UPPER TRIBUNAL (LANDS CHAMBER)

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0448 (LC)
UTLC Case Number: LP/10/2013

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – discharge – modification – proposed development of second house on application land – whether restrictions obsolete under ground (a) – change of character of neighbourhood – grounds (aa) and (c) – whether compensation payable to original covenantee under section 84(1)(ii) – application to modify covenants granted under ground (aa) – Law of Property Act 1925 section 84

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

BY

MRS SUDEEP KAUR LAAV

Applicant

Re: 146 Burges Road,
Southend-on-Sea,
Essex
SS1 3JN

Before: A J Trott FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
2-3 June 2015

Edward Denehan, instructed by Tolhurst Fisher LLP, for the applicant
Stephen Murch, instructed by Wallace LLP, for Thorpe Estate Limited (objector)
Mr Malcolm Webster and Mr Ian Stobart (objectors) in person

The following cases are referred to in this decision:

Re Bowden's Application (1984) 47 P & CR 455
Re Bass Limited's Application (1973) 26 P & CR 156
Re Truman, Hanbury, Buxton and Co Ltd's Application [1956] 1 QB 261
Re Zopat Developments' Application (1966) 18 P & CR 156
Shephard v Turner [2006] 2 P & CR 28
Re Fairclough Homes Limited's Application [2004] Lands Tribunal LP/30/2001 (unreported)
Excelsior Commercial and Industrial Holdings Ltd v Shrewsbury Hamer Aspden and Johnson (a firm) [2002] EWCA Civ 879
Esure Services Limited v Quarcoo [2009] EWCA Civ 595

The following cases were also referred to in argument:

Re Hextall's Application (1998) 79 P & CR 382
Gilbert v Spoor [1983] Ch.27
Re North's Application (1997) 75 P & CR 117
Re Vaizey's Application (1974) 28 P & CR 517
Winter v Traditional & Contemporary Contracts Limited (No.2) [2008] 1 EGLR 80

DECISION

Introduction

1. Mrs Sudeep Kaur Laav ("the applicant") is the freehold owner of a detached house and garden at 146 Burges Road, Southend-on-Sea SS1 3JN ("the application land").

2. The house at 146 Burges Road was constructed under a planning permission obtained by Mr George Bernard Law on 25 April 1960. On 9 November 1960 the then freeholder, Mr Michael Burges, demised No.146 to Mr Law for a term of 947 years from 25 March 1960 ("the principal lease"). The land included in the demise under the principal lease had a frontage of 70 ft to Burges Road and a depth of 145 ft.

3. On 12 April 1962 Mr Burges granted a lease ("the supplemental lease") to Mr Law of the area of land immediately to the rear (south) of 146 Burges Road. The demised land had a frontage of 70ft to Thorpe Bay Gardens, a road running parallel to Burges Road, and a depth of 161ft. The supplemental lease was for a term of 945 years from 25 March 1962.

4. The lessee under the supplemental lease covenanted to use the demised land as an extension to the garden of 146 Burges Road (as demised under the principal lease) "and for no other purpose and will not without the previous consent in writing of the Lessor erect or suffer to be erected on the said piece of land hereby demised any building or erection whatsoever except as hereinafter provided."

5. The supplemental lease went on to provide that:

> "And it is hereby agreed and declared that if at any time during the said term hereby granted the Lessee shall be desirous of building a private dwellinghouse on the said piece of land hereby demised the plans and elevations of which shall have been previously approved of by the Lessor's Surveyor the Lessor provided the plans and elevations and materials of such dwellinghouse have been approved of as aforesaid and conform to the standards of the Estate and the dwellinghouse erected in accordance therewith will accept a surrender of this Supplemental Lease and grant a new lease at the Lessee's expense of the said piece of land hereby demised and the private dwellinghouse erected as aforesaid to the Lessee …"

The relevant effect of this rather convoluted drafting was that the lessee was entitled to build a house on the land at the rear of 146 Burges Road to a design approved by the lessor.

6. On 29 October 1963 Mr Burges granted a lease ("the second supplemental lease") of a strip of land, 4ft wide, along the entire eastern boundary of the land demised under the principal lease and the supplemental lease, namely a strip running between Burges Road and Thorpe Bay Gardens. The second supplemental lease was granted for a term of 943 years from 24 June 1963.

7. The premises demised by the principal lease, the supplemental lease and the second supplemental lease together constitute the application land.

8. On 15 November 1968 Mr Law sold his three leasehold interests in the application land to Mr Eugene Barnard for the sum of £24,500. Those interests were registered under Title No. EX 123720.

9. The application land forms part of a large estate of some 1900 houses known as the Burges Estate ("the Estate"). The freehold of the Estate was acquired by Thorpe Estate Limited ("TEL") on 12 July 1984 and registered under Title No. EX 301174.

10. On 31 August 1989 TEL sold the freehold interest in the application land to Mr Barnard (who had acquired the three leaseholds in 1968) for £3,250. The freehold was registered under a new Title No. EX 411666. Leasehold Title No. EX 123720 was merged into this freehold title and closed.

11. Clause 3 of the transfer of the freehold interest states:

> "The Purchaser HEREBY COVENANTS with the Vendor for the benefit of the remainder of the land which has at any time been comprised in [Title No: EX 301174] or any part of parts thereof and any other adjoining or adjacent land now or formerly owned by the Vendor and so as to bind the Property into whosoever hands the same may come that the Purchaser and the persons deriving title under him will at all times hereafter observe and perform the restrictions and covenants set forth in the First Schedule…"

12. The First Schedule contains seven restrictions and other covenants of which numbers 1 and 5 are the subject of the present application:

> "1. Not to use or occupy the Property or permit the same to be used or occupied for any other purpose whatsoever than as a private dwellinghouse and usual outbuildings belonging thereto.
>
> …
>
> 5. To keep the garden and the grounds of the Property as garden and grounds only and in good order and cultivated."

13. Mr Barnard sold the freehold interest in the application land to Mr Thomas Hunt on 6 January 2010 for £1.05m. Mr Hunt then sold it to the applicant on 4 March 2011 for £1.675m.

14. On 6 July 2012 Mrs Laav's late husband, Dr Bupinder Singh, obtained detailed planning permission (reference 12/00699/FUL) to erect a two-storey detached dwellinghouse and a detached garage in the rear garden of 146 Burges Road with a frontage and vehicular access onto Thorpe Bay Gardens.

The application

15. Dr Singh and Mrs Laav applied on 17 May 2013 for the discharge, or modification in the alternative, of restrictions 1 and 5 of the First Schedule to the 1989 freehold transfer to enable the development of a second house on the application land. The application to discharge relied upon section 84(1)(a) of the Law of Property Act 1925 ("the 1925 Act") and the application to modify relied upon section 84(1)(a), (aa) (b) and (c).

16. There are three objectors to the application:

(i) Mr and Mrs Ian Stobart of 144 Burges Road;

(ii) Mr Malcolm Webster of 148 Burges Road; and

(iii) TEL, the original covenantee.

17. In the light of these objections the applicants did not pursue ground 84(1)(b).

18. Mr Edward Denehan of counsel appeared for the applicant and called Mrs Sudeep Laav as a witness of fact and Mr Michael Tibbatts MRICS, of Scrivener Tibbatts, Chartered Surveyors, as an expert valuation witness.

19. Mr Malcolm Webster and Mr Ian Stobart appeared as objectors in person. Mr Webster and Mr Stobart instructed Mr Simon Deacon FRICS, sole proprietor in the firm of Wheeldon & Deacon, to prepare an expert valuation report. This report was submitted in evidence but Mr Deacon was not called as a witness and his expert report was untested.

20. Mr Stephen Murch of counsel appeared on behalf of Thorpe Estate Limited and called Mr William Plumridge, a portfolio manager employed by Pier Management Limited, as a witness of fact and Mr Charles Huntington-Whiteley FRICS, a partner in Strutt and Parker LLP's Exeter office, as an expert valuation witness.

21. I made an accompanied site visit to the application land and to 144 and 148 Burges Road on 5 June 2015.

Statutory provisions

22. Section 84 of the 1925 Act deals with the power to discharge or modify restrictive covenants affecting land and states:

> "(1) 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, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, 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."

Facts

23. 146 Burges Road is a four-bedroom detached house with integral garage. It was constructed in 1960. It is located on the south side of Burges Road approximately mid-way between the junctions with Dungannon Drive and Barrowsand. The house stands at the northern end of a large plot which measures approximately 305ft by 74ft. The house enjoys an uninterrupted view southwards towards the Thames Estuary. The rear garden has a frontage to Thorpe Bay Gardens, a cul-de-sac extending to Thorpe Hall Avenue in the west.

24. The plot of 146 Burges Road is unusually long. Generally there are two detached houses on each plot between Burges Road and Thorpe Bay Gardens, with one house fronting Burges Road to the north and one fronting Thorpe Bay Gardens to the south. Each pair of houses has the same frontage and approximately the same depth of rear garden (although there are variations). The rear garden of No.146 creates a gap between 97 and 101 Thorpe Bay Gardens.

25. The first and second objectors, Mr and Mrs Stobart and Mr Webster, own the freehold interest in the properties adjoining 146 Burges Road. No. 144, to the west, is owned by Mr and Mrs Stobart. 97 Thorpe Bay Gardens is at the rear of No.144 and has a detached garage that adjoins No.144's rear fence. The boundary between No.144 and the application land comprises a wooden fence covered in vegetation. There are a number of trees in the rear garden of No.144 close to the boundary. No. 144 has a greenhouse in approximately the position where it is proposed to create the boundary between No.146 and the new house fronting Thorpe Bay Gardens. The proposed detached garage of that house would be sited within 1m of the boundary with No. 144 for a length of some 6m (20ft). The west elevation of the proposed garage, fronting the garden of No.144, is a gable end with a ridge height of 5m (16.5ft).

26. No. 148, to the east of the application land, is owned by Mr Webster. 101 Thorpe Bay Gardens is at the rear of No.148 and has a detached garage close to its boundary. No.148 is screened from 101 Thorpe Bay Gardens and from the application land by a tall, mature hedge and shrub screen which I estimate to be at least 12ft tall. The hedge along the boundary with the application land effectively screens the applicant's swimming pool from view from No.148.

27. No.148 has a large first floor balcony extending to approximately half the width of the house on its western side (closest to the application land).

28. The proposed boundary between 146 Burges Road and the new house would be 20m (65.5ft) from the rear elevation of No.146. This is some 20ft closer to Burges Road than the boundaries between No.144 and 97 Thorpe Bay Gardens and No.148 and 101 Thorpe Bay Gardens.

Evidence for the applicant

29. Mrs Laav explained the background to her purchase of the application land and said that she and her husband had been aware of the development potential of the rear garden. They had sought planning permission for the development of a new house fronting Thorpe Bay Gardens with the intention of moving into it themselves together with their two children. Unfortunately Dr Singh was diagnosed with motor neurone disease so they planned the new house to accommodate his needs, including a lift, a modified bedroom and bathroom facilities. It remained Mrs Laav's intention to move into the new house if the application was successful notwithstanding the death of her husband. Mrs Laav said that she had changed the position of the proposed garage and its roof configuration as a result of an objection to the planning application made by Mr and Mrs Stobart. Mr Webster had not objected to the planning application.

30. Mr Tibbatts gave the history of the Burges (Thorpe Bay) Estate and referred to "a Descriptive Handbook" that had been published circa 1925. The handbook, written by Mr Grover, architect and surveyor to the Burges Estate, said that all land was let on 999 year leases at "6/- to 8/- per ft frontage" with the depth of plots ranging "from 140ft to 150ft, and in a few cases, even deeper." Mr Tibbatts described the Estate as being of uniformly high quality, the development of which was controlled by the use of restrictive covenants.

31. Mr Tibbatts said that he had discussed the more recent history of the Estate (1980-2014) with Mr Ron Woodley, the Chairman of the Thorpe Bay Residents Association. Mr Woodley explained that Regis Group Holdings, the owners of TEL, had agreed to vary onerous restrictive covenants on a number of houses since 2000.

32. Turning to the vicinity of the application land, Mr Tibbatts said that since 1980 "all the original single plots on Burges Road from Thorpe Hall Avenue in the west to the cul-de-sac (131 Thorpe Bay Gardens) to the east have now been made [into] double plots." The only remaining single plots (extending between Burges Road and Thorpe Bay Gardens) were at 59 Thorpe Bay Gardens (with a rear garden extending to Burges Road) and the application land (with the rear garden of No.146 extending to Thorpe Bay Gardens).

33. Mr Tibbatts gave four examples since 2000 of what he described as single plots on Burges Road being allowed to become double plots. He believed that each property had been subject to similar restrictions to those on the application land. At the hearing Mr Tibbatts referred to a further example at 95 Thorpe Bay Gardens. He said that both the transfer plan and the title plan showed this property as an undeveloped plot when the freehold interest was sold by Thorpe Estate Ltd in January 1993. The purchase price was £2,000 which Mr Tibbatts said showed that the price paid to acquire the freehold of the application land in 1989 was fair.

34. Turning to the grounds upon which the application was made, Mr Tibbatts said that he thought the restrictions were obsolete under section 84(1)(a) due to changes in the neighbourhood of the application land. That neighbourhood could no longer be considered to be the whole of the Thorpe Bay Estate, but instead was more properly defined as the section comprising the 29 houses on Thorpe Bay Gardens between St Augustine's Avenue to the west to the end of the cul-de-sac in the east. This high class residential neighbourhood was no longer defined by plot size or the uniformity of the appearance of each house. Mr Tibbatts concluded:

> "What were relevant restrictions in 1924 for a much bigger neighbourhood and for different reasons are no longer relevant restrictions in 2014 (90 years later) for a much narrower 'neighbourhood'."

35. Mr Tibbatts understood a "reasonable user" of the land in section 84(1)(aa) to mean the person using the land rather than the use to which the land was put. Thus he stated at paragraph 8.2.1 of his expert report:

> "In my opinion, a reasonable user would want to develop the plot … because the plot is large enough to be developed, all the other plots/houses along Burges Road and Thorpe Bay Gardens (excepting 59 Thorpe Bay Gardens) have been so developed and planning consent exists for such a development."

36. Mr Tibbatts thought that a reasonable user (as he understood the term) would (i) want to renovate the existing house at No.146 which was tired and in need of improvements; (ii) feel exposed by the open garden at the rear of No.146 which was vulnerable to "nefarious activity"; and (iii) object to paying up to £100 per week to maintain the large rear garden.

37. The proposed modification of the restrictions would not injure any of the persons entitled to the benefit of them and therefore, said Mr Tibbatts, ground 84(1)(c) was satisfied. TEL would not suffer any injury as they no longer owned any neighbouring or adjoining properties. Mr Tibbatts said that the existing high hedges and trees would conceal the proposed development from the objectors' adjoining properties, Nos. 144 and 148. There was no entitlement to a view of the Estuary across the application land from the objectors' properties. The proposed development would make 144 and 148 Burges Road more secure at the rear and would generally improve the street scene in Thorpe Bay Gardens.

38. In cross-examination Mr Tibbatts criticised Mr Huntington-Whiteley's valuation in the sum of £225,000 under section 84(1)(ii) of the 1925 Act to make up for the effect which the restrictions had at the time they were imposed in 1989 in reducing the consideration then received for the freehold interest. In particular Mr Tibbatts said:

(i) Mr Huntington-Whiteley had produced no evidence to support a gross development value of £1.75m for the completed development of the proposed house;

(ii) he did not accept that 40% was an appropriate percentage to apply to the gross development value ("GDV") to obtain site value; and

(iii) he did not accept that it was appropriate to reverse index the value of the site by 25 years to 1989.

Evidence for the Objectors

Mr and Mrs Stobart and Mr Webster

39. The first and second objectors appeared in person and submitted a joint statement on the first day of the hearing. Mr Stobart did not accept that the covenants were obsolete and said when he and his wife purchased No.144 he had been made aware of the covenants over No.146 by its then owner, Mr Barnard, who had no intention of developing another house in his rear garden.

40. The applicant's proposed new house had a uniquely long rear garden which meant that it would be 20ft nearer Burges Road than neighbouring gardens and therefore completely out of character with all the properties in the block from Marcus Avenue in the west to Barrowsand in the east.

41. The proposed garage would be located at the end of this long rear garden within 1m of the boundary with Mr Stobart's garden. It would therefore "massively reduce" the light to the bottom of his garden and also his greenhouse. Gardening was Mr and Mrs Stobart's retirement pastime and the quality of their life would be impaired if the application was granted. Mr Stobart said that the impact of the proposed garage could be minimised by moving it to the centre of the boundary of the proposed house and No.146. The only change that the applicants had made to their plans for the garage following Mr Stobart's objection to their planning application had been an enforced reduction of 1m in its height. Otherwise it had not been moved.

42. Mr and Mrs Stobart had lived within some 200 yards of the application land before they bought No.144 in 1982. Six properties had been built in close succession in the 1960s on gardens running through from Burges Road to Thorpe Bay Gardens. No.146 was the last remaining single plot and the applicant was only seeking the removal of the covenants to realise value. Mr and Mrs Stobart had nothing to gain from agreeing to the application but had a lot to lose both financially and environmentally. The first and second objectors had commissioned an independent valuation from Mr Simon Deacon, a chartered surveyor, and his opinion should not be ignored.

43. Mr Webster did not consider that the restrictive covenants were obsolete. He had moved to Thorpe Bay about 20 years ago and had spoken to Mr Barnard, the then owner of No.146, who had told him that his garden was his passion and that he had been happy to accept the covenants against further development since he had no intention of developing the property himself. Mr Webster said that the benefit to him of the covenants was the maintenance of an open, undeveloped aspect as viewed from his balcony and rear bedrooms. The proposed boundary between No.146 and the new house was a major concern to Mr Webster. He said its encroachment 20ft beyond the existing rear boundaries of No. 144 and 148 meant that the

proposed garage would be closer to his property and there would be an increased risk of noise from cars revving up and manoeuvring.

44. Mr Stobart and Mr Webster instructed Mr Simon Deacon FRICS to prepare three market valuations of 144 and 148 Burges Road: (i) "as they stand"; (ii) assuming a new house was built on the application land fronting Thorpe Bay Gardens with a rear boundary in line with the existing rear boundaries of Nos. 144 and 148, and (iii) assuming the development of the new house with the boundary of its rear garden located 20ft north of the existing rear boundaries of Nos. 144 and 148.

45. Mr Deacon's respective valuations were:

(i) £550,000;

(ii) £530,000 to £540,000; a reduction of £10,000 to £20,000; and

(iii) £515,000 to £525,000; a reduction of £25,000 to £35,000.

Mr Deacon valued both Nos. 144 and 148 at the same figure and did not discriminate in the effect of the proposed development on the value of each house.

46. Mr Deacon's reasons for the reduction in value were:

(i) the creation of an additional neighbour if the boundary line is moved northwards;

(ii) the possibility of disturbance from a swimming pool, garage(s) and/or outbuildings;

(iii) loss of an open aspect;

(iv) overshadowing and loss of visual amenity;

(v) disturbance during construction works; and

(vi) overlooking by the new house.

47. Mr Deacon was not called to give evidence and his expert report was untested.

Thorpe Estate Limited

48. Mr Murch explained that TEL now accepted, contrary to their amended statement of case, that grounds 84(1)(a), (aa) and (c) were satisfied. Mr Huntington-Whiteley acknowledged this in his expert report where he said "I broadly agree with Mr Tibbatts' opinion on this matter." TEL's sole objection related to the assessment of compensation under section 84(1) of the 1925 Act. TEL relied upon section 84(1)(ii).

49. Mr Plumridge said that the Estate was developed by TEL's predecessors. Regardless of whether the houses when developed were sold freehold or leasehold the transfer or lease "almost without exception" contained restrictive covenants in a similar form to those imposed on the application land in 1989. The Regis Group acquired a majority shareholding in TEL in 2001 and had consistently taken steps to enforce the covenants and to ensure that such covenants were imposed whenever a lessee acquired the freehold interest in his property. It was important to TEL to maintain the Estate as a high class residential area and to prevent its overdevelopment.

50. In cross-examination Mr Plumridge agreed that the proposed house on the application land was not inconsistent with a high class residential area; that it reflected the ethos of the Estate; that it would not be overdevelopment; that it would not adversely affect the maintenance of property values on the Estate; that TEL had no objection to the proposed house; that there would be no difficulty in principle (subject to negotiation) to modifying the restrictions to allow the proposed development; and that it was now TEL's position that provided it received adequate compensation it had no objection to the modification of the restriction.

51. Mr Huntington-Whiteley assessed compensation as £225,000. He assumed that the price obtained on the sale of the freehold interest to Mr Barnard in 1989 (£3,250) was reduced to reflect the imposition of the restrictive covenants.

52. Mr Huntington-Whiteley said that his research showed that by 1989 a number of the rear gardens of properties in Burges Road had been developed with houses fronting onto Thorpe Bay Gardens. This set a precedent which he considered would have led the local planning authority to look favourably upon any planning application for a similar development on the application land made in 1989.

53. It was necessary to calculate the value of the application land as a building plot in 1989. Mr Huntington-Whiteley was unable to find any contemporary comparables of such building land so he proceeded as follows:

(i) He estimated the GDV of the proposed house at £1.75m.

(ii) "As a rule of thumb" Mr Huntington-Whiteley took 40% of the GDV as the value of the development plot. This gave a figure of £700,000.

(iii) Mr Huntington-Whiteley said this "checked well" against the applicant's purchase of the application land in 2011 for £1.675m. He compared this with similar properties in Burges Road (without building plots at the rear) which he said were marketed at that time between £560,000 and £750,000. In other words the purchase price in 2011 reflected a significant element of hope value for development in the rear garden of No.146.

(iv) The plot value of £700,000 was then "reverse indexed" to 1989 to give a figure of £280,000. Mr Huntington-Whiteley discounted this to £225,000 to allow for the lack of planning permission when the freehold was sold in 1989.

54. Mr Huntington-Whiteley was cross-examined about his experience. Prior to his current instruction he had undertaken no valuations on the Thorpe Bay Estate, none in Essex and "a very limited number over the years" in the south east of England. Mr Huntington-Whiteley said that when he signed his expert report on 13 May 2015 he had not read the 1989 freehold transfer document containing the covenants and had not been aware of the particulars and terms of the three leases on the application land.

55. Mr Huntington-Whiteley accepted that the compensation payable under section 84(1)(ii) fell to be considered in the context of the actual freehold sale in 1989 and not a hypothetical transaction. Mr Denehan pointed out that the supplemental lease contemplated and allowed (subject to the landlord's consent) the development of another house on that part of the application land to a depth of 160ft from Thorpe Bay Gardens. That being so the leaseholder, Mr Barnard, would not have been prepared to pay £225,000 for the freehold interest without the restrictive covenants since that gave him nothing he did not already have. Mr Denehan put it to Mr Huntington-Whiteley that the imposition of the covenants made no impact at all on the purchase price, to which he replied that it would "not be as significant a difference as if the supplementary lease wasn't there."

Submissions for Thorpe Estate Limited

56. Mr Murch described the background to TEL's objection and the preparation of Mr Huntington-Whiteley's expert report. He submitted that TEL's position on the application was clear at the time Mr Huntington-Whiteley's expert report was served on the applicant. TEL accepted that the applicant had successfully made out grounds (a), (aa) and (c). The only issue in TEL's objection was one of compensation.

57. Mr Murch submitted there was value to Mr Barnard in acquiring the freehold interest in 1989. The Tribunal was entitled to assume that Mr Barnard paid for what he got, namely a freehold that did not allow him to develop the land to the south of the existing dwelling. That explained why the price was so low. The search was on, said Mr Murch, for what effect the covenants had upon the price paid for the freehold. It was more than likely that the covenants had reduced the price otherwise payable and TEL was entitled to receive compensation for that reduction. TEL relied upon Mr Huntington-Whiteley's evidence. There was no specific evidence of the discussions between the parties to the 1989 sale, but, said Mr Murch, that was not an unusual state of affairs.

58. Mr Murch relied upon *Re Bowden's Application* (1984) 47 P & CR 455 in which the President of the Lands Tribunal, Sir Douglas Frank QC, considered whether compensation was payable under section 84(1)(ii). The case concerned the sale in 1964 of a plot of land made subject to a restrictive covenant allowing the erection of a single dwelling only. The applicant subsequently obtained planning permission for the development of a second dwelling and the objectors sought compensation under section 84(1)(ii). The applicant argued that planning permission for a second dwelling would not have been granted at the time of sale in 1964 and therefore, absent the restriction, there would have been no difference in value. The Tribunal said at 457:

> "…the objectors have not challenged the allegation that planning permission for an additional dwelling would not have been granted at the time of the sale. The objectors seem to rely on subsequent increases in land values but that is irrelevant. Nevertheless I am satisfied that there must have been some hope of the granting of planning permission in the future and that has been corroborated by subsequent events. Accordingly I have reached the conclusion that an additional amount would have been paid and, doing the best I can having regard to the dearth of evidence, I assess that sum at £250 and award it by way of compensation."

Mr Murch said that the Tribunal's conclusion that an additional amount "would have been paid" and that the President had to "do the best I can" showed that the issue could properly be resolved by inference as to what was most likely to have been the effect of the restrictions on the purchase price.

59. The absence of any notes or evidence about what discussions took place in 1989 meant that the Tribunal was entitled to come to the conclusion, on the balance of probabilities, that the effect of the restrictions was to reduce the price then paid. That being so compensation should be awarded under section 84(1)(ii).

Submissions for the applicant

60. Mr Denehan firstly considered the objections of Mr and Mrs Stobart and Mr Webster. Restrictions 1 and 5 did not mean that the applicant could not construct structures on the application land such as fencing, furniture, outbuildings, water features, canopies, a tennis court or a swimming pool. The difficulty for the objectors was that the risk to their alleged amenity existed independently of the restrictions and was not secured by them.

61. It was no part of the objectors' case that the restrictions operated to preserve the view towards the coast or that they had the effect of preserving rights to light. That left the objectors with a ground of objection based on the loss of an open aspect and a perception of space. But these supposed benefits were not observed at ground level in either 144 or 148 Burges Road. There was a mature hedge between the application land and No. 148 and a fence and vegetation between it and No.144. Mr Webster said he could not see into No.146 from his garden and that he did not intend to trim the hedge. Mr Stobart said there were gaps in the boundary screen with the application land but Mr Denehan submitted this was not the same as enjoying an open aspect. Nor did Nos. 144 or 148 have an open aspect over the application land from first floor level. The predominant view to the rear of these properties was of 97 and 101 Thorpe Bay Gardens respectively. These views were similar to those of any of the houses in this part of Burges Road.

62. The issue of loss of light was only vaguely described by the objectors. The location of the garage at the rear of the proposed development was consistent with that of other garages in Thorpe Bay Gardens, including those belonging to Nos. 97 and 101 which were already at the rear of the objectors' properties. The applicant also said that the proposed garage had been reduced in size from a triple to a double. The impact on the garden of No.144 would be no worse than that of the existing garages.

63. The objectors argued that the proposed boundary between No.146 and the new house had been moved northwards by 20 ft. Mr Denehan denied this saying there was no existing boundary. The possibility of noisy activities being conducted on the property was one that already existed. The applicant could at any time construct or use outbuildings that were ancillary to No.146's use as a dwellinghouse without breaching the covenants. The restrictions simply did not protect the objectors from their fears in this respect. The objectors' reference to Mr Barnard's expressed intention of not developing the application land by another house or at all was not to the point; Mr Barnard had sold the property.

64. Turning to the three grounds of the application, Mr Denehan said of ground (a) that the original purpose of the restrictions was to preserve the large historic plots along Burges Road. But the character of this part of the Estate had now changed and all the plots except for the application land had been developed with houses fronting Thorpe Bay Gardens. Mr Stobart, Mr Webster and Mr Tibbatts had all given evidence that some of the new houses had been constructed since 1989. The original purpose of the restrictions could no longer be achieved and they were therefore obsolete under ground (a).

65. If, on the other hand, part of the original purpose of the restrictions was to maintain single houses with gardens and not to develop flats then the restrictions were not obsolete. But the modification of the covenants to allow the proposed development would not be inconsistent with that purpose.

66. Mr Denehan considered ground (aa) by reference to the well known criteria set out by the Tribunal in *Re Bass Limited's Application* (1973) 26 P & CR 156:

(i) *Was the proposed user reasonable?* Yes, because it had planning permission and was consistent with many other similar developments in the locality.

(ii) Did the covenants impede that user? Yes.

(iii) Did impeding the proposed user secure practical benefits to the objectors? No. They did not protect the visual amenity of the objectors' properties nor any rights of light. There were no other identified benefits.

(iv) If the answer to question (iii) was affirmative, were those benefits of substantial value or advantage? If, contrary to the applicant's case, the Tribunal determined that the covenants did secure practical benefits, Mr Denehan submitted that they were not substantial.

(v) Is impeding the proposed user contrary to the public interest? This was not part of the applicant's case

(vi) If the answer to (iv) was negative, would money be an adequate compensation? Yes. A small sum of money would be appropriate, if at all.

Mr Denehan concluded that ground (aa) was satisfied.

67. For the reasons already explained Mr Denehan submitted that the discharge or modification of the restrictions would not injure Mr and Mrs Stobart or Mr Webster and therefore ground (c) was also satisfied.

68. Mr Denehan next considered whether it would be just to award any consideration to the objectors under either section 84(1)(i) or (ii).

69. Mr Stobart and Mr Webster relied upon a valuation report prepared by Mr Simon Deacon FRICS. Mr Denehan submitted that little weight should be given to Mr Deacon's valuation. His analysis had been based on poor comparables on the other (north) side of Burges Road. Mr Deacon's discounts were unexplained and unsupported by any evidence. It was inconceivable that a purchaser would pay £20,000 less for 144 and 148 Burges Road just because a house would be visible on the adjoining plot. Those properties already backed onto houses in Thorpe Bay Gardens. Mr Denehan said that Mr Deacon's conclusions about an increased discount if the boundary between the proposed house and No.146 were "to protrude further north" were hugely flawed. There was no continuity in the boundary line between the properties in Burges Road and those in Thorpe Bay Gardens and no existing boundary line that could be "moved". The applicant could construct whatever outbuildings she wanted. What mattered was what the applicant *could* do without breaching the restrictions rather than what she *would* do. Mr Denehan submitted that Mr Deacon's conclusions were not credible, even as a matter of common sense.

70. Finally, Mr Denehan considered TEL's objection. He submitted that Mr Huntington-Whiteley had not prepared his report adequately and had been unaware of what was required from him. He produced no evidence to support his opinions and had no experience of valuations in this part of the country. He had not armed himself with sufficient material upon which to make an informed judgment. Mr Huntington-Whiteley assumed the application land was subject to a long lease only when he was in the witness box. Until then he just referred to the acquisition of "the reversionary interest" with no reference to a long lease. Mr Denehan said it was extraordinary that Mr Huntington-Whiteley was not provided with copies of the leases. At least he would then have understood Mr Barnard's negotiating position. He was unaware of TEL's management policy and had not considered the position of the actual parities to the 1989 freehold sale.

71. Looking at the position of the actual parties Mr Denehan said that Mr Barnard owned a virtual freehold. The supplemental lease allowed him to construct another house fronting Thorpe Bay Gardens. It was inconceivable that the freeholder would be able to argue successfully that Mr Barnard should pay him £225,000 for the benefit of doing something he was already able to do. In reality Mr Barnard did not want to develop the plot and he was happy to accept the imposition of the restrictions, but that did not affect the amount of money that he would otherwise have paid.

72. Mr Huntington-Whiteley approached the exercise as an open market transaction based upon a residual valuation. But no third party would take such an approach because it ignored

the fact that the freehold reversion was subject to Mr Barnard's leases. Mr Huntington-Whiteley's starting point was fatally flawed.

73. Mr Huntington-Whiteley said in his expert report that he believed compensation should be paid under section 84(1)(ii) of the 1925 Act on the assumption the price had been reduced in 1989 due to the imposition of the restrictions. That assumption was not supported by evidence and did not reflect the actual circumstances of the case. Mr Denehan submitted that the Tribunal could not be satisfied that the existence of the restrictions had any effect on the price paid at the time they were imposed and consequently TEL's claim under section 84(1)(ii) should be rejected.

Discussion

Ground (a)

74. At the hearing TEL accepted that the applicant had satisfied this ground but Mr and Mrs Stobart and Mr Webster maintained their objections.

75. The test of whether a restriction is obsolete is whether it can still achieve its original purpose: see *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261, per Romer LJ at 272. In my opinion, as TEL stated in their amended statement of case and as Mr Plumridge said in evidence, the purpose of the restrictions was to maintain the character of the Estate as an exclusive, high class residential area. This purpose was achieved by limiting the development of the application land to a single house and by preventing alternative forms of residential development such as flats. There was no suggestion that the purpose of the covenants was to secure development value for TEL as the original covenantee. Mr Plumridge said in his witness statement that:

> "[TEL] is anxious to prevent overdevelopment of the Estate and to protect its character. [TEL] believes that the control which it exercises adds to the value of all properties on the Estate."

76. I do not consider it was a purpose of the restrictions to secure to the owners of 144 and 148 Burges Road the specific benefit of an open aspect over the application land. In my view insofar as such a benefit exists it was an effect of those restrictions and not a purpose of them.

77. The application land is undoubtedly still located in an exclusive residential area, but the character of the neighbourhood is no longer defined by single houses on large through plots running from Burges Road to Thorpe Bay Gardens. The development of such plots by two houses in the block bounded by Burges Road, Marcus Avenue, Barrowsand and Thorpe Bay Gardens was substantially complete by the date of the transfer in 1989, as can be seen from the transfer plan. Only the application land and 142 Burges Road remained as single plots. The other 11 plots had already been developed by two houses. Indeed the development of the application land by two houses was in prospect under the principal and supplementary leases and the tone of the Estate has been maintained despite this pattern of development.

78. Mr Tibbatts produced details of what he said were four single plots on Burges Road that had been allowed to become double plots for two houses since 2000 (see paragraph 33 above). I think Mr Tibbatts was mistaken about these transactions. From the official copies of register of title and the associated transfers it seems that in each case a second property had already been developed fronting Thorpe Bay Gardens and that the transaction was the acquisition by the lessee from TEL of the freehold interest in that developed property. Mr Tibbatts also referred to the sale of the freehold interest in 95 Thorpe Bay Gardens (at the rear of 142 Burges Road) to the lessee on 6 January 1993. It appears from the plans that this plot was indeed undeveloped at the time of sale although the transfer refers to the sale of the land edged red "together with the dwellinghouse and other buildings erected thereon". In each of these sales the transfer contained covenants similar (but not identical) to those which form the subject of the present application. It seems as though TEL imposed standard covenants whenever they sold a freehold interest, as Mr Plumridge confirmed in his evidence, the purpose of which was the same in each instance.

79. The purpose of the restrictions would still be achieved, in my opinion, if a second house were to be built on the application land. The effect of the vacant plot in Thorpe Bay Gardens resulting from the restrictions was fairly described by Mr Tibbatts as being like "a winning smile with a missing front tooth". The absence of a house in this location is visually disjunctive. The restrictions limiting the development of the application land to a single house are unnecessary to the achievement of their purpose, but that does not, in my opinion, mean that the restrictions are obsolete. TEL and Mr Barnard were content to agree to the restrictions in that form and they still achieve their purpose – to ensure a high class residential development of dwellinghouses. The fact that this purpose could have been achieved another way (by allowing the development of two houses on the application land) is not to the point.

80. Applications made under ground (a) are usually concerned with changes in the character of the property or of the neighbourhood since the restrictions were imposed. The character of the application land has not changed since 1989 and, with the possible exception of the development of a new house (95 Thorpe Bay Gardens) behind 142 Burges Road, the character of the neighbourhood has not changed either. In my opinion the restrictions are not obsolete and the application under ground (a) fails.

Ground (aa)

81. By reference to the criteria in *Re Bass Limited's Application* I conclude as follows. The proposed user is reasonable. It has planning permission and is in keeping with the surrounding development on the Estate. The restrictions impede that user.

82. In my opinion the restrictions do not secure to Mr Webster any practical benefits. The construction of a second house on the application land will not materially affect the setting, outlook or enjoyment of 148 Burges Road. It will not be overlooked by the proposed house. There would be no visual impact upon the outlook from the ground floor of No.148 or from its garden which is surrounded by a tall, mature hedge. At first floor level there is currently an angled view across the application land to the estuary from the balcony and bedrooms. But this is not the dominant view and in my opinion the open aspect across the application land is not a practical benefit secured by the restrictions. 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.

83. Much was made at the hearing about the location of the new boundary fence between No.146 and the proposed house. It is closer by 20 feet to No.146 than are the equivalent boundaries between Nos. 144 and 148 and 97 and 101 Thorpe Bay Gardens respectively. In my opinion this will not make a difference to the enjoyment of No.148 and its prevention is not a practical benefit secured by the restrictions. The mere existence of another neighbour, identified by Mr Deacon as a relevant factor going to value, does not, in my opinion, cause any loss or disadvantage to Mr Webster.

84. I distinguish the effect of the proposed development on No.144 from that on No.148. There are two main differences. Firstly, the application land is not as well screened from No.144 by hedges and other vegetation as it is from No.148 and, secondly, it is proposed to build a new detached double garage within one metre of the boundary fence of No.148 for a length of over 6m (20 ft) and in close proximity to Mr and Mrs Stobarts' greenhouse. In my opinion the restrictions have the practical benefit of preventing a possible slight loss of amenity to No.144. But, in the light of the evidence and my site inspection, I do not consider this benefit to be of substantial advantage to Mr and Mrs Stobart.

85. Mr Deacon's evidence suggests that by impeding the proposed user the restrictions secure to Mr and Mrs Stobart and Mr Webster practical benefits of substantial value (although his evidence is not directed specifically to the provisions of section 84 of the 1925 Act). I do not accept Mr Deacon's valuation analysis which was not tested under cross-examination. I do not think, either individually or collectively, the list of reasons given by Mr Deacon in paragraph 46 above supports his view that the value of Nos. 144 and 148 would be adversely affected by the proposals. His comparables (two of which were sold for £115,000 less than his valuation of the objectors' houses and the other for £75,000 less) do not obviously support his valuations and he gives no reasoned justification for the discounts which he adopts due to the proposed development. In my opinion this is a case "where the prospect terrifies while the reality will prove harmless" (see *Re Zopat Developments' Application* 18 P & CR 156 at 159).

86. The specific concern identified by Mr Deacon concerning disruption during construction works was considered in *Shephard v Turner* [2006] 2 P & CR 28 where Carnwath LJ (as he then was) said at 629:

> "The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. 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."

In my opinion there is nothing in the restrictions or in the facts of this case that justify the attribution of any special weight to this factor.

87. An order modifying the restrictions under section 84(1) may direct the applicant to pay any person entitled to the benefit of them such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the heads set out in section 84(1)(i) or (ii). Mr and Mrs Stobart and Mr Webster have sought a payment under subsection (i) while TEL has sought a payment under subsection (ii). A payment of a sum under subsection (i) is to make up for any loss or disadvantage suffered by a person entitled to the benefit of the restrictions in consequence of their discharge or modification.

88. In my opinion money would be an adequate compensation for any loss or disadvantage that the objectors would suffer. I do not consider that Mr Webster would suffer any such loss or disadvantage. For the reasons I have already stated I think that Mr and Mrs Stobart would be slightly disadvantaged by the proximity of the proposed garage to their back garden and a sum should therefore be paid to them under section 84(1)(i).

89. Mr Denehan submitted that in considering the sum to make up for any loss or disadvantage suffered in consequence of the discharge or modification of a restriction it was necessary to have regard to what the applicant could do without breaching that restriction. I do not accept that submission. The fact that another form of development could take place without breaching the restrictions and thus without triggering any payment under section 84(1)(i) is only relevant, it seems to me, to the extent that such alternative development is likely to happen and how bad, in comparison to the applicant's scheme, the effects of that development would be (see *Re Fairclough Homes Limited's Application* [2004] Lands Tribunal LP/30/2001 (unreported) at paragraphs 29 to 30). In this case I do not consider it likely that the applicant would erect any outbuildings of a kind described by Mr Denehan which would have the same impact as the proposed double garage that is to be built alongside the Stobarts' fence. I consider that the disadvantage to Mr and Mrs Stobart of having the proposed garage in close proximity to their fence would be adequately compensated by a payment to them by the applicant of £2,500 under section 84(1)(i) of the 1925 Act.

90. I consider that the application to modify the restrictions under ground (aa) is satisfied.

91. In reaching this decision I have also had regard to section 84(1B) of the 1925 Act and have taken into account the ascertainable pattern for the grant of planning permissions for the development of second houses on long through plots as well as the period at which and the context in which the restrictions were imposed. By 1989 the neighbourhood of the application land had already changed substantially with most plots having been divided into two. Furthermore the context in which the restrictions were imposed was one where the lessee under the supplementary lease could, subject to the landlord's consent, develop a second house on the application land.

Ground (c)

92. I have found that there would be a loss or disadvantage to Mr and Mrs Stobart in the event that the restrictions are modified. That being so it cannot be said, in my opinion, that there has been no injury to Mr and Mrs Stobart. Consequently ground (c) has not been satisfied.

TEL's objection

93. I turn next to TEL's objection to the application which is concerned only with the payment of the sum which it considers is due under section 84(1)(ii). I find no merit in that objection which I consider to be opportunistic. Mr Huntington-Whiteley was instructed shortly before the hearing and his expert report was apparently prepared without full knowledge of the history and tenure of the application land. He had no knowledge of the region let alone the locality of the application land; identified no comparables; made sweeping, unsupported assumptions; applied "reverse indexation" for an extended and inappropriate period of 25 years by an unidentified index; and based his analysis on a hypothetical open market transaction rather the context of the actual freehold transfer in 1989. I am bound to say that Mr Huntington-Whiteley's report seemed hurriedly prepared. It lacked the care and attention to detail that the Tribunal expects and requires of those who appear as experts before it. I found it to be wholly unconvincing and I give it no weight.

94. The short answer to TEL's objection is this. Mr Barnard, the lessee under the three leases of the application land, was entitled to develop a second house, subject to the landlord's consent, under the supplementary lease. There was therefore no reason why he would have paid more to buy the freehold of the application land free of the restrictions. That gave him nothing more than he already had under his leases. It seems strange under these circumstances that Mr Barnard should accept the imposition of the restrictions, but from the evidence it appears that he had no intention of developing a second house and was quite content to leave the rear of the large single plot as undeveloped garden land. In my opinion TEL have produced no relevant evidence or argument in support of their objection and I award it no sum under section 84(1)(ii).

The order

95. The applicant did not specify in terms the wording of the modification of the restrictions that she would be prepared to accept. Under section 84 (1C) of the 1925 Act I have the power to add such further provisions restricting the user of or the building on the application land as appears to me to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant. I may refuse to modify a restriction without some such addition.

96. The following order will accordingly be made:

In the First Schedule of the transfer dated 31 August 1989 restrictions 1 and 5 shall be modified on ground (aa) by the insertion of the following words at the end of the First Schedule:

> "Provided that the development permitted under planning permission reference 12/00699/FUL dated 6 July 2012 may be implemented in accordance with the terms, details and approved plans referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached to such permission."

97. An order modifying restrictions 1 and 5 in accordance with the above wording shall be made by the Tribunal provided, within three months of the date hereof, the applicant shall have:

(i) signified her acceptance of the proposed modification to restrictions 1 and 5; and

(ii) paid the sum of £2,500 to Mr and Mrs Stobart.

98. 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 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 10 September 2015

AJ Trott FRICS

Addendum on Costs

99. The applicants seek the award of 75% of their costs against all the objectors. Alternatively they seek an award of 75% of their costs against TEL, whose conduct they describe as reprehensible, and no order of costs against Mr Webster or Mr and Mrs Stobart. The applicants submit that TEL made a late objection in order to extract from them a substantial sum of money. It was self-evident that the modification or discharge of the restrictions would not have any adverse impact upon TEL. But in its objection dated 19 January 2015, its statement of case dated 2 March 2015 and its undated amended statement of case (received in May 2015) it maintained substantive opposition to the application under grounds (a) and (aa). This was despite the fact that Mr Huntington-Whiteley's expert report, dated 13 May 2015 and produced before TEL amended its statement of case, conceded that the restrictions were not obsolete and did not secure to TEL any practical benefits of substantial value or advantage. It was not until it produced its skeleton argument on 29 May 2015 that TEL said it would "not comment further upon those grounds."

100. The applicants sent an email to TEL on 15 May 2015 emphasising the weakness of TEL's objection which they said was based upon speculative evidence and "doomed to failure". They suggested that TEL would be at risk of costs if it continued its objection. TEL did not reply to this email and continued its objection based upon a claim for compensation of £225,000 under section 84(1)(ii). The applicants say that the predictions in their email of 15 May 2015 were borne out. By pursuing what the applicants say was a "flawed case" TEL increased the burden of the application, the time needed to deal with it before the Tribunal and the time needed by the Tribunal to formulate its decision. They consider that TEL's conduct was unreasonable and demanding of censure.

101. The applicants, as their primary submission, also seek costs against Mr Webster and Mr and Mrs Stobart, who they say wanted their day in court, advanced misconceived objections and spent time on irrelevant matters. Mr Webster and Mr and Mrs Stobart rejected an offer of £2,000 each made at a meeting on 9 September 2014. The applicants had also offered to re-site the proposed garage in a letter to Mr and Mrs Stobart dated 18 February 2013 if they would consent to the proposed application.

102. TEL submits that the applicants failed to serve it with a notice of the application when it was made on 13 May 2013. This was despite the fact that TEL was a party to the transfer which created the restrictions. TEL's continued existence and current address should have been apparent to the applicants by making simple enquiries. In any event the applicants' then solicitors had written to TEL on 6 January 2011 asking whether they would agree to removing the restrictions.

103. On 15 January 2015 the Tribunal invited TEL to file a notice of objection which it did on 19 January 2015, followed by a statement of case on 2 March 2015. By then the applicants had faced a contested application for about 18 months. There would have been a hearing in any event and the applicants would have incurred costs regardless of TEL's objection. Apart from a brief correspondence between the applicants and TEL in 2011 and 2012 any work carried out by the applicants before TEL made their objection on 19

January 2015 could only have been incurred in respect of the objections of Mr Webster and Mr and Mrs Stobart.

104. At the hearing the applicants relied upon the expert report of Mr Tibbatts which was dated 14 August 2014, well before TEL's objection was made. Mr Tibbatts recognised in his report that TEL had the benefit of the restrictions and considered briefly (in one paragraph) whether the proposed discharge or modification of the restrictions would injure TEL. Despite TEL's subsequent objection the applicants did not seek to submit an additional expert report to deal with it. The applicants relied solely upon Mr Tibbatts' original report to deal with the question of what compensation should be paid. The applicants could not have incurred any costs in considering Mr Huntington-Whiteley's expert report, and thus the substance of TEL's case, before 13 May 2015.

105. Mrs Laav's witness statement was dated 15 August 2014 and was not updated in the light of TEL's participation in the proceedings.

106. TEL said that it followed that the applicants' costs in dealing with its objection "must be modest indeed". The applicants' evidence of fact and expert evidence were already prepared (and not supplemented subsequently) by the time of TEL's objection.

107. TEL says it did not behave unreasonably. Nothing it did gave rise to the need for a hearing which might otherwise have been avoided. The only time it caused was that spent hearing TEL's evidence. TEL accepts that in the light of Mr Huntington-Whiteley's expert report TEL's position changed from being an objection under grounds (a) and (aa) to one based solely upon compensation. But that was not unreasonable conduct and, if anything, reduced the number of issues in dispute. Nothing in Mr Huntington-Whiteley's report unreasonably caused the applicants to incur costs they would not have done otherwise.

108. TEL submits that it can only be liable to such proportion of the costs as the applicant has incurred in dealing with its challenge. Apart from a limited amount of correspondence this could only extend to costs incurred after 19 January 2015 in dealing with TEL's objection i.e. no more than one third. TEL says that the Tribunal should not accept the applicants' alternative case on costs, namely that it should pay 75% of the costs. That was inconsistent with the applicants' submission that Mr Webster and Mr and Mrs Stobart had been the cause of costs and also failed to reflect the effect of TEL's involvement in the proceedings.

109. Mr Webster submitted an email dated 18 September 2015 to the applicants, copied to the Tribunal, accepting "the conclusion of the Tribunal and your [the applicants'] position re costs."

110. In a letter to the Tribunal dated 25 September 2015, signed jointly with Mr Webster, Mr and Mrs Stobart strongly object to any order of costs being made against them and refer to paragraph 12.5 of the Tribunal's Practice Directions in support.

111. Paragraph 12.5 sets out the principles to be applied in respect of the exercise of the Tribunal's discretion regarding liability for costs in applications under section 84 of the 1925 Act. Paragraph 12.5(3) states:

> "With regard to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to the application will not normally be ordered to pay any of the applicant's costs. …."

112. I do not consider that Mr Webster or Mr and Mrs Stobart acted unreasonably in pursuing their objections. They were litigants in person putting forward understandable, albeit unsuccessful, objections. I found that there would be a loss or disadvantage to Mr and Mrs Stobart in the event that the restrictions were modified and awarded them compensation. The applicants did not make any sealed offer. I therefore make no award of costs against Mr and Mrs Stobart or Mr Webster, whose email dated 18 September 2015 was written I suspect out of a genuine desire to maintain neighbourly relations with Mrs Laav rather than on the merits of his position in the light of the Tribunal's Practice Directions. I note in any event that Mr Webster subsequently co-signed the letter from Mr and Mrs Stobart opposing the award of costs against them.

113. I described TEL's objection as having no merit and as being opportunistic. I gave no weight to Mr Huntington-Whiteley's expert report for the reasons given in paragraph 93 above. TEL only abandoned its substantive objections on grounds (a) and (aa) in its skeleton argument which was filed and served two working days before the hearing. I do not consider that TEL had a genuine or serious objection to the application, a conclusion which was supported by Mr Plumridge's replies in cross-examination (see paragraph 50 above). In my opinion TEL's conduct in pursuing its objection was unreasonable.

114. I have considered whether TEL's conduct was such as to warrant an award of indemnity costs. Under the Tribunal's Practice Direction 12.2 the conduct of a party includes whether or not a party has acted reasonably in pursuing or contesting an issue and the manner in which they have conducted their case. In *Excelsior Commercial and Industrial Holdings Ltd v Shrewsbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879 Lord Woolf said at paragraph 19 that:

> "…if the court is to make an order for indemnity costs … it should do so on the assumption that there must be some circumstance which justifies such an order being made. …. there must be some conduct …. some circumstance which takes the case out of the norm."

115. In *Esure Services Limited v Quarcoo* [2009] EWCA Civ 595 Waller LJ said at paragraph 25 that:

> " In my view that word "norm" [in *Excelsior*] was not intended to reflect whether what occurred was something that happened often so that in one sense it might be seen as "normal" but was intended to reflect something outside the ordinary and reasonable conduct of proceedings."

In my opinion, TEL's pursuit of an objection based solely upon an unjustified claim for compensation under section 84(1)(ii), having abandoned at a very late stage its substantive objections under grounds (a) and (aa), is conduct that is outside the ordinary and reasonable conduct of proceedings.

116. TEL's objection was not simply misguided; it was an opportunistic attempt to obtain compensation which was not adequately supported by any relevant evidence and was entirely without merit. In my opinion, TEL's conduct in this matter was unreasonable to a high degree and deserving of an award of indemnity costs in favour of the applicants.

117. TEL shall pay to the applicants, on the indemnity basis, their costs of TEL's objection and also 50% of their cost of the hearing, such costs if not agreed to be the subject of a detailed assessment by the Registrar.

Dated: 6 October 2015

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