are also much as they were in 1936 (as depicted on a copy OS extract) let alone in 1947.

60. The objector's case was that there are no other circumstances justifying the conclusion that the restriction is obsolete, particularly when one takes into consideration ECA's 'special interest' in maintaining the features of its development, and the special interests of the residents. Authorities suggest that where such interests exist, substantial weight must be attached to the objections of ECA and its lessees – see *Dobbin v Redpath & Anor* [2007] EWCA 570 at para 24 where Collins LJ said:

> "It would be better for the Lands Tribunal to consider the matter in terms of the weight to be attached to objections in the light of the special interest of the beneficiaries of covenants of the building scheme"

And at para 29 when, agreeing with Collins LJ, Carnwath LJ made reference to the fact that the Member had accurately applied the balance required by section 84(1B) in having regard to the

development plan and any ascertainable pattern for the grant of permissions and was entitled to place weight on the fact that the restriction was imposed in the context of a building scheme or 'local law'.

61. Although this was not a building scheme, Mr Francis submitted that it was necessary to have regard to those special interests. This is an unusual case and the circumstances of the special role and responsibilities of ECA bear some resemblance to what are known as the 'Garden Suburb' cases: *Re Vertical Properties Ltd's Application* [2010] UKUT 51 (LC) and *Zenios v Hampstead Garden Suburb Trust Ltd* [2011] EWCA Civ 1645.

62. For the applicants, Mr Sheriff submitted that what constituted the neighbourhood both in 1947 and now is clearly a question of fact. It is centred upon the enclave (about 5.577 acres) that is depicted on the plan that accompanied the 1947 Deed. The wider neighbourhood and what has occurred in terms of changes is, he said, as described by Mr Jones. The question is whether in the light of the changes that have occurred, the purposes for which the restriction was imposed can still be achieved (*Re Marcello Developments Application* [2002] RVR 146). He said that unless the purpose of a restrictive covenant can be ascertained clearly and objectively from its wording, any interpretation of its meaning can only be supposition. The only purpose of the covenant here, of which one can be reasonably certain from the wording, is that it was intended to control the density of buildings on the burdened land. There is no other direct evidence as to the intended purpose, but from the fact that a significant part of the activities engaged in by the boys at St Benet's centred on light agricultural work and gardening training, it is reasonable to assume that the desire to maintain open space around the home was one of the drivers behind the restriction.

63. The assertion by ECA that the original purposes included the need to maintain calm, tranquillity and safety over the benefitted land is an inference that is at odds with the fact that the restriction expressly permits two professional residences where considerable additional traffic could be anticipated over that which may be expected at a private house. There was absolutely nothing to support Mr Lavin's contention that this case is out of the ordinary because of ECA's alleged 'special role' as 'guardian' of the residents' interests, and that the restriction confers upon it the ability to control traffic flows and the comings and goings of visitors, nor does it provide any sanction that would allow the company to 'control the destiny of the residents' or to 'control the boundaries'.

64. Regarding that alleged 'special role', and Mr Francis's reliance upon *Dobbin v Redpath*, *Vertical Properties* and *Zenios*, it was submitted that whatever weight might be applied to ECA's objections, its role in relation to the management of The Conifers cannot be taken into account since that development does not have the benefit of the restriction. Mr Sheriff said that reliance upon these three cases was in any event misconceived. In *Dobbin*, the application concerned a property within a building scheme, the existence of which was crucial to the judgment on this point. *Vertical Properties* and *Zenios* both concerned application land within an area over which the Trust exercised a significant degree of control over planning matters and existed for the preservation of maintenance of the amenities of the suburb. It exercised that

control within the framework of a statutory management scheme (of which the relevant restriction was part) established under s.19 of the Leasehold Reform Act 1967.

65. In *Vertical* HH Judge Reid QC considered the management scheme to be a 'very material factor' carrying even more weight than a building scheme [138], and that the Trustees views were entitled to 'great weight'. In *Zenios*, the Lands Tribunal had accepted at first instance that the disadvantage caused to the Trust by the development was related to its role as guardian of the public interest [17]. On appeal the Court of Appeal said that "the Trust's powers of control over applications to set aside restrictions such as here in play exist for the preservation and maintenance of the amenities of the suburb".

66. It was submitted by Mr Sheriff that ECA's role in managing the Lyefield Court estate comes nowhere near the role undertaken by those Trusts, and neither is it in any sense the guardian of a set of covenants that ensure consistency across the estate. It cannot fit itself within any definition for which there is support in authority for its views to be given extra weight.

67. Even if the Tribunal were to conclude that some injury may be sustained to the beneficiaries if the covenant were modified, unless that injury is of the same kind as the restriction was intended to prevent, then that is merely coincidental and will not prevent a finding that the restriction is obsolete.

68. The clear fact is that the area of the enclave now bears no resemblance to the situation that prevailed when the restriction was imposed. The 48 dwellings that have been constructed include nine on what was part of the burdened land (The Conifers) whereas only two were permitted. Further, The Conifers is also in breach because the nine properties are not detached. The original 5.577 acre site upon which the Boys' Home stood is now utterly unrecognisable. Even though the wider neighbourhood has been less intensively developed than the immediate environs of the application land, there has been one significant addition, namely the construction and extension of the primary school.

69. It is clear, Mr Sheriff submitted, that as a result of the dramatic changes that have occurred in the immediate vicinity and within the wider neighbourhood, the original purpose of the covenant can no longer be fulfilled. Ground (a) is thus satisfied.

70. In closing submissions Mr Francis referred for the first time to paragraph 3 of the Second Schedule of the 1947 Deed, which immediately follows the paragraph which is the subject of this application, and which reads:

> "No building shall be erected on the land coloured red [the application land] without the plans thereof being first approved by the Surveyor for the time being of the Society."

Mr Francis pointed out that nowhere within the application to the Tribunal or in the applicants' statement of case was there an application for that restriction to be removed (if the modification

to paragraph 2 is granted). Thus, it was submitted, the second objector (as successor to the Society) effectively retains the right to refuse any plans. It was surprising, he said, that the Tribunal had not made an order pointing out that this paragraph was germane to the application and that pleadings should deal with it.

71. Mr Sheriff objected to this submission being made at the very end of the hearing when there had been no previous reference to it. Not only did the applicants have no opportunity to consider the issue, but there had been no evidence or argument on the matter and neither was it something the experts had been asked to deal with.

72. Notwithstanding this objection, Mr Sheriff was able to provide a convincing rebuttal of Mr Francis's new point "on the hoof". As he pointed out, ECA is not the Society, and its surveyor is not "the Surveyor for the time being of the Society". The Society no longer has any interest in the land and as a result the requirement to obtain the consent of its Surveyor is "spent" – see *Crest Nicholson v McAllister* [2004] EWHC Civ 410. On reflection Mr Francis agreed with that analysis.

73. The late googly bowled by Mr Francis was in my view inappropriate at that stage of the proceedings, but in my judgment, since the Society no longer has an interest in its former land, the restriction at paragraph 3 of Schedule Two is indeed spent.

Discussion

74. In determining whether the restriction has become obsolete, it is necessary first to consider the original purpose of the restriction and whether it can still be achieved. If, in the light of changes in the character of the property, the neighbourhood or other material circumstances it can no longer be achieved, the restriction should be deemed obsolete.

75. I agree with Mr Sheriff's submissions that the only purpose of the restriction clearly identifiable is the purpose of limiting the extent of residential development on the land. Any other suggestion (including Mr Sheriff's own assumption that one of the purposes may have been a desire to maintain open space around the house) can only be supposition. The suggestions as to the extent of the original purpose identified by Mr Adams-Cairns, and the submissions by Mr Francis as to ECA's and the residents' alleged 'special interest' are, as Mr Sheriff observed, not based upon evidence and are an inference that is at odds with the wording of the restriction that effectively permits a more extensive (in terms of comings and goings and traffic generation) use than purely as private residential dwellings.

76. Mr Francis suggests that significant additional weight should be given to reflect ECA's 'special role' as 'guardian' of the residents' interests that extends to being able to control comings and goings and the use of the entrance road. I agree wholeheartedly with Mr Sheriff's riposte to that argument. The roles relating to the management of the estates in *Vertical Properties* and *Zenios*, on which Mr Francis relied in support, were governed by specific trusts

created within the framework of a statutory management scheme. No such management rules were laid down at Lyefield Court, and the matters referred to by Mr Lavin relating to the lease terms are standard commercial obligations that appear in most leases. He accepted that he was unaware of any terms in the leases that required ECA to assume responsibility for ensuring that Lyefield Court is insulated from the outside world in terms of noise, safety or any other intrusion. Further, both of the 'Garden Suburb' cases relied upon by Mr Francis relate to building schemes where the justification for additional weight being given to objectors exists, as does *Dobbin & Redpath* to which he also referred.

77. Turning to the changes that have occurred to the property and to the vicinity, I accept Miss Hancock's helpful and extensive evidence of fact based upon her personal knowledge and recollections gained over a period in the region of 50 years. As to the extent of the neighbourhood, whilst the experts were unable to agree, they were in reality not far apart. I agree with Mr Jones that the relevant neighbourhood includes a number of the roads and cul-de-sacs off Kidmore End Road and Grove Road and takes in more than the *immediate* vicinity; it was not unreasonable for him to have identified a slightly larger area than that promulgated by Mr Adams-Cairns.

78. It is clear beyond peradventure that there have not only been some changes to the general neighbourhood – the building of the new Emmer Green Primary School in 1952, its extension closer to the western boundaries of Brindles' additional land and The Conifers, and a number of infill residential developments on the other side of Kidmore End Road and off Grove Road, but there has been much more significant development in the immediate vicinity: the seven homes at Bell Court constructed in 2001 right at the entrance to what is clearly (and aptly described) as 'a residential enclave' along with the building of Lyefield Court and The Conifers.

79. In 1947 all there was on the land now comprising that enclave was the Boys' School and nothing else. Now there are 47 properties (48 with the "guest flat" at Lyefield Court) right in front of the application land. Thus, apart from on the northern boundary, the application land now has significant development on the other three sides. No development has yet been undertaken on the golf course, but it is included in the Development Plan for long-term phased development of over 600 residential units.

80. Whilst it could reasonably be argued that the changes that have occurred in the wider neighbourhood have had little if any effect upon the application land, what has occurred in development terms within the 'enclave' has, as Miss Hancock lucidly explains, completely changed the immediate environment of Brindles.

81. I agree with counsel for the applicants that Mr Lavin's description of the likely interference with the peace and quiet of the retirement homes from noise and family occupation of the proposed plots was overstated. This is particularly so as the siting of the proposed houses is not immediately adjacent to the benefitted land (as he accepted in cross-examination) and they will be shielded by the existing house at Brindles. The rear gardens of the new houses

would back onto The Conifers which, it is agreed, does not have the benefit of the restriction. Even if it did have the benefit, the boundaries contain tall and well-established conifer hedges that would shield any noise. The new houses would be no nearer to the western end of Lyefield Court than the houses at the eastern end (abutting Bell Court) are to the adjacent children's public play area. Further, there is no evidence that any objection was raised by ECA to the proposed development of seven residential units at Bell's Yard in 2001. That site is closer to Lyefield Court than the siting of the proposed new houses on the application land.

82. I cannot recall a clearer case of changes to the neighbourhood supporting an obsolescence argument. There are also, in my view, "other circumstances" which add support to that conclusion. We heard much about the negotiations that the applicants (and their parents before them) have had with ECD and ECA from which it is clear to me that the real reason for their refusal to consent to the proposed modification is to ensure that the application land can be acquired only at a price that does not include development value. The correspondence and discussions I have referred to above, and particularly English County Developments' letter of 25 May 2007, convince me that Mr Lavin's suggestion that ECA (or Cognatum) would wish to buy the application land solely to retain control and prevent development is not a true representation of their position. I am satisfied from Miss Hancock's evidence and the correspondence that early in 2016 Cognatum wished to purchase the land for development. If it was not ECA's intention to buy the property for development but only to gain control as Mr Lavin suggested, why did Cognatum's agent turn up unannounced with an architect to view the property? Nobody from Cognatum was called to speak to that issue or to rebut Miss Hancock's evidence.

83. It seems to me that the development that has occurred on the former Boys' School estate ending with ECA as freeholder, has clearly served to render the original purpose of restricting development no longer capable of fulfilment. More than half of what was the original burdened land has been acquired by ECA and comprehensively developed following the much larger development at Lyefield Court. If the restriction was to restrict residential development or otherwise control the use of the land so as to maintain "calm tranquillity" that purpose cannot now be achieved and has been unequivocally overridden. Even if it were not obsolete so far as it is capable of preventing the relatively minor and straightforward development now proposed on the only remaining undeveloped part of the burdened land, not one of the second objector's stated purposes which it has speculatively advanced as the reason it was applied, is any longer relevant.

84. It would in my view be incongruous if the second objector were able to succeed on this ground as it is its own and its predecessors' actions over the past 30 years or so that have served to completely transform the immediate area into an intensively developed housing project. I accept, as Mr Francis argued, that when The Conifers and Lyefield Court both vested in ECA on 21 June 2016, the restrictions over The Conifers were extinguished by unity of seisin. However, the incongruity is only heightened, to my mind, by that fact.

85. I conclude that as the original purpose for which the restriction was imposed (to limit the extent of residential development) can no longer be fulfilled, due to the changes to the property,

neighbourhood and the other circumstances set out above, and therefore determine that the application under ground (a) is satisfied and the restriction shall be deemed obsolete.

Ground (aa)

86. In respect of arguments under ground (aa), the parties rely upon the questions considered in *Re Bass Limited's Application* (1973) 26 P & CR 156.

Is the proposed development a reasonable use of the land?

87. It is common ground between the parties that the proposed development of Plot 1 (that has the extant planning consent) is a reasonable use of the land. However, Mr Adams-Cairns reserved his position in respect of Plot 2 where no planning consent yet exists, saying it was by no means certain that an application would be successful. It may therefore be open to question whether the use of this part of the application land for residential development would be reasonable.

88. The proposal for the second dwelling is for a substantial detached house that is to all intents and purposes identical to that for which consent has been granted on Plot 1. It would be constructed on an almost identically sized plot on the other side of which is another large detached property, Brindles. The pattern of development in the area supports such a proposal and I can see no reason whatsoever to conclude that the development of the second plot would be anything other than a reasonable use of the land.

Does the covenant impede that use?

89. It is common ground that it does.

Does impeding the proposed use secure practical benefits to the objectors, and if so, are those benefits of substantial value or advantage?

90. There was no issue between the parties as to the meaning of "practical benefits" and that the accepted authority as to its interpretation is set out in the judgment of Eveleigh LJ in *Gilbert v Spoor* [1983] Ch 27 where he said, at p32:

> The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase "any practical benefits of substantial value or advantage to them" is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression "any practical benefits" is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the tribunal is required to consider the adverse effects upon a broad basis."

91. The principal concerns of all the objectors related to the adverse effects on peace, quiet and enjoyment of their surroundings at Lyefield Court caused by increased traffic using the existing access. Mr Adams-Cairns said that a key feature and principal selling point for the ECA estate was the quiet and peaceful nature of the grounds. This benefit would be detrimentally affected by what was likely to be a significant increase in traffic and noise engendered by the development of two substantial family homes on the application land. He initially relied upon a report commissioned by ECA in August 2018 on the basis of which he concluded there would be a 9.52% (say 10%) increase in vehicle movements. In cross examination, Mr Adams-Cairns accepted that the report was unreliable and abandoned his own reliance upon it. He also admitted that his own counting of comings and goings had been entirely unscientific and over such a short period as to render his findings of no value. He conceded therefore that he had no evidence to support the views he had expressed other than his opinion that the creation of the additional properties would inevitably cause a significant and noticeable increase in traffic through the ECA estate.

92. Mr Adams-Cairns also pointed out that there is an approximately 70-metre section of the access drive that has only a pea-shingle finish rather than tarmacadam. It is narrow, with a minimum width of only 4.2m, and part of it lacks a pavement; although there are alternative paths through the development use of them is less convenient for those with mobility issues and may affect some residents' privacy.

93. Whilst it was accepted that there could only be very minor overlooking issues relating to the two proposed plots, ECA and the residents would have no control over the retention or maintenance of the high hedges on Brindles' east and south boundaries. Further, the garden to be left with Brindles once the plots have been developed will be relatively small, and the owners may well consider removing the second, internal hedge along the eastern boundary that currently cuts the garden off from the now defunct access track into The Conifers in order to maximise the rear garden area.

94. Thus, it was his considered view that the ability to impede the proposed development does indeed secure to the objectors' significant practical benefits and, mindful of the words of Carnwath LJ in *Shephard* at 621[23] and [23], where he considered the meaning of 'substantial' as "considerable, solid, big" they are in his opinion of substantial value or advantage.

95. For the applicants, it was Mr Jones' view that even if an increase of traffic (once construction of the houses had been completed) was in the region of 10% as the August 2018 report had concluded, whilst noticeable, such an increase would be "marginal" and not significant. Whether or not the ability to impede a development that caused a 10% increase in traffic constituted a practical benefit, Mr Sheriff submitted that if it did, it was only those who are entitled to enforce the restriction that should be taken into account. This was the occupiers of the properties at Lyefield Court and not the occupants of The Conifers.

96. It was submitted for the applicants that the concerns over residents' safety were illusory at most, and there is already a significant amount of traffic movement created by Lyefield Court and The Conifers with a resultant affect upon privacy and the alleged peaceful environment.

97. Turning to the question of whether maintaining the restriction secures the practical benefit of being able to prevent the 'snowball' effect that relaxation might lead to further applications for modification (commonly referred to as the "thin end of the wedge argument"), Mr Adams-Cairns said that ECA's and the residents' concerns were well founded. As it was, there was uncertainty about what might happen on plot 2 where no planning application had yet been made, and the evidence before the Tribunal in this case was that the applicants had been in discussions with a developer about potentially going for a development of seven new units on the site. If the applicants decided to sell Brindles and the plots, there would be every likelihood that a purchaser would seek to maximise development to a much more significant degree than the applicants were currently seeking, and it could be expected therefore that there would be further planning applications and applications to this Tribunal. It was Mr Adams-Cairns' view that whilst such risks are not uncommon in circumstances such as this, any concerns of the residents of Lyefield Court would be felt more deeply and with greater sensitivity because they were an ageing population.

98. Mr Francis, in submissions on ground (aa), referred again to ECA's special interests and the weight to be given to them in the arguments that I have outlined and determined above under ground (a). He said that whilst it was accepted that the application land is not part of a building scheme *per se*, the Tribunal's comments on weight applied in *Broadway Homes (Cambridge Ltd) v Marshall & Others* [2018] UKUT 264 at paras 88-104 and the comments of Carnwath LJ in *Shephard v Turner* [2006] P & CR 28 were apposite and the genuine fear that the door will be opened to further applications should carry significant weight.

99. Mr Sheriff submitted that neither of those two cases support ECA's assertion that the Tribunal should consider the potential snowball effect in this application. In *Shephard*, the Court of Appeal was concerned with an application on a property that was part of a building scheme whereby it and others were mutually bound by identical covenants. Carnwath LJ referred to the words of Judge Bernard Marder QC in *Re Snaith and Golding's Application* [1995] 71 P & CR 104 where he said:

> "Any application under section 84(1) must be determined upon the facts and merits of the particular case […] It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme."

Those words do not encompass a situation where there is no scheme of covenants of any kind (as here), the integrity of which the objectors seek to maintain.

100. Whilst *Broadway* was not a building scheme as such (in that title to the estate properties did not derive from a common vendor) there was nevertheless a scheme of corresponding covenants. It is clear, Mr Sheriff said, that the vast majority of cases in which the argument

promulgated by ECA has been argued successfully have involved the maintenance of some scheme of covenants. There is no clear authority for its more general application to the possibility of any future applications. If the modification were granted in respect of the two plots the only possibility of a further application would relate to the site of Brindles itself. But, once the plots have been hived off, Brindles' house and its remaining area of garden is relatively small and, as Miss Hancock had stressed, the demolition of the house and its replacement with two or more units would be most unlikely to be economically viable.

101. In fact, it was submitted, granting the relatively small modification sought would be likely to limit the scope of further applications rather than increase it. But for the modification, Brindles and the application land might well be sold to a developer, with such a purchaser being most likely to submit an application for a modification which would allow a significantly greater density of building on the whole than what is anticipated under the current proposal. That would be a less attractive outcome (if it were successful) than the existing proposal is for those with the benefit of the covenant.

102. Mr Sheriff reiterated that the application before the Tribunal is modest in extent and the fears expressed by the objecting residents relating to noise, disruption, loss of privacy and of amenity are most unlikely to materialise. ECA's position is, it was submitted, very different to that of the residents. It needs to be borne in mind that the company's obligations do not extend beyond their obligations as landlords. ECA is not guardian of any set scheme of covenants, so there is no reason why any more weight should be given to their objections than to those of the residents. It is the applicants' case therefore that the ability to impede the development as proposed does not secure to the objectors any practical benefits. Even if the Tribunal determines that it does secure such benefits, they are minor and insubstantial. There is already significant traffic using the access road with resultant noise and disturbance and it was submitted that ECA has overstated its practical ability to control who comes and goes. There is also noise from the primary school, playing fields and recreation area and, to some extent, from the houses in Bell Court. Thus, any additional traffic, noise or other disturbance from the proposed two new dwellings, which are sited well away from the benefitted land, would be minimal and of no consequence.

Discussion

103. This application covers the area of land occupied by the two proposed building plots and not the whole of Brindles. The development proposed is small and, as Mr Sheriff stressed, the two dwellings are to be sited well away from any of the properties that have the benefit of the restriction. On the basis of the evidence and argument, and the impression I gained on inspection, I am satisfied that this proposal and the use of the new properties would have virtually no effect upon the use and enjoyment of any of the residents' properties on Lyefield Court, particularly when considering the location and the general neighbourhood is already a relatively densely populated residential area. Indeed, the proposed dwellings represent, as argued by the applicants, a considerably less intensive development than has already taken place in the immediate vicinity, i.e. Lyefield Court and The Conifers.

104. In my judgment, the only noticeable effect upon the occupiers of the benefitted properties might be the increase in vehicular traffic using the shared drive to serve two additional properties. However, I am entirely satisfied that such additional use will be minimal and am comfortable with the admittedly unscientific assessment that the increase might be in the region of 10%. I agree with Mr Jones that such intensification of use could not be considered significant and would be barely noticeable.

105. As to ECA's arguments as guardians of the estate, I have already dealt with this at length in respect of the application under ground (a) and do not therefore repeat what I have already said other than to reiterate my view that the concerns expressed are somewhat overstated. Indeed, looking back at the history of the Lyefield Court, and the subsequent Conifers and Bell Court developments, it is evident that ECA and its predecessors have been unconcerned about additional traffic, noise or other allegedly detrimental effects when permitting them to proceed.

106. Further, it was clear from Mr Francis's closing that he was disassociating himself from the evidence relating to the historical negotiations between the applicants and ECA/Cognatum/ECD regarding the potential for their purchase and potential residential development on the application land. He said *"The evidence of the previous negotiations and dealings between ECA/ECD/Cognatum and others and [the applicants] do not affect the merits of the opposition to the present application. That has to be judged on its merits as they are now. This is not a case where ECA could be said to have approbated or reprobated in its attitude to the development of Brindles; see for example [copy inter party correspondence from December 2015/January 2016]".*

107. I agree that this, and any application, must be judged on its particular merits and in my view the merits of the applicant's proposed development are much less detrimental to the beneficiaries than, for instance, the 2007 proposal for 4 units on Brindles with a new detached house on the adjoining land would have been. If there had been the concerns that Mr Lavin and ECA are now rehearsing, it is difficult to see why the discussions that Miss Hancock has referred to in such detail took place.

108. As to the 'thin end of the wedge' arguments, I acknowledge that there must be a risk that by allowing the modification sought in this application a potential purchaser of either the application land alone, or the existing site of Brindles and the adjoining land as a whole might see the potential for a much more significant development project. However, were that to happen it is my view that not only would it be most unlikely that planning consent would be forthcoming for any more intensive development (and even the two for which the modification is sought are not both yet subject to consent), but the further intensification of traffic and disturbance that such a development would entail would mean the objectors' arguments before me in this case might well carry much greater weight.

109. I am satisfied that, in respect of this application, the ability to impede the proposed development does not secure to the objectors any practical benefits of substantial value or advantage. There was no argument as to whether or not, under section 1A(b) of section 84,

modification would be contrary to the public interest. In the light of the evidence and the relevant planning policies, I conclude that that modification on the grounds sought would not be against public interest. The application under ground (aa) is therefore made out.

110. As to whether money will be adequate compensation for the loss or disadvantage (if any) suffered by any of the objectors from the discharge or modification of the restriction, I record that by the time of the hearing, neither of the experts was arguing that any of the objectors should be compensated for alleged loss. The two unrepresented objectors who said in their responses to the application that they would be seeking £10,000 and £100,000 produced no evidence in support. Mr Adams-Cairns for ECA said that in his view there would be "little loss" in respect of ECA's reversionary interest and its stated special obligations as estate manager and that he was unable to estimate an amount that any negative impact created by the modification sought would have. Mr Jones said that no compensation would be due as there would be no loss suffered by any of the objectors.

111. Whilst it might be suggested that there will be disruption and losses caused during the building works, and that repairs might be needed to the access road as a result of incursion by heavy vehicles, it should be noted that the 1947 restriction anticipates residential development and that the Deed gave specific rights of way over the access road for all purposes. It was therefore anticipated that there would be construction traffic and disturbance commensurate with the building of a residential property - see *Re Perkins v McIver* [2002] EWCA Civ 735. I therefore determine that no compensation for modification of the restriction shall be payable to the objectors.

Ground (c)

112. In the light of my findings above, I conclude that modification of the restriction will not injure any person entitled to the benefit. Ground (c) is therefore made out.

Disposal

113. The application succeeds under grounds (a), (aa) and (c) of section 84 of the 1925 Act.

114. I determine that the restrictive covenant (set out in paragraph 3 above) included in the entries at Schedule 2, clause 3 in the charges registers relating to Brindles (Title No. BK84649) and the adjoining land (Title No. BK451271) shall be discharged pursuant to ground 84(1)(a).

115. In exercise of the discretion afforded to me under section 84(1C) of the 1925 Act, clause 3 shall be replaced in the charges register for the adjoining land (BK451271) with the following clause so as to permit the applicants' proposed development of **one** detached dwelling house on that section of the application land:

> "2. THAT no building or erection of any kind other than one detached private residential dwelling house and integral garage shall be constructed on the land, that building to be in

accordance with the planning permission granted by Reading Borough Council on 30 October 2008 under reference 08/00161/FUL. Reference to that planning permission shall include any subsequent planning permission that is a renewal of that consent and any other matters approved in satisfaction of the conditions attached to that permission."

116. In respect of the charges register relating to Brindles (BK84649), clause 3 of the second Schedule shall read:

> THAT no building or erection of any kind other than one detached private residential dwelling house and integral garage shall be constructed on the land forming the western section of the garden serving Brindles and that a right of way at all times and for all purposes shall be reserved across the northern section of the land giving unrestricted and unfettered access to the land forming Title No. BK451271. Such dwelling house shall be designed and constructed to match identically the dwelling the subject to planning permission granted by Reading Borough Council on 30 October 2008 under reference 08/00161/FUL. Reference to that planning permission shall include any subsequent planning permission that is a renewal of that consent and any other matters approved in satisfaction of the conditions attached to that permission."

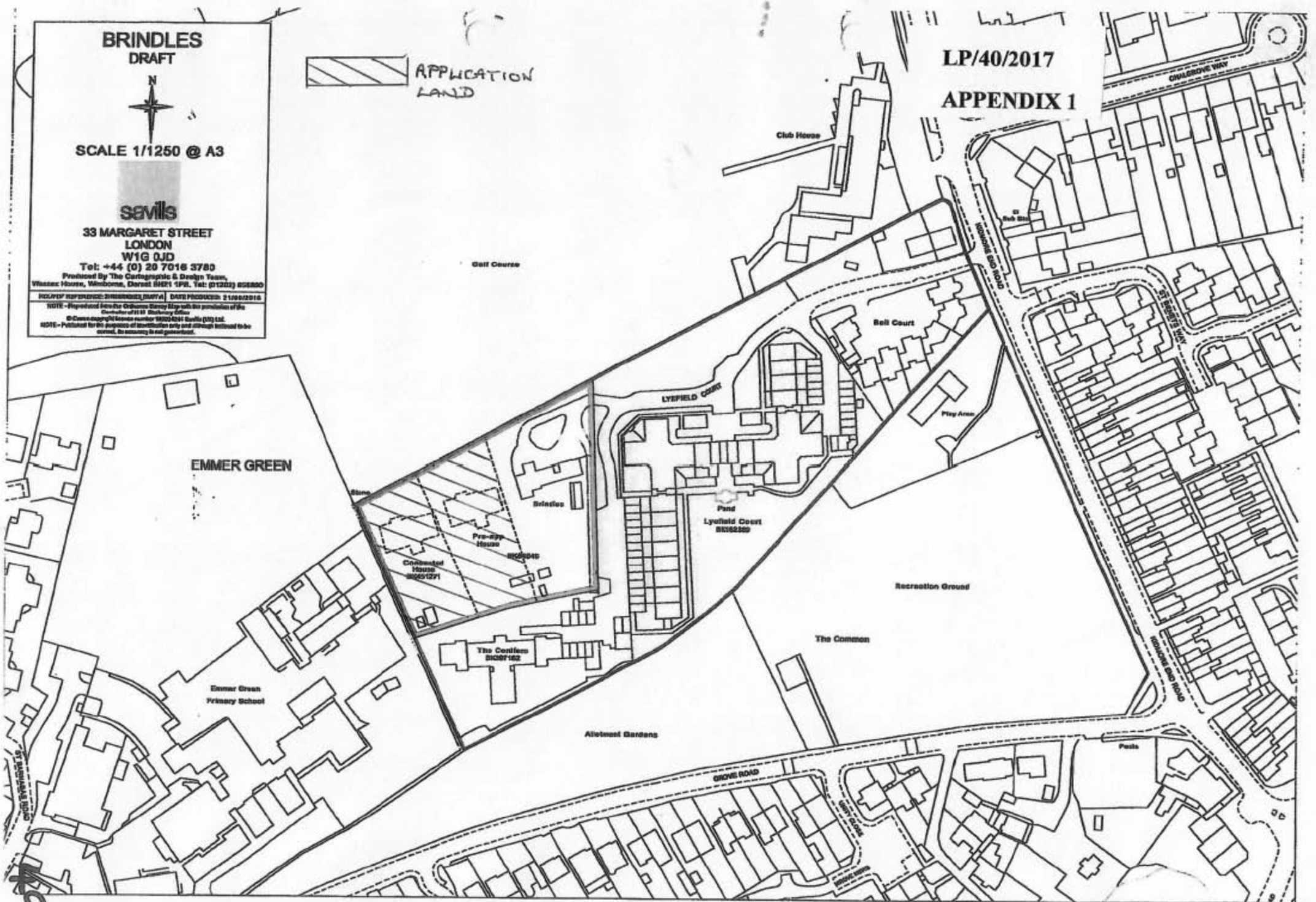
117. Clause 3 of Schedule 2 in the 1947 Deed is discharged pursuant to the determination in para 73 above that it is now spent in respect of both the above Titles.

118. An order modifying/discharging the restrictions in clauses 2 and 3 of the Deed dated 24 March 1947 referred to above shall be made by the Tribunal provided that, within three months of the date of this decision, the applicants shall have signed their acceptance of the proposed modification/discharge.

119. 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: 24 January 2019

Paul Francis FRICS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Bell Court
LYEFIELD COURT
Play Area
EMMER GREEN
Bristles
Pond
Lyefield Court
Pre-App House
Consented House
Recreation Ground
The Common
The Conifers
Emmer Green Primary School
Allotment Gardens
GROVE ROAD
Pools
RIDGMONT END ROAD
CHALGROVE WAY
ST BERNARDS WAY