LP/53/2005
LP/62/2005

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – costs – single objector – objections withdrawn before exchange of expert reports – whether objector's conduct unreasonable – objector ordered to pay applicants' costs

IN THE MATTER OF APPLICATIONS FOR COSTS ARISING FROM TWO APPLICATIONS UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

by

ANTHONY JAMES NESTER
and
AMANDA NESTER

Re: Merrifield, 9 Top Park, Gerrards Cross,
Buckinghamshire, SL9 7P
(LP/53/2005)

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and by

NICHOLAS RICHARD JONES
and
SUZANNE JONES

Re: The Lantern House, Camp Road, Gerrards Cross,
Buckinghamshire, SL9 7PD
(LP/62/2005)

Before: N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 15 March and 17 May 2007

Martin Hutchings, instructed by IBB Solicitors of Uxbridge for the applicants.
Edward Denehan, instructed by the objector, Mrs Kareen Stuart, solicitor, of Gerrards Cross.

The following cases, although not mentioned in the decision, were referred to in argument:

Re Bass Limited's Application (1973) 26 P & CR 156
Re Martins' Application (1988) 57 P & CR 119
Re Nichols' Application [1997] 1 EGLR 144
Re Norfolk and Norwich University Hospital NHS Trust's Application, LP/41/2001, unreported

DECISION ON COSTS

1. These two applications, heard together, were made under section 84(1) of the Law of Property Act 1925. Both seek the modification of restrictive covenants affecting freehold land in Gerrards Cross in order to permit the erection of a replacement family home on each of the respective application sites. The first application, LP/53/2005, is by Mr Anthony James Nester and Mrs Amanda Nester and relates to land known as Merrifield, 9 Top Park. The second, LP/62/2005, is made by Mr Nicholas Richard Jones and Mrs Suzanne Jones and concerns The Lantern House, Camp Road.

2. The only objector to both applications, Mrs Kareen Stuart, is a solicitor and her firm, Stuarts, operates from Gerrards Cross. She is the owner of a residential property in Camp Road known as Saxons Green. She is also the owner of a road known as Main Drive, Gerrards Cross. It has been accepted for the purpose of these proceedings that Mrs Stuart is able to enforce the covenants which form the subject of both applications.

3. In February 2004 Mr and Mrs Jones purchased The Lantern House with the intention of knocking it down and replacing it with a new building. The site was subject to restrictive covenants resulting from a conveyance of part of the property dated 13 March 1948. The relevant terms of the restrictive covenants imposed a 50 feet building line from the road and a restriction on building more or less than two storeys without the consent of the "estate surveyor".

4. On 2 August 2004 Mr Jones obtained planning permission for the proposed redevelopment. No objection was made by Mrs Stuart to the proposals. Mr and Mrs Jones made an application under section 84 of the 1925 Act on 5 August 2005. Mrs Stuart gave notice of her objection on 17 November 2005, but withdrew it on 21 February 2006 because she was too unwell to continue.

5. Mr and Mrs Nester are the freehold owners of Merrifield, which they bought in August 2003 with the intention of redeveloping the house. They obtained planning permission to construct a replacement family home on the site as a result of applications made on 17 August 2004 and February 2005. Mrs Stuart did not object to either of the planning applications.

6. Merrifield is burdened by restrictive covenants contained in a conveyance dated 16 March 1937. The relevant terms of these restrictions imposed a 60 feet building line from the front boundary fence, which may be reduced in relation to specific buildings where in the opinion of the estate surveyor a 60 feet building line is impractical, provided that the building line shall in no case be less than 30 feet from the front boundary fence. It appears that there is no longer an estate surveyor.

7. Unaware of the restrictive covenants burdening Merrified, Mr and Mrs Nester commissioned builders to start work in early January 2005. By the end of May 2005 the building works had progressed to the stage where the brickwork was complete and the roof trusses were in position. The footprint of the development works is at its closest point 30 feet from the boundary. The previous building that had been demolished was at its closest point 51½ feet from the boundary.

8. In June 2005 Mrs Stuart sent Mr and Mrs Nester a letter marked "Service of notice of breach of restrictive covenant occurring at Merrifield, Top Park, Gerrards Cross". The breach of covenant alleged was that the replacement building was being constructed less than 60 feet from the front boundary.

9. An application for modification was made by Mr and Mrs Nester to the Lands Tribunal on 23 August 2005. Mrs Stuart gave notice of her objection on 17 November 2005, but withdrew it on 21 February 2006 because of her illness.

10. On 24 July 2006 the President made a Final Order, in respect of the application by Mr and Mrs Jones, that the restrictions be modified on ground (aa) so as to permit the erection of a replacement dwelling with integral garage and construction of vehicular access in accordance with the planning permission which had been granted by South Bucks District Council.

11. By letter dated 22 June 2006, the solicitors acting for Mr and Mrs Nester were advised that the President would make a similar Order in respect of their application, but that this would not be finalised until either their proposed application for costs had been determined or they had stated that they would not be proceeding with such an application.

12. Both Mr and Mrs Jones and Mr and Mrs Nester have applied for costs orders against Mrs Stuart. The applications were resisted and were originally to be determined on the basis of written submissions. After the matter had been allocated to me, however, I ordered that an oral hearing should take place in order to clarify certain aspects of the written representations. At that hearing Mr Martin Hutchings of counsel appeared for the applicants and Mr Edward Denehan of counsel appeared for Mrs Stuart. No oral evidence was adduced, the parties being content to rely on the relevant correspondence, to which I now turn.

Correspondence – The Lantern House

13. On 21 April 2004 Mr Jones wrote to Mrs Stuart as follows:

> "We have recently purchased 'The Lantern House', 66 Camp Road, which we intend to seek planning approval to replace with a new property for our own family use. We are not property developers, we are a family with three young children currently living in West Common, Gerrards Cross and have been looking for a property in Camp Road for several years.

The current house is a rather tired property built between 1950 and 1960 and added to in various haphazard extensions in the 1970s. We hope to replace it with a very high quality new house which we feel will greatly enhance the plot, whilst remaining very much in keeping with the neighbouring properties. We are using a very well regarded local architect, Bjorn Hall, to create an 'arts and crafts' style house which will be a subtle and non-imposing design.

We understand from Bjorn that you are highly involved in the Camp Road Residents Association and would like to discuss our plans with you prior to seeking planning approval. Please could you call me on the above number and I would be happy to meet you and bring copies of the proposed plans".

14. Mrs Stuart replied on 25 April 2004, saying:

"Thank you for your letter of 21 April which was hand delivered to my house.

I would first of all explain that Bjorn Hall is right to point you in my direction in terms of the plans for planning approval but not because of my involvement with the Camp Road Residents Association.

The Residents Association is a voluntary body which collects money to maintain Camp Road. To the best of my knowledge the ownership of the road itself is vested in Camp Road Estates Limited and when I last checked this company was under the sole control of Susan Andrews who is a partner in BP Collins.

When you purchased The Lantern House the transfer of ownership which you signed contained a covenant by yourself and your wife that you observe the covenants which affect the property. I presume therefore that your solicitor explained the nature and effect of these covenants to you.

I hold the benefit of these covenants"

15. Mrs Stuart followed that letter up with another on 31 May 2004:

"Thank you for coming round to Saxons Green recently and bringing with you plans which have been prepared for your new property. You explained that you were looking forward to having a new family home where your three daughters will grow up.

I explained that I hold the benefit of the restrictive covenants which affect the Bulstrode Estate which comprises of Camp Road, Valley Way, Top Park and Main Drive. These covenants provide a regulatory framework for ensuring for example that no blocks of flats are built on the estate. From the plans which you showed me I thought that your new house would be very much in keeping with the appearance of the present houses in Camp Road.

You explained that you had let your property for a few months and so the demolition of The Lantern House is not immediately imminent within the next few weeks but more within the next few months. I asked if you would request Bjorn Hall to send me a copy of the plans, which he had prepared.

I look forward to receiving a copy of the plans which I can then look at in detail before giving official approval.

May I ask please if you were advised when you purchased the Lantern House that the owner of the road had no intention of spending any money on its maintenance and that is the reason that the residents of Camp Road will have to spend money in the resurfacing of it?"

16. Mr and Mrs Jones wrote to Mrs Stuart on 26 September 2004. They said:

"Thank you for your letter of 31 May in relation to our plans to build an upgraded replacement property at The Lantern House, 66 Camp Road. Our architect, Bjorn Hall, assures me that he sent you copies of all plans which were prepared for planning purposes.

We are pleased to say that our plans have been fully approved by South Bucks and we hope to commence work on the new property some time in late 2004/early 2005. In this regard, we have been asked by our solicitor to provide a 'Release from Covenant' form/letter from you as beneficiary of the Camp Road covenant. We are not familiar with this process, so please let us know if there is anything further you need from us in order to help you provide this.

Thank you for all your help in this matter."

17. Mrs Stuart replied on 4 October 2004 as follows:

"I am in receipt of your letter to me of 26 September.

The contents of your letter rather gives the impression that you have not been advised properly by your solicitor as to the covenants affecting Camp Road at the time of purchase.

I would suggest at this stage that you contact me with a view to coming round to see me and bringing with you the conveyancing file and also the plans which were the basis of the planning permission.

The plans which I received from John Hall were similar but not identical to the ones submitted for planning if my memory serves me correctly."

18. Mrs Stuart wrote to Mr Jones again on 10 December 2004, saying:

"I met with Ian Johnson yesterday at BP Collins and I imagine that he will contact you as a result of the meeting.

Ian explained that he had seen the copies of the correspondence passing between us although it turned out that he did not have a full set and I handed to him copies of the correspondence and e-mails passing between us for him to photocopy. This is standard practice in such matters.

At our meeting on 1 November you showed me the two page information sheet provided to you about Camp Road, the ownership of it and on page 2 it had reference to me and the general advice that I should be contacted. As I recall it was printed on blue paper.

You also showed the letter which Robin Couser had written to you at the time just prior to exchange of contracts and by which he was reporting to you on the property. It described the covenants in general terms. Again it was more than one sheet in length.

There was a further letter written to you by Robin Couser at some date between 1 November 2004 and 19 November 2004, some or all of the contents of which you read out to me.

As I have done the right and proper thing by giving such documents as I had to BP Collins so that they have a complete set I would be grateful please if you would copy the three documents to which I refer above and send me a copy."

19. On the same day Mr Hallchurch, the senior partner of BP Collins wrote a long letter to Mr and Mrs Jones. It included the following observations:

"Most unfortunately Ian's meeting with Mrs Stuart yesterday was unsuccessful. The meeting was without prejudice. Mrs Stuart was under the impression that we had called the meeting, which we had, but only in response to her invitation that you should ask us to do so. The bottom line is that she says she is in dispute with three developers, one of whom has already built in breach of the building line restrictive covenant, and two others who are threatening to do so. We do not know what stage the proceedings are at and where her litigation has been issued or when the disputes might come to trial and be determined by a Judge one way or the other. She is concerned that any deed of variation that she might be asked to give would prejudice her position in those disputes. Her position is that if you make her an offer she will seek counsel's advice whether she can make an agreement with you without prejudicing her disputes with the developers. In the circumstances she did not make any offers herself at the meeting, but merely indicated that she would consider any that she receives with counsel. This is entirely disappointing, but not entirely unexpected...

She also discussed her concern that we represented Camp Road Estates Limited and the possible sale of Camp Road which she indicated she would be willing to purchase from the company which owns it, and she indicated that her acquisition of the road would remove the obstacles in the way of her granting you the deed of variation that you want."

20. Mr Hallchurch put forward four alternative courses of action which he suggested were open to Mr and Mrs Jones. He continued:

> "We may have reached the stage where it would be appropriate and in your best interests for you to consult other solicitors about your situation generally given that it appears unlikely that a deal will be struck with Mrs Stuart in the short term. Your new solicitors will then advise you in more detail about your situation and any claims which you may have against this firm arising from your letter to us or otherwise.
>
> We are very disappointed that Mrs Stuart is not telling us the terms on which she would be willing to grant the deed of variation she has discussed with you previously. It may be worthwhile making her a further offer through us, but if that did not lead to a swift negotiated settlement with her, then you should seek independent legal advice at that stage, if not before. Formally, you will recognise that we deny the claims contained in your letter but we have not set out our formal defence to your claims while you agreed that we should continue to act to try to negotiate a settlement with Mrs Stuart."

21. On 4 February 2005 Mrs Stuart wrote to Mr Johnson at BP Collins as follows:

> "After our meeting yesterday I went quietly about my own business and did not, and have not discussed the subject of our meeting within any other party.
>
> I received a telephone call out of the blue at about noon from Mr Jones. He had received a telephone call from Mr Hallchurch. Whatever Mr Hallchurch had said to him had apparently distressed him. Mr Jones became cross.
>
> Apparently Mr Hallchurch had a discussion with him and a figure of £100,000 was mentioned. I confirm to Mr Jones, as has been my position all along and indeed explained to you yesterday, that I did not expect at any stage for Mr Jones to be involved in any finances for any arrangement. Indeed I mentioned that at the beginning of the meeting and stated that I did not want to be a party to anything that was not allowed or anything that in any way could be construed as improper. It was you, yesterday who put forward the view that Mr Jones would benefit from the three storey breach of covenant and therefore you would have to consider the matter.
>
> I must draw to your attention **Principle 29.02 of the Professional Guide to Solicitors** which states '*If a solicitor makes a claim against a solicitor or notifies an intention to do so or if the solicitor discovers an act or omission which would justify such a claim the solicitor is under a duty to inform the client that independent legal advice should be sought.*
>
> *Note 2 states:*
>
> *If the client refuses to seek independent legal advice the solicitor should decline to continue to act unless satisfied that there is no conflict of interest."*
>
> From the evidence before me there is no doubt that BPC has made a mistake about the building line in Camp Road. I have explained to you that when I produced a copy of

the Land Registry entries of the title of The Lantern House that Mr Jones remarked that he had never seen a copy of those before. Of course I cannot comment on whether or not Mr Jones saw or did not see the Official Copies prior to exchange. Your file will reveal that.

If he did not then the presumption will be that he was not advised about the two or three storey requirement and that BPC are liable for any losses which he incurs.

Whatever date BPC advised him to come and see me that cannot be taken as a fulfilment of the requirement on the part of BPC to inform him about the two or three storey rule. You must satisfy yourself as to whether or not he was sent a copy of the official copies. I have seen many months ago a copy of a letter sent to Mr Jones which dealt with at least some of the covenants and I confirm that it was not a comprehensive report on the covenants and it did not deal with each and every one and the likelihood of enforcement. It was to say the least a very sketchy letter. It is for you to go through the file and see how and when and what he was advised to do. Suffice it to say that if any member of my own staff conducted a conveyancing matter in a similar fashion to this that they would not remain on my staff for much longer.

Mr Jones inferred from the conversation with Mr Hallchurch that I had refused or was unwilling, or in some way fettering the transaction. Without prejudice to my own position as you will be aware I offered to grant deeds of release in relation to both, I left the amount of consideration 'entirely flexible' and it was agreed that I would wait to hear <u>from you</u>. Thus to indicate that in some way I am fettering the matter is reprehensible.

To find then that Mr Jones is cross with me comes as a shock as I have left the matter completely open and awaiting your decision. I have stipulated nothing regarding financial amount and left the matter entirely in your hands. I was told that I had no idea how stressful this is for him and the effect that it was having on his wife. I did not carry out the conveyancing work for Mr Jones and I have no fault in that whatsoever. I advised your firm many years ago of the fact that I claim the benefit of the covenants and I have been nothing but honest and open since then. Mr Jones accused me of knowing about the two or three storey covenant when he first came round to see me in terms that somehow this is my fault. I am not prepared to accept blame in this matter. Any blame must lie at the door of whoever did or did not make proper enquiries before contract whether that is Mr Jones or your firm I know not.

I would add that this week I have received plans from another of your clients regarding a possible new property. At the date hereof I have not opened the package. However I must be seen to be consistent and can hardly grant a deed of release free of charge to one if appropriate and charge another of your clients for the same thing.

If you are suggesting that Mr Jones should bear part of the cost whatever that turns out to be then you cannot be said to be free of conflicts of interest and <u>*your firm must not act further.*</u>

I am not prepared to continue and find that somehow the blame is passed to me. Either this matter is capable of resolution this afternoon or not. If not I suggest that it

is referred to the Law Society and that way Mr Jones will have the benefit of our professional body giving their own ruling on it. I myself consider that there may be conduct issues arising from the failure of Robin Couser to notify Mr and Mrs Jones of the fact that the road was owned by another of your clients ie. Miss Andrew's company. That in itself could place you in a breach of Rule 15 of the Solicitors Practice Rules. I am content that any papers in my possession to be sent to our governing body and I trust that you are too. I will be sending a copy of this letter to Mr and Mrs Jones.

I would finish by stating unequivocally that your firm as a conduct issue cannot involve Mr Jones in any issues. Either there is no conflict of interest or there is. If you require Mr Jones to make any payment whatsoever there is an issue hence a conflict and you have to cease acting forthwith.

This matter must be dealt with by Monday next at 5.30 pm at the latest and either concluded or referred to the Conduct Investigation and Assessment Unit of the Law Society. I either therefore await hearing from you with proposals which will involve me granting a deed of release of both covenants and which do not involve Mr and Mrs Jones in any payments whatsoever and which are acceptable to me, or with your agreement that both your files and my papers concerning Camp Road go off to the Law Society.

I must reiterate that I am not in any way prepared to have it inferred that I am in any way to blame for this sad and sorry tale and that I will not tolerate such interference on your firm's behalf which is certainly what happened this morning in terms that Mr Jones was left with the impression that this is my fault".

22. Mrs Stuart sent a copy of that letter to Mr Jones on 7 February 2005. In the accompanying letter she said:

"I write to enclose a copy of the fax which I sent to Ian Johnston on Friday afternoon.

I find this whole episode unpalatable. I enclose a copy of the article from the Law Society's Gazette headed the Do's and Don'ts of Indemnity Claims. From it you will see that once a claim has been notified to a solicitor they can only continue to act if the matter is *trivial* and there is no conflict of interest. I do not see how and why they continue to involve you in discussions and I have no wish to end up either associated or involved with something improper. Either they set out terms on which the matter can be settled or they do not but whatever happens I do not see how they can involve you in any questions of money. If they do it seems to me they are in a conflict of interest situation and they must cease to be involved.

I have given them until close of business today to either settle this matter or not. If they have not come up with acceptable terms then I intend to send my file of papers to the Law Society. There is another plot in Camp Road which they were selling last autumn and which if developed would overlook the motorway service area, the planning application for which has been the subject of a public inquiry, and like Camp

Road is owned by one of their partners. As an outsider it seems that they are making rather a habit of not telling buyers all that the buyer needs to know.

I sincerely hope for everyone's sake that this matter does settle but if it does not then it must be right and proper that you take your own independent legal advice from an independent solicitor who can advise you on the way forward."

23. On 8 February 2005 Mr Johnson wrote a lengthy letter to Mr and Mrs Jones, summarising a meeting which, with his clients' agreement, he had attended with Mrs Stuart, in an effort to see whether the dispute could be settled. The meeting was on a without prejudice basis and was inconclusive. The letter included the following remarks:

"Mrs Stuart then proposed that in view of the substantial additional value which would be obtained by yourselves from the additional square footage on the second floor of your proposed new house and the value of the release of covenant relating to the building line she considered that an appropriate way forward would be for the shares in Camp Road Estates Limited to be transferred to her for nil consideration in return for her granting a release of the breaches of covenant in relation to The Lantern House.

I reiterated what had been said both before and at the start of the meeting that the questions of a release or variation of the covenants relating to the Lantern House and the purchase of the shares in Camp Road Estates Limited were two entirely separate matters as they relate to separate clients. Any terms would therefore have to be negotiated separately in relation to the two transactions Mrs Stuart's view however was that from her own point of view she would not want to have to make financial arrangements to make a payment on one transaction and then receive funds on another. I stated that whatever might be the net position for herself it did not change the fact that any negotiation had to be on the basis that there were two entirely separate transactions and that I had no authority to agree anything on the lines that she had proposed. I made the point that as Mrs Stuart had not given me any details of her proposals in advance of the meeting I had not been able to take any instructions from either yourselves or from Camp Road Estates Limited as to any proposals that Mrs Stuart might put forward."

24. The letter concluded:

"I understand from Nick that you were likely to instruct other solicitors if the outcome of the meeting on 3 February was unsatisfactory, and I understand from Nick that you cannot allow the matter to drift on indefinitely wondering whether or not you can achieve a satisfactory settlement with Mrs Stuart. There is also the question of your claims against this firm which we have agreed to leave on one side pending the outcome of my discussions with Mrs Stuart, although we have told you that we do not agree with your claim against us.

In the above circumstances it is fairly clear to me, as I am sure it will be to you, that we have now reached the point where it would be eminently sensible for your new solicitors to continue to act for you in the matter and to take over the settlement negotiations with Mrs Stuart where the current position is as she left it at the end of the meeting on 3 February.

Please now confirm that you agree that your new solicitors should take over the conduct of your dispute with Mrs Stuart and any claim that you may have against this firm, and please confirm whether your new solicitors require any further information or documentation at this stage in order to fully appraise themselves of the current situation.

I am sorry that the settlement negotiations with Mrs Stuart on your behalf have not proved successful to date, which is why your new solicitors need to advise you what to do in your best interests.

Meanwhile, thank you for allowing us the opportunity to discuss the position with Mrs Stuart and I hope that the information which was obtained during that process is of assistance to both you and your new solicitors, and obviously I wish you luck with your further negotiations with Mrs Stuart."

25. Mr and Mrs Jones then instructed a new solicitor to act on their behalf, Mr Andrew Olins of IBB Solicitors. Mr Olins wrote formally to Mrs Stuart on 4 March 2005. He set out certain contentions as to the benefit and enforceability of the restrictions and concluded:

"My clients are anxious to proceed with their proposed development of The Lantern House. I have advised my clients that if you apply for an interim injunction to prevent the development, they have good grounds for opposing the application by contending:

you have no arguable case that Main Road is benefited;

damages would be an adequate remedy (because it is all that you would be granted by the Court and/or the Lands Tribunal at a trial); and

the balance of convenience favours allowing the development to proceed.

I would be grateful if you would let me have your substantive response to this letter of claim by 5.30 pm on Friday, 11 March. In particular, your response should identify how and in what ways the part of Main Drive that you own is capable of benefiting from the restrictions in paragraphs 3, 4 and 6 of the Schedule to the 1948 conveyance. If I do not receive your response by the stipulated time, I shall advise my clients that they may proceed with the proposed development without further reference to you."

26. In a second letter to Mrs Stuart, sent on the same day and marked "without prejudice save as to costs", Mr Olins said:

"I invite you to attend a without prejudice meeting with a view to resolving your dispute with my clients. If you decline the invitation and litigation ensues, I reserve the right to bring this letter to the attention of the court on the issue of who should pay the costs of the action and on what basis."

27. Mrs Stuart replied to Mr Olins on 14 March 2005. She said:

> "I received your letter of claim regarding The Lantern House on Friday 11 March at approximately 2.00 pm by collecting the recorded delivery letter personally from the sorting office.
>
> Clearly you have not considered the matter fully.
>
> You seem to be unaware of the fact that on 23 January 2004 Rex Arthur Outram consultant with IBB Solicitors stated that 'it may be .... will actively enforce the covenants and it would be sensible to apply and obtain approval on the design and plans of any new property ...." in his replies to pre contract inquiries when acting for the vendors of The Lantern House. He signed the document R A Outram and underneath it stated "Iliffes Booth Bennett on behalf of the seller" and it is dated 23 January 2004 underneath that statement.
>
> Thus the view was expressed by IBB that the covenants were enforceable prior to exchange of contracts.
>
> IBB cannot now act in conflict with its own conveyancing consultant and state that the covenants are not enforceable. This is at the very root of the conflict of interest situation where you will be damaging the reputation of your own firm's consultant should you continue to act.
>
> In the circumstances I will expect you to cease acting forthwith for Mr and Mrs Jones in any dispute as to the enforceability of the covenants. If I do not have in my possession by Thursday March 17 at 1pm by delivery through ordinary first class post to my home address a letter confirming that you are to cease acting for Mr and Mrs Jones in any claim that the covenants are unenforceable then I will have no alternative but to draw the matter immediately to the attention of Stephen Booth, your managing and senior partner and the Law Society.
>
> Mr and Mrs Jones are of course free to allege that the covenants are not enforceable. However, Mr Chapman and Mr Denehan have both concurred that the covenants are enforceable at The Lantern House. This concurs with the statement made by your firm's own conveyancing consultant.
>
> It must be the case, in these particular circumstances, however, that Mr and Mrs Jones must find alternative solicitors if they wish to pursue their allegation that the covenants are not enforceable whether by litigation or not."

28. Mr Olins in turn replied on 14 March 2005:

> "Thank you for your letter of 14 March. My clients will obviously be disappointed that you did not receive my letter until last Friday despite the fact that it was sent by recorded delivery on 4 March.
>
> I must again ask you to stop raising irrelevant side issues. Any reply to preliminary inquiries given by Rex Outram on behalf of my client's sellers, cannot "taint" my

clients (and by extension) my firm in relation to this dispute. In any event, Rex Outram does not, in the words that you have quoted, state that the covenants are enforceable; he merely observes that [you] might seek to actively enforce them.

I do not accept that there is a conflict of interest. If you wish to refer the matter to IBB's managing partner, Steven Booth, and/or the Law Society, you are of course at liberty to do so. As an alternative, it is of course open to you to apply in any proceedings that my clients issue for an injunction preventing IBB from acting.

I invite you to concentrate on the substantive issues in dispute. I am prepared to extend the deadline for responding to my letter of 4 March until 3pm on Thursday 17 March. Whilst I accept that you are perfectly entitled to act in person, I believe that both parties would be better served if you were to instruct a solicitor to act on your behalf.

I am sending a copy of this e-mail to Steven Booth in anticipation that he can expect to hear from you."

29. On 4 April 2005 Mrs Stuart wrote to Mr Olins with her response to the substantive matters he had raised in his letter of 4 March. A without prejudice meeting was then held, following which Mrs Stuart wrote to Mr Olins again on 24 April 2005 without prejudice save as to costs. The letter said:

"I write to clarify the issues as to which I am taking an opinion from counsel pursuant to our without prejudice meeting regarding the above. My conference is currently scheduled for this Thursday 28 April and I hope to receive a reply from you before it occurs in order to make full use of it in an effort to try and settle this matter without the need to resort to litigation which could be lengthy and expensive for all concerned.

You explained that you act for Mr and Mrs Jones who had purchased The Lantern House, Camp Road last year using BP Collins as their solicitors. You had read the file and that Mr and Mrs Jones had not been sent a report on title and hence you felt that they had a good claim against BP Collins. I would point out that I have seen some of the correspondence in this matter and that I would agree that the advice given by BP Collins was not only negligent but it raised conduct issues under Principle 15.01 and Principle 15.04 of the Guide to the Professional Conduct of Solicitors 1999. You may or may not be aware that another one of the partners of BP Collins faced the SDT last year over a breach of a similar provision (LS Gazette 7 October 2004).

You must of course consider your own duty to report breaches of the conduct rules in a case such as this under Principle 19.04 in the Guide to the Professional Conduct of Solicitors.

You explained to me at the meeting that you had taken counsel's opinion and that he (or she) had said that I had a 70 per cent chance of gaining an interim injunction, a 65 per cent chance of gaining a final injunction and that hence your opinion was that I was in a stronger position that I was in terms of St Merryn.

You went on to say that as far as Mr and Mrs Jones were concerned that BP Collins would pick up the tab.

For the reason that counsel did not think that your clients had a strong position with regard to The Lantern House and their ability to build in breach of covenant your counsel had advised you to make an application to the Lands Tribunal under the section (aa) modification of covenants. You explained to me that the likely costs of your clients would be £80,000 (you said that mine might be cheaper) and that the process would take a year. You also explained that I would be the only defendant. At this point I conclusively disagreed with you. You did not tell me that I was wrong in explicit terms but were quite certain and you said, 'It was your job'.

Of course during the course of time of one year your clients' losses will grow not only by the amount of fees made in the application to the Lands Tribunal but by the increase in costs of the construction of the proposed dwelling even if the Lands Tribunal application were successful. As I understand the situation your clients must mitigate their loss and if the property is to remain empty for one year then presumably some attempt should be made to rent it out to recoup some of the losses. If I understand your proposition correctly your clients' total losses therefore would be in excess of £100,000 but you appeared confident that BP Collins would have to pick up the tab.

I was surprised however, when you were asked if you had read the case Russell -v-Archdale that you asked me what was the ratio in that case. You said that you had 'pottered through it'. Having read and re read the case armed with the conveyancing plan which makes sense of it all, my own opinion is that Russell -v-Archdale is positively hard work and not a case where one would potter through any of it.

I also asked if you had a copy of the 1934 Conveyance which is the root conveyance of the Bulstrode Park Estate of the Watson Investment Company Ltd. You said that you did not.

I explained that I had set this out in my reply to your letter of claim, which at the date of our meeting you had apparently not received.

I asked you if you were familiar with the cases of damages of restrictive covenants and particular to the Amec case. You were not and you asked me what the ratio was and I read it out to you.

You offered me a figure of about £10,000 for a Deed of Release and told me that I could 'forget' anything much higher ...

I would be most grateful if before I seek Counsel's opinion you could confirm to me in writing whether or not you have now

(a) Obtained a copy of the Conveyance dated 28 September 1934 referred to in my letter of response to your letter of claim.

(b) Obtained a copy of the Conveyance dated 10 October 1956 which defines the Bulstrode Park Estate and which is referred to in my letter of response to your letter of claim.

(c) Considered the ratio in the case of Russell-v-Archdale and its effect on our particular set of covenants.

(d) Considered the cases for damages of restrictive covenant and in particular the Amec case.

You will appreciate that the Pre Action protocol specifies

The aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in Part 1.1 of the Civil Practice Rules.

In order that I can fully and meaningfully discuss the matters with my Counsel in an effort to bring this matter to a satisfactory conclusion without the need for litigation I need to know whether you have considered the above items (a)-(d) inclusive and if so whether your position has changed in any way since your letter of claim and our without prejudice meeting.

30. On 13 May 2005, in a without prejudice letter to Mr Olins, Mrs Stuart said:

"As you have already been advised, my Counsel Edward Denehan is to conduct a site visit within the next 2 weeks or so in order to inspect the locus in quo.

I therefore invite you to attend a without prejudice meeting to be held in Gerrards Cross at which my Counsel and I will both be present. Mr and Mrs Jones are welcome to attend such meeting with you, if they wish. The purpose of such meeting would be to explore the possibility of settling this matter at this stage without the need for litigation.

If you decline and litigation ensues then I reserve the right to bring this letter to the Court or Tribunal on the issue of who should pay the costs of the Action and on what basis ..."

31. In his reply dated 16 May 2005, Mr Olins said:

"In my view, there is little, if any, point in my clients and me attending a without prejudice meeting with Counsel unless and until you make known the sum that you want my clients to pay in return for granting a deed of release. It will be worthwhile my clients incurring the cost of instructing me to attend a without prejudice meeting only if there is a prospect of that meeting 'bridging any gap' between the parties."

32. On the same day Mrs Stuart sent Mr Olins a formal letter of claim concerning the enforcement of the restrictions. It referred to advice on the subject given by Mr Vivian Chapman of Counsel and concluded:

> "If Mr and Mrs Jones continue with their intention to build in breach of restrictive covenant on the plot of the Lantern House, Camp Road then the writer gives notice of her intention to seek a declaration of the High Court that the land in her ownership at Main Drive and Camp Road carries the benefit of the restrictive covenants imposed by the Watson Investment Company Limited and that if Mr and Mrs Jones continue with their development plans that the development is in breach of the restrictive covenants imposed by paras 3 and 4 of the Schedule to the 1948 conveyance.
>
> As the proposed building to be erected by Mr and Mrs Jones has four storeys and in light of the decision in Mortimer v Bailey it is contended that damages would not be a sufficient remedy.
>
> Conversely, if it becomes apparent from the plans proposed by Mr and Mrs Jones once inspected by the writer that damages would be a sufficient remedy then regard must be had to the ratio of the case Amec Developments Limited v Jury's Hotel Management (UK) Limited [2001] 07 EG 163. In that case it was held that the principal issue would be the amount of the benefit or gain that the defendant acquired in being allowed to breach the covenant and the discount from that sum that would have been applied in negotiations. An incremental approach by which the defendant's gain was assessed by considering the number of extra bedrooms and the extra profit from them (after allowing for expenses and capitalising appropriately) was the correct way of approaching the assessment of gain.
>
> I would be grateful if you would respond to this letter within the time set out in the Pre Action Protocol.
>
> Should you wish to inspect any of the documentation referred to above then please notify the writer accordingly."

33. On 2 June 2005 Mrs Stuart wrote to Mr Olins as follows:

> "Under Principle 29 of the Guide to the Professional Conduct of Solicitors 1999 in particular 29.09 if a solicitor discovers an act or omission which would give rise to a claim then they must advise their client to seek independent legal advice. The solicitor must notify their indemnity insurer. Thus if Steven Booth becomes aware of negligence then the Rules of Professional Conduct apply. It means essentially that any firm which finds negligence cannot continue to act. The point of my correspondence should therefore be clear.
>
> For the avoidance of any doubt can you please confirm to me in writing by the end of the day that you stated to me that I am the only person who can enforce the covenants at The Lantern House and thus I am the only potential defendant for an application to the Lands Tribunal."

34. In a reply faxed the same day Mr Olins said:

> "I wish to reiterate my concern that you appear to be focusing on (irrelevant) side issues rather than concentrating on the real issues in dispute between the parties. As regards Broad Beach and The Lantern House, I believe that if you are willing to recognise that the dispute between the parties lies not (necessarily) as to the enforceability of the restrictive covenants, but, rather, as to whether those restrictive covenants are susceptible to modification, a resolution of your various disputes with my clients is readily achievable."

35. In a second fax the same day Mr Olins said that he was unaware of anyone apart from Mrs Stuart who claimed to have the benefit of the restrictive covenants affecting The Lantern House. In a further letter dated 24 August 2005, marked without prejudice save as to costs, he said:

> "I wish to make it clear, so that there is no room for argument later, that when the Lands Tribunal comes to decide which party should pay the costs of the proceedings and on what basis, my clients will refer to their offer made at our meeting on 6 April (and repeated in my letter of 13 May) to pay you £10,000 for a deed of release that modifies the restrictive covenants affecting The Lantern House so as to permit their proposed development for which they have obtained planning permission."

36. In a letter to Mr Olins dated 24 August 2005 Mrs Stuart said:

> "I truly believe that Mr and Mrs Jones have a claim against you in negligence owing to the fact that you clearly do not understand the substance of or the mechanism of enforcement of the restrictive covenants on our estate. This is all too clear by virtue of the fact that you have sought to modify the wrong set of covenants in your application to the Lands Tribunal to which you made Mr and Mrs Jones a party.
>
> Further if you understood the mechanism of the enforcement of these particular covenants, Mr and Mrs Jones can object to the applications made by Mr and Mrs Nester of Top Park and also Mr and Mrs Brooker of Valley Way. Thus you act in a complete conflict of interest, which I pointed out to you at an early stage and I was accused of raising a side issue. If you still cannot see the situation I will have to write to the Registrar of the Lands Tribunal with the appropriate documentation and when he serves Mr and Mrs Jones with papers on which they can object to Mr and Mrs Nester's application and Mr and Mrs Booker's application then you may begin to understand the actual situation which prevails. At that point you will have to consider the very serious consequences of acting in a conflict of interest situation.
>
> I find it difficult to understand myself how Mr and Mrs Jones would have confidence in the judgment which you have displayed if the full facts were explained to them. Further I believe that the losses, which they continue to incur, are caused by you and your lack of understanding of the situation. I have sent you this week an extract from counsel's opinion dated 18 July 2005 where he states that it is clear that IBB have not fully understood the position.

Both Mr and Mrs Jones and I would like to have a round table meeting to explore the possibility of settlement. However, as a result of the inaccurate quantum which you place on consideration for Deeds of Release which arises from the fact that you use St Merryn as the rule on the estate rather than the exception, I do not see how any progress can be made unless and until specialist counsel is consulted with regard to The Lantern House and an expert opinion taken so that this matter may progress. I do not know if you are aware of it but Mr and Mrs Jones were given an indication albeit without prejudice of what BP Collins might pay for a Deed of Release and suffice it to say that it was considerably higher than yours for obvious reasons.

I will await the outcome of the situation but if you continue to act I will have to write to the Registrar of the Lands Tribunal to explain how Mr and Mrs Jones can object to the Nesters and the Brookers application and if Mr and Mrs Jones are sent papers to register an objection then I presume you will take that as conclusive that there is a fundamental conflict of interest here. Of course, I will also have to write and explain the other errors in your application. I would remind you that I asked if you would like to amend it before it was issued and served on me but you declined.

I would add that the further conflict of interest issues also include your opinion being different from that of Rex Outram of IBB. I have written to Mr Booth making him aware of the situation because to an outsider at any rate it appears to be potentially embarrassing to have two different personnel from the same firm expressing different opinions about the same matter when the matter is subject to litigation and hence one is bound to be proved right and one wrong! Prudence it would seem would have required that situation to be resolved prior to the issue of proceedings.

I will wait to hear from you and in particular as to whether you are to continue to act for Mr and Mrs Jones but I can only advise you to take great care in the circumstances as there are conflict of interest issues to address and which require a full understanding of the covenant issues on our estate so to do and of which, as yet, you have not exhibited an understanding, as indeed confirmed by my counsel."

37. Mr Olins's reply dated 25 August 2005 included the following paragraphs:

"Conveyance of 29 September 1949"

This conveyance is not mentioned in my clients' registered title. If, in due course, it becomes apparent that this conveyance ought to be specified in my clients' application, an amendment can be made. As it appears from BP Collins' letter of 11 November 2004 that the relevant covenants in the conveyances of 1948 and 1949 are 'identical', you will not suffer any prejudice by a subsequent amendment.

Conflict of interest

The Joneses are entirely comfortable with the Brookers' application to the Lands Tribunal. I would imagine that they are comfortable with the Nesters' application too. Further, The Lantern House, Broad Beech House and Merrifield are not in the immediate vicinity of each other, and if these properties are developed in accordance

with the planning permissions granted by South Bucks District Council, the Joneses, the Brookers and the Nesters are most unlikely to suffer a loss of amenity.

I can only pour scorn on your allegation that my clients are tainted by comments made by Rex Outram when acting for the Joneses sellers.

I am not persuaded that a conflict of interest exists. On the contrary, in my opinion the Joneses, the Brookers and the Nesters have a strong commonality of interest in their desire to seek a modification of the same or substantially the same restrictive covenants.

Negligence

I note your allegation that I have been negligent. I have nothing to say in response...

Your conduct

For several months I have been asking you repeatedly to disclose what "substantive" grounds you have for opposing the applications to the Lands Tribunal made by the Joneses, the Brookers and the Nesters. You have persistently refused to set out your grounds for opposing the applications; instead, you have concentrated on trying to muddy the waters and sow discord between my clients by raising irrelevant side issues. You have also sought to intimidate my clients emotionally and to exploit them financially. I have every intention of bringing your conduct to the attention of the Lands Tribunal both as to your motivation in opposing my clients' application and on costs."

38. On 16 November 2005 Mrs Stuart submitted a notice of objection to the application to the Lands Tribunal, claiming £50,000 "being a reasonable sum for the release of the restrictions."

39. Mr Olins wrote to Mrs Stuart again on 6 December 2005 saying:

"I have received from the Lands Tribunal a copy of your notice of objection dated 16 November 2005. In response to the notice I have, inter alia, advised the Tribunal that, for the purposes of this application but not otherwise, my clients are willing to accept that you have the benefit of the restrictive covenants affecting The Lantern House.

I have read your notice of objection and I do not believe that you have any real prospect of successfully objecting to my clients' application.

My clients have obtained planning permission for their proposed development and, indeed, you concede that 'in planning terms no objection can be raised to the proposed development of [The Lantern House]'. Therefore, prima facie the restrictive covenants (to the extent that they prohibit my clients' proposed redevelopment) impede a reasonable use of the land. Importantly, you do not specify what, if any,

actual loss of amenity you would suffer if my clients' particular proposed redevelopment went ahead.

This failure on your part to specify any actual loss of amenity is consistent with my inability since March 2005 to solicit this information from you. My repeated requests for this information have been ignored. Perhaps this failure on your part can be best explained by a letter that you wrote to my clients on 31 May 2004 in which you stated:

> 'From the plans which you showed me I thought that your new house would be very much in keeping with the appearance of the present houses in Camp Road.'

I venture to suggest that the reason why you have failed to specify what, if any actual loss of amenity you would suffer if my clients' proposed redevelopment went ahead is simply that you are unable to identify any such loss.

The gist of your objection to my clients' application seems to be 'the thin end of the wedge' argument. I do not believe that this argument can have any merit. You and the other residents of Camp Road are sufficiently protected by the Lands Tribunal judging any (subsequent) application or applications to modify restrictive covenants affecting properties in Camp Road on their own merits.

Accordingly, your assertion that a modification of the restrictive covenants affecting The Lantern House so as to permit my clients to build a replacement family home for which they have obtained planning permission would lead to 'a cascade of such redevelopments which would result in the destruction of the established identity and ethos of the neighbourhood, causing incalculable loss, both in terms of money and amenity, to those who live in the neighbourhood' is pure exaggeration. It is difficult, if not impossible, to reconcile this assertion with the comments that you made in your letter of 31 May 2004 ...

In your notice of objection at para D2, you have put your claim for compensation at £50,000 '*being a reasonable sum for the release of the restrictions'*. Please explain whether it is your contention that every owner of a property within the vicinity of The Lantern House who has the benefit of the restrictive covenants affecting The Lantern House is entitled to a broadly equivalent sum? If not, please explain why not. In either case, please explain how you arrived at a figure of £50,000 for compensation.

Unless you are able to specify any actual loss of amenity that you will suffer if my clients' proposed redevelopment went ahead, I invite you to withdraw your notice of objection.

Although you are a solicitor, I do not believe that it is wise for you to act in person . Indeed, given the content of your notice of objection, I believe that you would benefit from receiving advice from a firm that has expertise in handling section 84 applications.

I would appreciate a substantive response to this letter within 7 days. I reserve my clients' right to produce this letter to the Tribunal on the issue of costs."

40. On 16 February 2006 Mrs Stuart wrote to Mr Olins, without prejudice save as to costs. She said:

> "I note that the tenants have vacated The Lantern House at the present time and that it stands vacant. I therefore write with the aim of exploring whether it would be possible to reach a compromise on this matter. This, if possible would have the advantage of enabling your clients to proceed with the construction of their new property in the Spring without the need for the full hearing at the Lands Tribunal which is likely to be some months away.
>
> It is my understanding that your clients have a potential claim against their original conveyancing solicitors who acted for them in the purchase and that it may be the case that your clients will pursue their claim by litigation. With that in mind it is their duty to mitigate their losses which was told by them to believe (sic) run at a large figure per month.
>
> I would like, with your permission, to meet with your clients this weekend with a view to making/discussing the proposal with them on a without prejudice basis leading to settlement of this matter.
>
> Would you please confirm that you will allow me to contact your clients with a view to setting up a meeting."

41. On 20 February 2006 Mr Olins replied by e-mail in the following terms:

> "**Witness statement evidence**
>
> I am in a position to exchange my clients' witness statement evidence. Unless you confirm by 2pm on Wednesday 21 February, I shall seek instructions to make an application to strike out your objection.
>
> **Expert evidence**
>
> My clients have instructed Martin Friend to give expert evidence at trial. I anticipate that I will be in a position to exchange expert reports by 7 March. Please confirm that you will be able to meet this deadline that the Lands Tribunal has imposed for exchange of expert reports.
>
> **Statement of facts**
>
> I enclose a draft statement of facts. Please may I have your comments on the draft statement by Friday 24 February otherwise I will be obliged to seek instructions from my clients to raise your lack of co-operation with the Lands Tribunal.
>
> **Unreasonable objection**
>
> I have to say that I was greatly troubled by your continuing objection to my clients' application. It is apparent that you do not understand the issues that the Lands

Tribunal has to determine. Your lack of understanding is causing my clients to incur needlessly significant legal costs. I believe that if you had taken professional advice (as I have repeatedly suggested) you would not be opposing my clients' application.

In my opinion, my clients' application is straightforward. They obtained planning permission in August 2004 for the construction of a replacement house at The Lantern House. The restrictive covenants burdening The Lantern House – to the extent that they prohibit the construction of a replacement house – impede a reasonable user of the land. Unless you are able to demonstrate that you have suffered injury (and, in particular, loss of amenity) because of the construction of the replacement house, my clients are entitled to have the restrictive covenants burdening The Lantern House modified so as to permit 'this' reasonable user of the land. I have repeatedly asked you to explain or identify the injury you have suffered that leads you to oppose my clients' application but you have refused to do so. I believe that your silence on this issue is quite unacceptable and demonstrates an unreasonable willingness to co-operate in the conduct of these proceedings. If these proceedings had been before the High Court, you would have been debarred by now from opposing my clients' application.

I recently paid a further site visit and I re-acquainted myself with the houses in Camp Road. Although I am not an expert and, therefore, can only express a personal opinion, I am at lost to understand what possible injury (and, in particular, loss of amenity) you could have suffered. I do not see how you could have suffered a loss of privacy, additional noise, loss of light etc because of the construction of the replacement house. The proposed replacement house would be entirely in keeping with recent developments that have been carried out within the Bulstrode Estate and, if anything, would enhance Camp Road.

I noticed during my site visit that your property, Saxons Green, has dormer windows in the roof space and a garage fairly close to the front boundary. I believe that you are at risk of facing a charge of hypocrisy. Such a charge, will, I believe be unanswerable if, when you built your own replacement house at Saxons Green, you breached a building line covenant or height covenant contained in the conveyances dated 12 November 1945 and 19 September 1958 referred to at paragraphs 2 and 3 of the charges register to the title of the property (BM 216682). Please let me have a copy of the 1945 and 1958 conveyances together with a set of the architectural drawings for the replacement house.

I believe that your opposition to my clients' application is unreasonable, and I shall be advancing this contention at the trial when the Judge comes to consider what order as to costs, if any, ought to be made."

42. On the same day Mrs Stuart wrote to this Tribunal, withdrawing her objection to three applications relating to different properties in Gerrards Cross, namely The Lantern House in Camp Road, Merrifield in Top Park and Broad Beech House in Valley Way. She said:

> "As a result of medical issues from which I started to suffer at the end of November/beginning of December 2005 and which, despite medication, have increased in severity I have no option but to withdraw my objections to the above applications. In all three cases IBB have admitted that I hold the benefit of the restrictive covenants. I realise therefore that by withdrawing I could be losing my rights in terms of the benefit of the restrictive covenants but I have no alternative in the circumstances..."

43. Mrs Stuart advised Mr Olins that she had withdrawn her objection. She wrote to him on 22 February 2006, unsolicited, consenting "to the application made by Mr and Mrs Jones in respect of The Lantern House being amended to include reference to the 1949 covenants without the need for any readvertisement." That was a reference to an additional set of covenants which Mrs Stuart considered would have prevented the proposed development.

44. On 8 March 2007, seven days before the commencement of the hearing of this costs application, Mr Stuart wrote the following letter to Mr Olins:

> "I write to ask please your position viz a viz the negligence claim against B P Collins arising from the 'Report on Title' document which they were sent in early 2004, which I have seen, and the failure of B P Collins to set out the covenants therein which affected the above property. There is of course also the issue of the incorrect boundary definition of the plot.
>
> I write in open correspondence to invite you to deny that your clients have a claim in negligence against B P Collins for their losses arising as a result of the advice given by B P Collins.
>
> If you fail to deny in open correspondence that your clients have a valid claim in negligence against B P Collins then it will be assumed that such a claim exists and is either being pursued by your clients Mr and Mrs Jones at the present time or will be pursued by Mr and Mrs Jones at some point before the expiry of the limitation period thereto. Please be clear that I am not asking whether IBB is acting for Mr and Mrs Jones in making such a claim at the present time but simply whether or not such a claim exists in law.
>
> In order that there can be no possible doubt, the time frame for receipt of such reply is close of business ie 5:30 pm on Wednesday 14 March by either fax ... headed 'Personal Private and Confidential' or e mail ... or by regular mail to my home address.
>
> Please note that the right is reserved to produce a copy of this letter and the reply to it both to the Lands Tribunal for the purposes of the hearing on 15 March 2007 and to the Law Society. I would therefore urge you to consider very carefully your duties under Solicitors Practice Rules 1990 Rule 1(a), Rule 1(d) and Rule 1(f) as well as Principle 19.01 of the Professional Guide to the Conduct of Solicitors 1999 published by the Law Society before constructing any reply."

Correspondence – Merrifield

45. Mrs Stuart wrote two letters to Mr and Mrs Nester, one on 12 June 2005 and one a little earlier but undated. The first was entitled "Service of notice of breach of restrictive covenant occurring at Merrifield, Top Park, Gerrards Cross." It pointed out that the building in course of construction on the plot was in breach of the restrictive covenants to which the plot was subject. It stated that the works contravened the building line and that if they continued Mrs Stuart would issue "such proceedings in the High Court as will prevent the continuing breach of covenant." It added:

> "If the solicitor who acted for you on your purchase did not explain the enforceability of the restrictive covenants to which your plot is subject then you may have a claim against the solicitor in negligence for any expense to which you were put in taking action to remedy the breach."

46. The second letter referred to a telephone message which she had received from Mr Nester. It added, inter alia,

> "You explained that you were taking this matter seriously, which of course is right and proper as it is a very serious matter. You stated that it had come as a shock to you. I asked whether you had used a local solicitor or one out of the area to which you replied that you had used a local one. I then asked if it was BP Collins to which you said that it was not. I explained that I would be surprised, as many, if not all of the local solicitors know that I claim the benefit of these covenants, as do the local agents.
>
> I advised you that you should seek advice from a solicitor of your choice and you stated that you would get back to me by the end of next week.
>
> The fact that you say that it came as a shock to you surprises me because if the nature of the covenants affecting your plot had been explained to you upon exchange of contracts then this is something that you would have been aware of ...
>
> If you were not advised of the covenant then you should consider seeking independent legal advice from a large firm on the merits of a claim in negligence against the original solicitor for your losses, which you will incur in having to comply with the covenant. *I will need a written undertaking from you by 17 June at close of business, which gives you sufficient time to seek independent legal advice this week, that you will cease development in breach of covenant on the plot.*
>
> I must advise you that if no such undertaking is received and if development continues then I will have no alternative but to apply immediately during the week commencing 20 June for an interim injunction in the High Court which will operate to prevent any further building works taking place pending the trial of the matter which will be in some months time..."

47. On 21 June 2005 Mr Olins of IBB wrote to Mrs Stuart as follows:

> "I act for Tony Nester and his wife Amanda Nester.
>
> I have been shown copies of your recent correspondence to my clients.
>
> I am instructed to advise you that:
>
> 1. My clients do not admit that you are entitled to the benefit of restrictive covenants burdening Merrifield;
>
> 2. If, which is not admitted, you are entitled to the benefit of those restrictive covenants, it is denied that you are entitled to enforce those covenants by an injunction;
>
> 3. My clients are unwilling to cease the redevelopment that they are presently carrying out at Merrifield;
>
> 4. I have instructions to accept service on any application that you make to the Court for an injunction; and
>
> 5. My clients are considering making an application to the Lands Tribunal to modify the restrictive covenants burdening Merrifield so as to permit them to carry out their redevelopment for which they have obtained planning permission."

48. On 22 June 2005, apparently before she had received the letter from Mr Olins, Mrs Stuart wrote again to Mr and Mrs Nester. She advised that she had decided not to apply for an interim injunction, but that she still intended to issue a High Court claim for a permanent injunction.

49. In a letter dated 28 June 2005, Mr Olins asked Mrs Stuart to confirm that she still intended to issue substantive proceedings for breach of covenant. He also asked her to state why she believed the court ought to exercise its discretion in her favour to grant a permanent injunction, assuming she was able to establish an entitlement to the benefit of the building line covenant.

50. Mr Olins also sent Mrs Stuart a draft application to the Lands Tribunal. He asked whether she agreed that the restriction impeded a reasonable user of Merrifield and, if not, why not; whether she was willing to concede that the building line covenant did not afford her any practical benefit and, if not, why not; whether she was willing to concede that owners of properties in various roads on the estate had carried out developments comparable to that proposed by the Nesters and whether she conceded that the proposed modification would not cause her injury and, if not, why not.

51. In a letter to Mr Olins dated 17 July 2005 Mrs Stuart said:

> "If Mr Nester was not advised by his solicitor at the time of purchase that there was a building line affecting any possible development of his property then Mr Nester has a claim against the solicitor that acted on his purchase. The solicitor if finding restrictive covenants should have taken out restrictive covenant indemnity insurance to comply with the terms of the Mortgage Lenders' Handbook. It would seem therefore that from what Mr Nester said to me that he had no insurance. This leads me to suspect that he was not advised as to the enforceability of the covenants and hence has a claim against Hardcastles, solicitors in those circumstances.
>
> However, a solicitor did not act for Mr Nester on the occasion of his purchase, it would seem. The Land Registry has informed me that the application was lodged by Ref CW of Hardcastles. CW is not a solicitor at all. I am not sure if she has any legal qualifications whatsoever.
>
> A site inspection of Top Park will show that the property is the first in Top Park to be developed.
>
> A prudent person therefore would, one would imagine, consider the situation carefully, examine my claim to be entitled to enforce the covenants, seek counsel's opinion if that was thought to be advisable, and consider whether there exists a claim in negligence against the firm of solicitors who acted for Mr Nester on the occasion of his purchase.
>
> At that stage one might weigh up the situation as to whether it was prudent to commence building again on the basis that if the covenants are enforceable that it would be better to cease building and for your clients to claim all their losses from Hardcastles.
>
> I understand that immediately on receipt of instructions that you did not consider their title deeds, the covenants contained in them, the documents by which those covenants were imposed and the various matters such as words of annexation which may be relevant to these covenants. Instead you simply dashed off a letter to me denying my ability to enforce.
>
> Indeed this is confirmed by the fact that in the document which you enclosed with your letter of 28 June, which consists of your clients' draft application to the Lands Tribunal, you state that "the applicants are uncertain as to the extent of the land that is burden by the restrictive covenants".
>
> Indeed my counsel advised me some months ago to write to you in open correspondence and list the documents that you needed to study in order to understand these covenants and to offer you inspection of them so that litigation could be avoided if at all possible. That as far as I am aware is the overriding objective of the CPR to avoid litigation if possible and keep the costs proportionate.
>
> How then if you are offered site of documentation which would enable you to understand the nature of these covenants the land burdened by them and the inter relationships of the roads on our private estate can you not even bother to reply to my

letter and yet go on to make an application to the Lands Tribunal stating that your clients are uncertain as to the land that is burdened by the restrictive covenants?

If that is not patent negligence then I simply do not know what is.

You will no doubt appreciate that evidence in the form of written correspondence with you can be adduced to the Tribunal. You will be aware that I have no issues of client confidentiality and therefore can provide copies of all correspondence from any of our matters proving that you failed to respond to offers of (i) provision of copy documents and (ii) the offer of a meeting with my counsel with my costs of shipping my counsel down from Lincoln's Inn to Gerrards Cross. Indeed you could have met my counsel on site if you had wished.

I believe that Mr and Mrs Nester have an action against you in negligence for not following the dicta of Lord Jacob in *Mortimer v Bailey* where he says "the prudent party will get the matter sorted out before starting to build..." You have clearly not done all that you should in investigating these covenants before advising Mr and Mrs Nester to apply to the Lands Tribunal...

If Mr Nester had been made aware of the covenants at the time of purchase then he should have insurance and his first role would have been to notify the insurer. The insurers would have had to consider the matter. They would not have made the application to the Lands Tribunal that you have made.

I am inclined therefore to think that Mr Nester did not have restrictive covenant indemnity insurance.

In that case he has not been advised that the covenants were enforceable and this would explain his shock. Please confirm that you have notified Hardcastles of Mr Nester's claim and that you have informed them of their obligation to inform their indemnity insurers.

If I do not hear from you within 7 days with confirmation that Hardcastles have been informed of the situation and that they have notified their indemnity insurers then I will write to them myself and notify them of those facts.

If indeed Mr and Mrs Nester do have an action in negligence against Hardcastles then their duty is to minimise their loss which is the basic rule of litigation. In order to minimise their loss they have to consider the situation carefully and this requires you to consider the area affected by the covenants.

My position is that careful stock must be taken of the situation currently outstanding at Merrifield and that before your clients simply plough on with their building an evaluation must occur as to the wisdom of their further actions. I will assume that you will consult with a specialist member of your property department in considering the evidence presented to you in this letter as you will be presumed to have all the specialist knowledge required in the pursuit of this matter and in respect of which your draft claims to the Lands Tribunal will speaks volume for themselves."

52. On 2 August 2005 Mr Olins wrote to Mrs Stuart, asking for a reply to the questions raised in his letter dated 28 June concerning the claim for a permanent injunction and the application to the Lands Tribunal, since these had not been answered in the letter of 17 July.

53. On 20 October 2005 Mr Olins gave Mrs Stuart formal notification of his clients' application to the Lands Tribunal for the modification of the restrictive covenant burdening Merrifield so as to permit them to redevelop in accordance with the planning permission they had received.

54. On 31 October 2005 Mrs Stuart wrote to Mr Olins, with a number of criticisms regarding the wording of the application to the Lands Tribunal and alleged inadequate disclosure to the public of documentation relating to the extent of the land burdened by the restrictions. On 16 November 2005 Mrs Stuart submitted a formal objection to the application to the Lands Tribunal. She claimed £50,000 "being a reasonable sum for the release of the restrictions".

55. On 7 December 2005 Mr Olins formally notified Mrs Stuart that his clients accepted that she had the benefit of the restrictions burdening Merrifield. He asked her for details of any actual loss of amenity she had suffered as a result of his clients' development, which was by then nearly completed. He also asked her to clarify a number of matter raised in her notice of objection, including her claim for compensation. He added:

> "Unless you are able to specify any actual loss of amenity that you have suffered from my clients' replacement family home, I invite you to withdraw your notice of objection."

56. On 13 February 2006 Mr Olins wrote to Mrs Stuart about witness statements, expert evidence and statement of facts, in broadly similar terms to the letter he was to write on 20 February in connection with The Lantern House.

57. Mrs Stuart wrote to the Lands Tribunal on 20 February 2006, withdrawing her objection on the grounds of her ill health.

58. Eight days later Mr Olins wrote as follows to Mrs Stuart:

> "I note that you have written to the Lands Tribunal withdrawing your objection to a modification of the restrictive covenants burdening Merrifield, The Lantern House and Broad Beach House. Please send me by fax a copy of your letter(s) to the Tribunal. Once I have seen the correspondence, I will take instructions and let you know how my clients intend to proceed.
>
> I would be grateful if you would confirm that you are willing to consent to an amendment of the Joneses application (LP/62/2005) to include (i) at paragraph 8.1 and (ii) in the schedule reference to the covenants imposed by the conveyance of 29 September 1949 (entry number 3 in the charges register to the title of The Lantern

House (BM78067)) without the need to re-advertise the application. If you are unwilling to give your consent to this amendment, an application for permission to amend will be pursued and an order will be sought that you pay the costs of the application in any event."

The applicants' submissions

59. In their initial written submissions, Mr and Mrs Jones and Mr and Mrs Nester justified their applications for costs on the grounds that Mrs Stuart had not objected to the original planning applications for the proposed development projects, had been the only one to object to the applications to the Tribunal, and had failed to identify any loss of amenity that would be suffered as a result of the proposed developments. In addition, Mr and Mrs Jones relied on Mrs Stuart's acceptance, in her letter of 31 May 2004, that their proposed house appeared to be in keeping with the neighbouring properties, as indicating that the objection was unreasonable. They also submitted that Mrs Stuart had unreasonably refused their repeated offers of £10,000 compensation.

60. These grounds were expanded upon and added to significantly in the course of the oral hearing. Mr Hutchings submitted that the proposals that were the basis of the modifications suggested by Mr and Mrs Jones were of negligible impact on any of the surrounding area. They merely involved building 10 feet closer to the road and converting the loft space of The Lanterns into bedrooms so as to add another storey to the building. Nor could Mrs Stuart have been affected by the minor incursion into the 60 feet building line required for the proposed redevelopment of Merrifield. In particular her property, Saxons Green, was far away from Merrifield and the previous building on the application site had also encroached to some extent over the building line. Moreover, Mrs Stuart's reliance on the thin end of the wedge argument was wholly misconceived. The modifications requested were slight and of very limited impact. They would therefore not damage the ethos of the neighbourhood or set a precedent for further modifications. Furthermore, the Tribunal would always consider each case on its own merits.

61. Mr Hutchings suggested that there were five respects in which Mrs Stuart's conduct, both before and after Mr and Mrs Jones submitted their application for modification, was improper and (particularly for a solicitor) unprofessional. The first related to her request in her letter dated 4 October 2004 to be shown the conveyancing file. These documents were privileged and wholly irrelevant to the issues raised by the application. Mrs Stuart's request for Mr Jones to provide copies of letters he had received from BP Collins in connection with the proposed purchase was another example of improper conduct. Mrs Stuart knew that Mr Jones had instructed solicitors. It was a breach of the Solicitors Rules for a solicitor on the other side to communicate directly with the client in those circumstances. Her motive in doing so was to extract privileged communications to use in her attempt to obtain a collateral benefit from BP Collins – namely the shares in Camp Road Estates Ltd held by a partner in BP Collins. Thirdly, Mrs Stuart's meetings and correspondence with BP Collins were wholly inappropriate. It was clear that Mrs Stuart's concern did not relate to the amenity of the surrounding area but in extracting the best financial deal possible. Fourthly, Mrs Stuart made numerous allegations of negligence and threats of reporting BP Collins to the Law Society, even though any claim of

negligence had nothing to do with her. These accusations and threats continued in relation to IBB, causing distress to the clients and increasing their legal costs. Finally, Mr Hutchings said that Mrs Stuart increased the costs of Mr and Mrs Jones by regularly raising issues that were not relevant to the issues in dispute, such as unsubstantiated conflicts of interest. She criticised the manner in which the application was being conducted, but failed to identify any alleged failings that had caused her prejudice.

62. In relation to the application by Mr and Mrs Nester, Mr Hutchings cited the following examples of what he described as Mrs Stuart's unreasonable conduct: numerous inappropriate and irrelevant references to the potential negligence of Hardcastles and IBB; focusing on irrelevant issues such as an unfounded allegation of misleading the public; threatening to institute High Court injunction proceedings; and raising the issue of whether Mrs Stuart could enforce the covenant even though this had been admitted by Mr and Mrs Nester.

Mrs Stuart's submissions

63. Mrs Stuart's response to the initial application for costs by Mr and Mrs Jones made the following principal points: the primary reason why they had applied for planning permission in breach of covenant was the poor advice received from their former solicitors and so the costs of the application to the Lands Tribunal would fall to be claimed against those solicitors as part of their losses; the application to the Lands Tribunal was incomplete, because it failed to refer to a restriction contained in a conveyance dated 29 September 1949 which would also have been breached by the proposed development; the application to the Tribunal was inaccurate in asserting that Mrs Stuart claimed sole benefit of the covenants (Mrs Stuart had offered to provide full documentation so that IBB could properly identify the land with the benefit and burden of the covenants, but this offer was ignored); the files open for public inspection at IBB's offices were unsatisfactory and it would have been impossible for a member of the public to deduce whether he could validly object to the applications; the over dominance of properties in Camp Road was a matter of general concern within the Bulstrode Park Estate and the local parish; there was no requirement for the parties to lodge an agreed statement of facts before the hearing; since Mrs Stuart had not replied to IBB's letter of 27 January 2006 asking whether she was to call expert evidence, there was no need for IBB to involve their clients in the expense of preparing expert evidence when they did; the offer of £10,000 was made on the incorrect basis that Mrs Stuart claimed the sole benefit of the restriction; IBB sent a letter of claim to Mrs Stuart without any prior correspondence or willingness to enter into correspondence, refused the offer of a without prejudice meeting with Mrs Stuart's counsel in May 2006 and continued to correspond in threatening and hostile tones, which resulted in Mrs Stuart suffering severe depression in December 2005; Mrs Stuart was entitled to lodge an objection and should not be unduly penalised for so doing.

64. In response to Mr and Mrs Nester's initial application Mrs Stuart again alleged that any liability for costs should fall on the solicitors who had negligently advised on the purchase of the property; the application to the Tribunal stated that the applicants were uncertain as to the extent of the land burdened by the covenants, although Mrs Stuart had offered to disclose all the relevant documentation to IBB and had advised them that the covenants could be enforced

throughout the estate; the files open for public inspection at IBB's office were unsatisfactory and would justify an action for negligence against that firm; since a similar breach of covenant at a property to the rear of Merrifield had resulted in the applicant being ordered to pay compensation and contribute towards the objector's costs, a similar decision would be justified in the case of the Merrifield application; Mrs Stuart withdrew her objection because of the oppressive nature of the correspondence with IBB, which resulted in her depression; her objection was withdrawn prior to the deadline for submitting expert evidence, thus minimising costs.

65. In the course of his oral submissions, Mr Denehan said that the applicants had purchased their respective properties, intending to redevelop them in a way which was inconsistent with the restrictive covenants. It was therefore inevitable that they would incur the costs resulting from an application to the Lands Tribunal. None of the correspondence demonstrated improper behaviour on the part of Mrs Stuart. Indeed, in the context of the dispute with Mr and Mrs Jones, Mrs Stuart had assisted their solicitors by identifying the need to apply for modification of the 1949 covenants.

66. Mr Denehan said that Mrs Stuart's dealings with Mr and Mrs Jones in 2004 were friendly and neighbourly. Her purpose in requesting the conveyancing file was to clarify the covenant position for their mutual benefit. The dynamics of the relationship between the parties changed with IBB's letter dated 4 March 2005, which wrongly asserted that Mr Stuart was not entitled to the benefit of the restrictions. Mrs Stuart was then entitled to argue, whether rightly or wrongly, that the Amec decision justified her in claiming damages assessed by reference to the profit which the applicants would realise if the covenants were modified. Where a covenantor is seeking to breach a restrictive covenant, it is not unreasonable behaviour for the covenantee to seek to take advantage of the position by threatening injunction proceedings and being difficult in negotiations. In any event, Mrs Stuart had offered to arrange a without prejudice meeting between the applicants and her Counsel, which was declined.

67. Mr Denehan said that it was quite proper for Mrs Stuart to take issue with the conduct of solicitors advising Mr and Mrs Jones, and that such actions did not add to the cost of disposing of the application. Moreover, the applicants' solicitors had been guilty of adopting double standards in accusing Mrs Stuart of failing to concentrate on the issues raised by s.84(1), bearing in mind IBB's letter of 4 March 2005, which endeavoured at some length to explain why Mrs Stuart could not enforce the restrictions. This, said Mr Denehan, was not to criticise Mr Olins, but to demonstrate that it was not unreasonable conduct for a solicitor to take a bad point.

68. Mr Denehan said that Mr and Mrs Jones had not incurred expenses because Mrs Stuart objected unreasonably and then withdrew her objection. She had a valid objection, which she withdrew because of her ill-health. As a result, the applicants had saved £10,000 (and possibly more) and had not had to bear the costs of a hearing.

69. By August 2005, when Mr Olins accused Mrs Stuart of intimidating his clients emotionally and exploiting them financially, Mr and Mrs Jones had found themselves in a difficult position as a result of poor advice given by their former solicitors. Mrs Stuart was entitled to rely on her legal right to the benefit of the covenant in an attempt to maximise the compensation payable. She was under no obligation to do anything to help the applicants. It was for the applicants to satisfy the statutory criteria. It was legitimate for Mrs Stuart to rely on the thin end of the wedge argument. It was open to the applicants to reject any unreasonable offers and to ignore any bad points made by Mrs Stuart and instead to press ahead with the application to the Tribunal. Mrs Stuart's failure to set out in detail the loss of amenity that she would suffer had not increased the applicants' costs in any way.

70. All exchanges between the parties before the application to the Tribunal was made were legitimate and could have been adopted by any reasonably competent lawyer acting in such a case. The application would have had to be made and pursued unless settlement terms could be agreed. It was not unreasonable conduct to seek to exploit a legitimate advantage, and to suggest that it was BP Collins, and not Mr and Mrs Jones, who should pay the compensation, given that they had not pointed out the significance of the restrictions before purchase. It was also reasonable to raise the possibility of acquiring the shares held by a partner in BP Collins. That request was motivated by a desire to maximise her ability to police the quality of the estate. There was nothing to prevent BP Collins from simply replying that the shares were none of Mrs Stuart's concern. The fact that Mrs Stuart adopted this negotiating position did not cause the applications, add to their duration or otherwise impede their just disposal. The costs which were incurred thereafter would have been incurred in any application which had not been compromised, and the application was eventually withdrawn on grounds which it was agreed were bona fide. Since the matter was not litigated, it was impossible to say that Mrs Stuart had failed to beat the settlement offer of £10,000.

71. Mr Denehan submitted that Mrs Stuart was also entitled to point out to Mr and Mrs Nester that they might have a claim against their former solicitors. That was a question of fact and did not constitute unreasonable behaviour. Nor was there anything unusual or untoward in threatening to apply for an interim injunction, and subsequently deciding not to do so.

Conclusions

72. Paragraph 22.4 of the Lands Tribunal's Practice Directions dated 11 May 2006 reads as follows:-

> "On an application to discharge or modify a restrictive covenant the general rule as to costs does not apply. The nature of proceedings under section 84 of the Law of Property Act 1925 is that the applicant is seeking to have removed from the objector particular property rights that the objector has. In view of this (and subject to any offer to settle that either party may have made), an unsuccessful objector who had the benefit of the covenant which has been discharged or modified will not normally have to pay any part of the applicant's costs unless he has acted unreasonably, and a successful objector will normally get all his costs unless he has in some respect been unreasonable."

73. The question therefore is whether Mrs Stuart acted unreasonably in pursuing her objection. In the light of the correspondence between the parties, I find as a fact that Mrs Stuart's predominant motive in lodging an objection to both applications was the extraction of a large sum of money from the applicants, even though she was scarcely affected by the developments to which the applications related. In each case she claimed compensation of £50,000 and at no stage before her objections were withdrawn did she put forward any reasoned justification for that figure or anything approaching it, apart from a general reference to the need to preserve the high class residential nature and ethos of the neighbourhood. In the case of The Lantern House the offer of £10,000 made by Mr and Mrs Jones was accompanied by an offer to attend a without prejudice meeting with Mrs Stuart if there was a prospect that that meeting would bridge the gap between the two parties, but no meeting took place because Mrs Stuart declined the invitation to state the sum she required in advance of the meeting. In the case of Merrifield, the only offer by either side was the £50,000 stated in Mrs Stuart's notice of objection and, again, she did not attempt to justify such an exorbitant figure or suggest that a significantly lower one might be acceptable.

74. These considerations alone would in my view justify an award of costs against Mrs Stuart. In addition, I consider that Mrs Stuart acted unreasonably in using threats that went well beyond fair bargaining.

75. I bear in mind that the applicants would have had to apply to the Tribunal for an order of modification and to incur some costs even if there had been no objections, or if any objections had been pursued entirely reasonably; that Mrs Stuart was the only objector; and that she withdrew her objections, which will have limited the costs. In view of what I regard as her unreasonable conduct I determine that Mrs Stuart must pay the costs of Mr and Mrs Jones and Mr and Mrs Nester, incurred between the date of her objections and the date of their withdrawal. In the absence of agreement such costs are to be assessed by the Registrar of the Lands Tribunal on the standard basis. Such an assessment will no doubt consider the extent, if any, to which the applicants have incurred costs unnecessarily, as suggested by Mrs Stuart.

76. A letter inviting submissions in relation to the costs of this application for costs accompanies this decision, which will take effect in the case of Mr and Mrs Jones when any question on that matter is determined, and in the case of Mr and Mrs Nester when the final order is made on their application.

Dated 4 July 2007

N J Rose FRICS

Addendum on Costs

77. I have received written submissions from the parties in respect of the costs of the costs hearings on 15 March and 17 May 2007. The applicants asked for their costs. They said that they were successful and Mrs Stuart had made no offers to compromise the issue of the costs of the applications. Accordingly, costs should follow the event.

78. Mrs Stuart did not make an application for the costs of the costs hearings. She submitted, however, that the applicants should be deprived of their costs, or alternatively a significant proportion of them. Although, in each case, the applicants had sought an order that Mrs Stuart should pay the applicants' costs of the application or a substantial proportion thereof, the submissions made at the hearing on behalf of the applicants did not expressly seek any order other than one that Mrs Stuart should pay the whole of the costs. In this respect the applications were not successful. The Tribunal recognised that there were significant reasons why the applicants should not be awarded all their costs, limiting its award to costs incurred between 16 November 2005 and 20 February 2006, a relatively short period within the context of a broader dispute. On any view the applicants were only partially successful in that they recovered a small fraction of their total costs. That relative lack of success ought to be recognised in any future costs order by significantly limiting any order in favour of the applicants.

79. Mrs Stuart's second point related to the manner in which the applicants' case was advanced. Prior to the hearing they had relied upon five grounds, summarised in paragraph 59 of the Tribunal's decision. At the hearing the entire emphasis of the submissions changed to an argument that Mrs Stuart had behaved unreasonably throughout. Apart from Mrs Stuart's rejection of Mr and Mrs Jones's offer of £10,000 compensation, none of the points originally relied upon was mentioned in the Tribunal's reasons for its decision. To use an analogy from a different type of litigation, the applicants therefore succeeded only on points as if they had amended their pleadings during the course of the trial. Accordingly, even if they had wholly succeeded on such arguments it would be wrong to award them all the costs of their applications for costs.

80. Mrs Stuart submitted that, taking both points together, in the case of The Lantern House Mr and Mrs Jones ought to be deprived of a substantial proportion of their costs of the costs hearings. In the case of Merrifield, where the additional feature of the £10,000 offer was not present, since Mr and Mrs Nester had succeeded only on points raised at the hearings for the first time, each side ought to bear its own costs.

81. I am not persuaded that the applicants should be deprived of any of their costs of the costs hearings. They applied for their costs of the applications or a substantial proportion thereof. They were awarded a substantial proportion and I do not consider that Mrs Stuart was prejudiced by the way the applications for the costs of the applications were argued by the applicants or that those costs would have been significantly reduced if the applications had been pursued differently. Mrs Stuart must pay the applicants' costs of the costs hearings on

15 March and 17 May 2007, to be assessed by the Registrar of the Lands Tribunal on the standard basis in default of agreement.

Dated: 26 September 2007

N J Rose FRICS