IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 175 (LC)
Case No: LP/16/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – MODIFICATION – qualified covenant against building without consent of covenantee – consent refused – whether applicant required to admit refusal of consent was reasonable – whether proposed use impeded if consent unreasonably refused - planning permission to build in the Green Belt – whether intended use reasonable – whether construction of replacement house would have adverse impact on benefitted land – s.84(1)(aa), (c), Law of Property Act 1925 – application allowed in part

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

BETWEEN:

DEAN NICHOLAS LAMBLE

Applicant

- and -

VINCENZO BUTTACI
GIUSEPPINA BUTTACI

Objectors

Re: Burn Barn Cottage,
Carthouse Lane,
Horsell,
Woking GU21 4XT

Martin Rodger QC, Deputy Chamber President and Mr P McCrea FRICS

Royal Courts of Justice, London WC2A
27-28 March 2018

Andrew Francis, instructed directly, for the applicant
James McCreath, instructed by IBB Law, for the objectors

© CROWN COPYRIGHT 2018

The following cases are referred to in this decision:

Re: Bass Ltd's Application (1973) 26 P&CR 156

Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320

Gilbert v Spoor [1983] Ch 27

Ideal Film Renting Co Ltd v Nielsen [1921] 1 Ch 575)

International Drilling Fluids v Louisville Investments [1986] Ch 513

Lawrence v Fen Tigers [2014] 1 AC 822

Re: Martin's Application (1988) 57 P & CR 119

Re: Wild's Application [2012] UKUT 306 (LC)

Shephard v Turner [2006] 2 P & CR 28

Treloar v Bigge (1874) LR 9 Ex 151;

`

Introduction

1. This is really quite a simple case. Shorn of some legal complexities, to which we will return later, it comes to this.

2. Mr Lamble lives with his wife and three small children in a modest bungalow on a large plot of land in semi-rural Surrey. He would like to build a replacement house on his land, which will be bigger and a little closer to the boundary with his next door neighbours, Mr and Mrs Buttaci. He would also like to build a large garage, with a new drive, which again will be closer to his neighbours, and a third building which is called a summerhouse but is really an outsized gym or recreation space. Mr Lamble has planning permission for all three new buildings, but before he can proceed he is first required by a restrictive covenant to obtain the consent of Mr and Mrs Buttaci.

3. Mr and Mrs Buttaci live in a large and attractive house next door to the Lambles, with a very large garage and a substantial garden which enjoys views of the surrounding Surrey countryside, uninterrupted by any other building. They do not want anything built on the Lamble's land, because Mr Buttaci considers it will disturb his and his family's enjoyment of their home. He fears an intensification of domestic use in close proximity to his boundary, intrusive views of the new buildings from his own home and garden, additional noise of family members and guests, additional light spillage, and interruption of his own view over the adjoining land. He and his wife have therefore refused to approve the Lambles' plans.

4. Instead of applying for a declaration in the High Court that the Buttacis' refusal of consent is unreasonable, Mr Lamble has applied to this Tribunal under section 84(1), Law of Property Act 1925 for the modification of the covenants to enable the implementation of his proposals. He says that his proposed use of his own land is reasonable, that the covenants impede it, and that, in doing so, they secure no practical benefit to the Buttacis of substantial value or advantage; he also says that the modification would not cause any injury to the Buttacis.

5. Having visited the two properties, considered the plans, and heard the objections of Mr Buttaci and the views of his expert witness, Mr Michael Derbyshire MRTPI, of Bidwells LLP, we agree with Mr Lamble that the building of his new house and its garage will not disturb the Buttacis' enjoyment of their own home to any significant extent. The two sites are so well screened from each other by trees and shrubs that the presence of a larger house and garage on the other side of the boundary will make no difference to Mr Buttaci or his family. The new house will be used for the same activities of family life as already go on in the Lambles' home, and bringing those activities a little closer to the boundary will make them no noisier, no more intrusive, and no more objectionable (if they are thought to be) than at present. While we do not doubt the sincerity of Mr Buttaci's fears, we are satisfied that they are without real substance.

6. On the other hand, we agree with Mr Buttaci and Mr Derbyshire that the construction of the summerhouse close to the boundary between the two properties, in a location which is not well screened by trees or vegetation, is likely to have a significant adverse impact on the views of

surrounding countryside from the Buttacis' home and garden and on the sense of space and relative seclusion which those views help to create. Moreover, the introduction of the summerhouse into the green belt is difficult to reconcile with the reasons which persuaded the local planning authority to relax green belt protection so as to permit the construction of the Lambles' much larger house and garage. In those circumstances we consider that the construction of the summerhouse is not a reasonable use of Mr Lamble's land and will cause injury to his neighbours.

7. In the event, therefore, we will modify the covenants sufficiently to permit the construction of the new house and garage, but not the summerhouse.

8. Mr Andrew Francis, who represented Mr Lamble, and Mr James McCreath, who appeared for Mr and Mrs Buttaci, have burnished this simple story with an impressive display of learning and sophisticated argument, but we are satisfied that none of it really matters to the outcome.

Burnt Barn and Burnt Barn Cottage

9. The application concerns two properties which adjoin each other on the north side of Carthouse Lane, close to the village of Horsell about three miles outside Woking in Surrey. Mr and Mrs Buttaci's house is called Burnt Barn. Mr Lamble's house next door and to the west is known as Burn Barn Cottage.

10. Burnt Barn and the surrounding land are held by the Buttacis under two titles, SY399835 (the front plot which adjoins Carthouse Lane and comprises the house, a substantial modern garage with residential accommodation above, and most of the garden), and SY399340 (to the rear, and which incorporates a much larger area, extending north by 100 metres to a small tributary of the River Bourne and east and north-east by a greater distance). When we refer to the "house and garden" we mean all that is comprised in SY399835, and when we refer to the "amenity land", we mean the land in SY399340. The whole property comprises approximately 16 acres.

11. The Buttacis bought Burnt Barn in 1996 and shortly afterwards extended the house, which now comprises substantial accommodation over two storeys, arranged in an "L" shape. On the ground floor there is a lounge, dining room, kitchen, utility room and family room. On the first floor there is a large master bedroom suite, a family bathroom and four further bedrooms, one of which has an *en suite* dressing room and bathroom. The principal windows of the reception rooms face north and east. The rear elevation of the property faces west towards Burnt Barn Cottage. The west-facing windows at ground floor level are two small windows in each of the lounge, family room, kitchen and utility room. At first floor level, they are three small windows in the master bedroom, three windows on the landing, and one small window in the dressing room and bathroom to the second bedroom.

12. Outside, Burnt Barn has a large terrace to the north of the house, with extensive views to the north, east and west, over the lawned grounds to the countryside beyond. The western

boundary, adjoining Burnt Barn Cottage, is of varying density with a mixture of trees and hedging. The southern section of this boundary, between the houses, has a combination of mature trees and vegetation which has created a near-impenetrable screen. Further north along the boundary, the growth is notably sparser and a tennis court of Burnt Barn Cottage is visible from the terrace and north elevation of the house. The detached garage with first floor space, a sweeping drive with central fountain, and large electric gates to Carthouse Lane complete Burnt Barn.

13. Burnt Barn Cottage is also held under two titles and totals 2.021 acres. SY407754 comprises the house, and an area of garden immediately behind and to the east of it as well as the current drive. SY648807 includes a much larger area of open garden land extending north to meet the same small river as forms the northern boundary of the amenity land at Burnt Barn. Aerial photographs show that, as recently as 2002 this area featured a good many substantial trees, most of which are no longer present, except along the boundaries of the land.

14. In its current form Burnt Barn Cottage is a three bedroom bungalow with a net floor area of 127 m^2. It is around 27m from the boundary with Burnt Barn, and the nearest corners of the two buildings are 50m apart. Its rear elevation largely aligns with Burnt Barn's front elevation. The ridge of the roof, which at its highest point is 7.1 m, runs from west to east, meaning that the gable end faces Burnt Barn. From front to rear the structure is 8.9m deep.

15. The existing buildings at Burnt Barn Cottage are not located centrally, but are a little towards the west side of the plot and hence away from Burnt Barn; they are also closer to the road than Burnt Barn which sits centrally in its immediate grounds. The current short driveway to Burnt Barn Cottage is in front of the house and shielded from the eastern boundary by the double garage. The driveway arrangement at Burnt Barn Cottage is symmetrical to its neighbour, so that the drive emerges onto Carthouse Lane towards the western end of the plot, away from Burnt Barn.

16. For planning purposes, both Burnt Barn and Burnt Barn Cottage are within the Green Belt.

Mr Lamble's proposals

17. Mr Lamble wishes to be able to build a five bedroom house, part two-storey and part single-storey, with a gross external area of 300m^2. It will not sit on the footprint of the current house (which we assume will still be lived in until the Lambles' new home is ready to be occupied) but will remain towards the western side of the plot, and be moved back from the road by about 12m. Its elevations will be more aligned with Burnt Barn and it will make better use of the much larger garden which is now available following the clearance of trees from the land at the rear.

18. The new house will have two wings connected by a linking section. The main living areas will be single storey in the eastern and central sections, with bedrooms on two floors in

the western section, three on the ground floor and two, including a master bedroom suite, on the first floor. Pitched roofs will run from front to back of the east and west wings while the central linking section will have a flat roof. The highest point of the ridge will be 7.8m at its western end, some 70m from the Buttacis' house, with the closest point having a height of 5.6m. As originally designed, there was to be extensive glazing covering most of the north elevation, and both elevations of the flat-roofed link section. The entrance will be in the eastern elevation, facing Burnt Barn. As part of the project a larger driveway will be created to the east of the new house, the entrance to which will be further along Carthouse Lane and closer to the boundary with Burnt Barn than the present arrangement.

19. Planning consent for the new house was granted on 31 March 2017. The consent is subject to a number of conditions, including a removal of general permitted development rights, and a requirement that before work begins a scheme for the disposal of surface water must be approved by the planning authority. After taking into account objections raised by Mr Buttaci in these proceedings Mr Lamble sought consent for some non-material amendments to the original design (for example, to reduce the area of glazing looking north into the garden, to relocate the main entrance from the eastern elevation to the southern elevation of the link section, and to correct the impression that a very large terrace was to be constructed). These amendments were approved on 14 February 2018.

20. Mr Lamble's proposals also include a substantial new garage, much closer to the boundary with Burnt Barn. It will be an "L" shaped building with a footprint of $115m^2$ (about 80% of the floor area of the existing house). Its eastern elevation facing Burnt Barn will be 16.2m long, including an open carport at the southern end. It will provide space for three cars, as well as a storage area for tools and a separate space to keep a ride-on mower. At the hearing, Mr Francis indicated that Mr Lamble would be prepared to forgo the carport, which would reduce the length of the elevation to Burnt Barn to 13.4m. We have assessed the application in relation to the garage on that basis.

21. Finally, Mr Lamble wishes to build a new "L" shaped summerhouse, which had been intended to abut the boundary with Burnt Barn, about half way down the plot. As originally conceived it was to have occupied a footprint of 126 m^2 which is comparable to the existing house, and its longer eastern elevation was to have been 14.8m long, including an overhanging roof at one end. Its intended use is as a gym and possibly a games room. Before closing the case for Mr Lamble, Mr Francis offered that the area of the summerhouse could be reduced to 80 m^2 and that the building could be relocated to the other side of the garden, close to the western boundary. The result of this reorientation would be that the windows which were intended to face west, into the garden and away from the boundary with Burnt Barn, would now look east, across the boundary (although at some considerable distance from it).

22. Planning permission is not required for the new garage or the summerhouse, because on 23 October 2015 Mr Lamble obtained a certificate of lawful use or development from the local planning authority, confirming that he was entitled to erect both buildings under the rights conferred by the Town and Country Planning (General Permitted Development)(England) Order 2015.

23. It was an important part of Mr McCreath's submissions that the local planning authority had not required Mr Lamble to surrender his general development rights as a condition of being granted planning consent for his new house (although once it is built a condition in the consent will take away general development rights for the future). It was therefore common ground that if the garage and summerhouse are commenced first, it will be possible for Mr Lamble to construct all three buildings, despite the whole of his land being within the Green Belt. It was Mr and Mrs Buttaci's case that this was a surprising outcome which must have been unintended and which was likely to have been the result of a mistake on the part of the local planning authority.

24. It is finally convenient at this stage to mention the tennis court which is already located at the end of the Lambles' garden, close to the boundary with Burnt Barn's amenity land. This was created by Mr Lamble, without any consultation with Mr and Mrs Buttaci, following the granting of a certificate of lawful use or development on 28 October 2013. It is surrounded by a mesh fence and, at present, it is not screened to any significant extent by vegetation as the trees and shrubs on that part of the boundary are very limited. It is clearly visible from Burnt Barn through north and west facing windows and from the terrace on the north side of the house.

The restrictions

25. Two restrictions are in issue in this case.

26. The first is contained in a transfer of the land in title SY407754 dated 5 July 1971 ("the 1971 Covenant") by Mr and Mrs Buttaci's predecessors in title. The land burdened by the 1971 Covenant is only the land on which the current buildings at Burnt Barn Cottage are built, and on which the new house and driveway (but not the garage or summerhouse) are proposed to be constructed.

27. The benefit of the 1971 Covenant is expressly annexed both to the house and garden at Burnt Barn and to the amenity land. The transfer contained various restrictions, including a requirement that Burnt Barn Cottage was not to be used other than as a private dwellinghouse for the occupation of one family only. The most relevant of the restrictions is (ii), which is a covenant by Mr Lamble's predecessor in title:

> "Not to erect any addition or to make any alterations to the existing building without first depositing plans of such alterations or additions and obtaining the approval in writing of the Transferors to the same."

Following litigation in 2009 between Mr and Mrs Buttaci and Mr Lamble's immediate predecessor in title, Mrs Farrington, over the meaning of the 1971 Covenant it was declared by the High Court that it was implicit that the approval of the Transferors, or their successors, to any such proposed alterations cannot be unreasonably withheld.

28. The second restriction is contained in a transfer dated 3 November 1994 ("the 1994 Covenant"), by which Mr and Mrs Buttaci's predecessor in title conveyed the land now owned by Mr Lamble under title SY648807 (the wider garden land). This is the land on which the proposed garage and summerhouse would be constructed.

29. The benefit of the 1994 Covenant is expressly annexed only to the amenity land at Burnt Barn, and not to the house and garden. The restrictions imposed are very similar to the 1971 Covenant and include a requirement not to use the land except as a private house for one family. The most relevant provision is again (ii), which is in slightly different terms to the 1971 Covenant, including that the words qualifying the Transferor's right to refuse consent are express rather than implied, as follows:

> "Not to erect on the land hereby transferred any building of any description without first depositing plans of such building and obtaining the written approval of the Transferor to such plans such approval not to be unreasonably withheld."

30. It was acknowledged by Mr Francis, on behalf of Mr Lamble, that the proposal to build a new house engaged the 1971 Covenant, and that the new garage and summerhouse engaged the 1994 Covenant. Moreover, he did not invite us to read either covenant in a narrow sense as allowing the covenantee the right to withhold consent simply to plans (and thus to control only the form and appearance of the proposal); we were to assume instead that it allowed the covenantee to object on reasonable grounds to the principle of any new building, as well as to the plans.

31. The Lambles' tennis court is also within the land burdened by the 1994 Covenant. Mr McCreath asked us to find that the tennis court was a building of some description and that its construction without the consent of Mr and Mrs Buttaci had therefore been a breach of the 1994 Covenant. We do not accept that submission. Although the prohibition on "any building of any description" is a wide one, to fall within it there must first be something capable of being called a building. As a matter of ordinary language a tennis court is not a building of any description.

The statutory provisions

32. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify restrictive covenants affecting land, where certain grounds in section 84(1) are made out. Mr Lamble relies on grounds (aa) and (c).

33. Although the application submitted to the Tribunal formally sought the discharge of the restrictions in their entirety, with modification as an alternative, as presented at the hearing we were invited only to consider modification.

34. So far as is material, ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction must impede some reasonable use of

the land for public or private purposes. The Tribunal must therefore be satisfied that the restriction is operative or effective in the circumstances which exist. Satisfaction of subsection (1A) is also essential to a successful claim under ground (aa); it provides as follows:

> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either —
>
> (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
>
> (b) is contrary to the public interest,
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

35. The Tribunal is required, when considering whether sub-section (1A) is satisfied and a restriction ought to be discharged or modified, to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area (section 84(1B)).

36. To succeed in his alternative case under ground (c), Mr Lamble must demonstrate that the proposed modification of the restrictions would not cause injury to those entitled to the benefit of them.

37. It is also relevant to note the power specifically conferred on the court (but not on the Tribunal) by section 84(2) of the 1925 Act to make declarations in any particular case as to the existence, extent and enforceability of a restriction imposed by any instrument.

38. We will first consider the applicant's case for modification of the restrictions under ground (aa).

Are the proposed uses reasonable?

39. Mr Francis invited us to find that the proposed use of Mr Lamble's land was reasonable, having regard in particular to the fact that planning permission had been granted for the house while the garage and summerhouse were authorised under permitted development rights. Mr McCreath did not suggest that the construction of a new house alone was an unreasonable use of the Burnt Barn Cottage plot, but argued that the implementation of the proposal to construct all three buildings would be unreasonable.

40. Mr McCreath made two points in support of his submission. The first we can deal with briefly. It was that until the local planning authority had approved a surface water drainage scheme, as required by one of the conditions to which the planning permission for the new house was subject, it could not be said that the proposal to implement the planning permission

was reasonable. We disagree. The new house will not be capable lawfully of being built until the condition is discharged. There is no reason to think that it will be especially difficult to design a drainage scheme satisfactory to the local authority. In those circumstances there is no reason to treat prior satisfaction of the condition as a necessary preliminary to our consideration of whether the proposed use is reasonable.

41. Mr McCreath's second point was more substantial. He first accepted that the existence of the 2017 planning consent was "very persuasive" evidence that the proposed use for the permitted purpose was reasonable, as the Lands Tribunal had said in *Re: Bass Ltd's Application* (1973) 26 P&CR 156, 159. Nevertheless, it was not conclusive, as the Lands Tribunal in *Re: Bass* and the Court of Appeal in *Re Martin's Application* (1988) 57 P&CR 119, 125 had each made clear. In the latter case Fox LJ had explained the position in this way:

> "The granting of planning permission is, it seems to me, merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by section 84. It is for the Tribunal to make up its own mind whether the requirements of section 84 are satisfied. The grant of planning permission by the Secretary of State is no more conclusive of that than is, for example, the deemed grant of planning permission under the provisions of the General Development Order. All the facts of the case have to be examined by the Lands Tribunal."

42. Despite the weight to be given to the planning permission Mr McCreath explained that, on the facts of this case, it was apparent that something had gone seriously wrong in the planning authority's consideration of the application for consent to build a new house in the Green Belt in circumstances where general development rights already allowed for the construction of two additional buildings. If the garage and summerhouse are built first, before the planning permission for the new house is implemented and the condition requiring the surrender of general development rights takes effect, Mr Lamble will be able to construct all three buildings. Yet it appeared previously to have been the consistent intention of the planning authority that this possibility should be prevented. Thus it was a requirement both of the current consent to re-develop the house, and of a previous consent in 2008, that implementation of these consents should be accompanied by a removal of the permitted development rights under which the proposed garage and summerhouse could be constructed. Any subsequent development on the site, including the garage and summerhouse, would require its own separate planning permission.

43. In considering whether to grant permission for the new house, which is about 80% larger than the current Burnt Barn Cottage, the planning authority was required to give effect to the National Planning Policy Framework ("NPPF"). Under paragraphs 87 and 89 of the NPPF the replacement of a building in the Green Belt with another materially larger building, even in the same use, constitutes inappropriate development for which consent must be refused except in very special circumstances. The very special circumstance which the planning authority was persuaded clearly outweighed the harm to the Green Belt of the proposed inappropriate development was that the proposal included the demolition of the existing cottage and its

detached garage, and their replacement with the new house. The authority anticipated that the effect of this work would be to reduce the spread of built structures from east to west and from north to south. It concluded its consideration of the application by explaining that "the reduced spread of development and removal of detached garage would consolidate the development into one mass and increase openness in the Green Belt." To ensure that this was achieved conditions requiring the demolition of the original house and garage and removing permitted development rights were imposed.

44. The difficulty with the planning authority's reasoning, and with the conditions by which it intended to achieve greater openness in the Green Belt, is that they appear to give no weight at all to Mr Lamble's intention (and entitlement) to build the new garage and summerhouse, which would increase the spread of development both east to west and north to south. The authority was clearly aware of the lawful development certificates, as Mr Francis emphasised, but it did not require Mr Lamble to enter into a section 106 agreement voluntarily renouncing them as a condition of granting permission. Instead it relied only on the condition removing permitted development rights after construction of the new house begins. Mr Derbyshire, who has 28 years experience as a town planner including work as head of development control in a number of local authorities, observed that this was a wholly ineffective approach. It left Mr Lamble free, by building the ancillary buildings first, to achieve an intensification of development, rather than a consolidation as the planning authority had intended.

45. In response to these submissions Mr Francis suggested that Mr Derbyshire's criticisms of the grant of planning consent and its interaction with the certificates of lawful development was misconceived as the consent had been obtained and had not been challenged by judicial review, the time for which has now long since expired. Where there has been scrutiny of a proposed development through the planning process, and its approval, that should be taken as establishing a benchmark of reasonableness (by analogy with the significance of planning consent in a case involving an alleged private nuisance: see *Lawrence v Fen Tigers* [2014] 1 AC 822, at paras. 217 – 223, per Lord Carnwath). We do not think that is an answer to the objectors' point. The planning history is a relevant circumstance, but is not conclusive, and we must form our own judgment of whether the proposed uses are reasonable. As Lord Carnwath put it in *Lawrence*, albeit in a different context, where a planning permission includes "a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise nuisance, they may provide a useful starting point or benchmark for the court's consideration of the same issues." If, on consideration of the same issues, the Tribunal doubts that the planning permission was carefully considered, and instead comes close to regarding the terms of the grant as irrational, the weight which the Tribunal feels able to give to the permission will inevitably be diminished.

46. Mr Lamble told us that when he read Mr Derbyshire's report he had telephoned the planning officer to check whether he was indeed entitled to build all three structures. The planning officer had replied that, yes, he was lawfully able to do so. There is no evidence from the planning officer that the problem of sequencing, as it was called by Mr Derbyshire, had been appreciated when the resolution to grant consent was passed, and while we do not doubt that the conversation Mr Lamble recounted took place, we do not regard the content of that conversation as shedding light on that question. The planning officer appears simply to have

acknowledged the effect of the permission and the permitted development rights in combination, without expressing a view on whether it had really been the intention that Mr Lamble should have his cake and eat it in the way he now can. We agree with Mr Derbyshire's assessment that it is extremely difficult to reconcile the planning officers' choice of conditions with the reasons they gave for their recommendation.

47. The Tribunal itself is required by section 84(1B) to take into account the development plan and any pattern for the grant or refusal of planning permission in the area when determining whether an application under ground (aa) meets the requirements of subsection (1A), and generally in determining whether a restriction ought to be discharged or modified. Having regard to the very great significance attributed to the protection of the Green Belt by the NPPF, and the incompatibility (as it seems to us) of that protection with the realisation of Mr Lamble's proposals to their fullest extent, we are satisfied that the use of Burnt Barn Cottage and its grounds as the site of all three new buildings (the house, the summerhouse and the garage) would not be a reasonable use. It would represent an intensification of use, damaging to the Green Belt and to the immediate locality, with no discernible countervailing benefits.

48. In contrast, we find no such difficulties with regard to the house alone. Mr McCreath did not suggest that the construction of the new house in substitution for Burnt Barn Cottage would be an unreasonable use of the land.

49. Nor do we consider that the construction of the house and the adjoining garage would be an unreasonable use of the land, even taking full account of their presence in the Green Belt. We recognise that the benefit which the planning authority considered it would achieve by the grant of planning consent for the house included the demolition of the existing garage thus reducing the spread of the development. Nevertheless, the presence of the original garage together with a new house was not considered objectionable in principle when planning permission was granted to Mr Lamble's predecessor in 2008, despite the fact that the developed area was to be extended further back into the plot to align with Burnt Barn. The relationship between the new house and the new garage will also be similar to that of the house and (more substantial) garage at Burnt Barn and many others in the locality. The new garage will be moved back in the plot, further from the road. It will largely be concealed from the road and wholly concealed from Burnt Barn by hedges and fencing. When viewed from the opposite boundary, to the north of Burnt Barn Cottage, the two new buildings will be more dispersed and therefore more obvious than the current arrangement; those views are distant (the boundary will be about 100 metres from the new buildings) and from undeveloped boggy heathland. In our judgment the house and garage together are a reasonable use of the land, consistent with other roadside sites, and the compelling objection is to the summerhouse, which would extend the built space significantly further into the plot and which would be very visible from Burnt Barn.

50. We acknowledge a degree of tension between our finding that the use of the land for all three new buildings would be unreasonable, and our acceptance that the house and garage alone would be reasonable, despite the planning objection to inappropriate development in the Green Belt being applicable to both. We are required to take into account the development plan and

any pattern for the grant or refusal of planning permission in the area, and we have done so before arriving at our own conclusions. In this case the development plan (which may be taken to include Green Belt policy) and the pattern of permissions applicable to Burnt Barn Cottage are themselves difficult to reconcile. Having visited the area and considered the planning history we are satisfied that, despite not yielding the benefits anticipated by the planning authority, the use of the land as the site of the new house and garage will be a reasonable one.

51. For these reasons we consider that the proposal to use the application land as the site of all three new buildings is not a reasonable use of the land, but that the use for the new house and the new garage is reasonable.

Do the covenants impede the use of the land for the new house and garage?

52. It is unusual for this question to be contentious in applications under section 84, since there would ordinarily be no reason to make an application to discharge or modify a restriction which did not impede a proposed use. In this case, however, the issue is very much in dispute.

53. Mr McCreath argued that it was not open to the applicant to suggest, on the one hand, that the restrictions impede his proposed use of Burnt Barn Cottage while arguing, on the other, that they secure no practical benefits to the objectors. The basis of that submission was the conclusion of the High Court in 2009 that both the 1971 and 1994 Covenants were "qualified" i.e. that the prohibition on erecting any new building on the land without first obtaining the approval in writing of Mr and Mrs Buttaci, as successors to the original the Transferors, is subject to an implied proviso that such approval cannot be unreasonably refused.

54. An agreement that A will not do something without first obtaining the consent of B, whose consent may not be refused unreasonably, operates as a condition: so long as B does not refuse consent unreasonably, A may not take the prohibited step. If the condition is broken by an unreasonable refusal of consent, A is free to proceed as if the restriction did not apply. These propositions are well established and were not in dispute (see, for example, *Treloar v Bigge* (1874) LR 9 Ex 151; *Ideal Film Renting Co Ltd v Nielsen* [1921] 1 Ch 575).

55. Mr McCreath's argument proceeded in the following stages. First, the objectors had been asked for their consent to the proposed development and had refused it. Secondly, if that refusal was unreasonable, the 1971 and 1994 Covenants would no longer impede the applicant in carrying out the development. Thirdly, it was for the applicant to satisfy the Tribunal that it had jurisdiction to modify or discharge the restrictions. Fourthly, it was therefore for the applicant to satisfy the Tribunal that the refusal of consent was reasonable in the circumstances. Fifthly, the question whether consent had been unreasonably refused overlapped substantially with the next question under ground (aa), namely whether, in impeding a proposed use, the restrictions secure practical benefits of substantial value or advantage for the objectors. Sixthly, the applicant's case was that the restrictions secured no practical benefits for the objectors at all. Seventhly, the Tribunal should not allow the applicant to found his case under ground (aa) on two mutually inconsistent propositions i.e. that the refusal of consent was

reasonable, yet the restrictions confer no practical benefits; Mr McCreath characterised the applicant's case in this respect as "blowing hot and cold" and as "approbation and reprobation", which he argued ought not to be permitted. Eighthly, and separately, the Tribunal had no jurisdiction to determine whether the applicant's refusal of consent had been unreasonable; that was a question which could only be determined by the High Court in separate proceedings, and the applicant could obtain no relief in the Tribunal until it had been resolved there.

56. For the applicant Mr Francis submitted that in the circumstances which existed, and for all practical purposes, the 1971 and 1994 Covenants impede the applicant's proposals. He acknowledged that the Tribunal's jurisdiction under section 84(1) of the 1925 Act does not extend to making a binding determination that consent has been unreasonably refused, and it was no part of his case that such a determination should be made. Moreover, it would be inconvenient and obstructive to justice for an applicant first to be required to apply to the court for a declaration that consent had been unreasonably withheld before being in a position (such declaration having been refused) to apply to the Tribunal for a modification of a qualified restriction. In principle, a covenant requiring prior consent was capable of impeding the proposed use, and because there had been a refusal (whether it was reasonable or unreasonable) the applicant was at risk of an injunction if he proceeded with his proposal without either obtaining a declaration that the restrictions were no longer enforceable or obtaining the modification or release of the restrictions under section 84(1). In any event, the question whether consent had been unreasonably withheld overlapped, but was not the same as the question whether a restriction secured benefits of substantial value or advantage to the same landowner for the purpose of ground (aa); it was perfectly possible for consent to a development to be withheld reasonably, yet for a case under ground (aa) to be made out in respect of the same development. There was therefore no necessary inconsistency in the presentation of the applicant's case.

57. We are satisfied that the 1971 and 1994 Covenants do impede the applicant's proposals, whether or not the objectors' refusal of consent was reasonable.

58. Where the unreasonableness of a refusal of consent is clear cut, someone in the applicant's position may feel confident that a qualified covenant which would otherwise restrict an intended use of their land has fallen away and need no longer be observed. In our experience such cases are rare. It is much more common that a covenantee's objection to a covenantor's proposal cannot be dismissed out of hand as obviously unreasonable. In such a case the only advice which the covenantor could sensibly be given is that recommended by Jacob LJ in *Mortimer v Bailey* (2005) 2 P & CR 41, at [41]:

> "Where there is doubt as to whether a restrictive covenant applies or whether consent under a restrictive covenant is being unreasonably withheld, the prudent party will get the matter sorted out before starting building, as could have been done in this case. If he takes a chance, then it will require very strong circumstances where, if the chance having been taken and lost, an injunction will be withheld."

59. Before the Tribunal can exercise its jurisdiction under ground (aa) it must be satisfied that the continued existence of the restriction in its unmodified form would "impede" some reasonable use of the applicant's land. In ordinary speech to impede a use means to delay or to prevent it. An objection or obstacle which is capable of being overcome may nevertheless be said to impede a proposed use of land. There is nothing in the purpose of section 84(1)(aa) (the discharge or modification of restrictions which unreasonably impede the use of land), or in the statutory language, which requires that the impediment must otherwise be insuperable before the Tribunal's jurisdiction is engaged.

60. When other aspects of ground (aa) have been considered these have been interpreted broadly (see the decisions of the Court of Appeal in *Gilbert v Spoor* [1983] Ch. 27, and *Shephard v Turner* [2006] 2 P & CR 28, both concerned with the meaning of the expression "practical benefits of substantial value or advantage"). In the same spirit it would seem to us to be perfectly legitimate to speak of a covenant as impeding a use where its effect is only to delay that use, for example by requiring a lengthy period of notice to be given before the use may be implemented. In the same way, we consider it appropriate to recognise that a qualified covenant which may or may not prohibit a use, because consent has been refused on grounds which cannot immediately be said to be capricious or unsustainable, can properly be said to impede the use. The continued existence of the covenant provides the covenantee with a *prima facie* cause of action for an injunction to restrain the proposed use, and means that the only practical and prudent course available to the covenantor is to seek a declaration that consent has been unreasonably withheld or an order under section 84(1) for discharge or modification of the restriction before proceeding to implement the proposal. We therefore have no difficulty in this case in concluding that the applicant's intended use of Burnt Barn Cottage is impeded by the 1971 and 1994 Covenants.

61. Nor do we accept Mr McCreath's argument that the applicant's case is internally inconsistent. The principle of law that a person may not "approbate and reprobate" is of general application, as Sir Nicolas Browne-Wilkinson VC explained in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, 1329 F-G:

> "There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

Nevertheless, as Mr Francis submitted, the question whether consent had been unreasonably withheld is not the same as the question whether a restriction secures benefits of substantial value or advantage for the purpose of ground (aa).

62. In a claim for a declaration that consent has been unreasonably withheld, the reasonableness of the covenantee's response to the request for consent is judged from the standpoint of a reasonable land owner. It is not necessary for the covenantee to establish that the conclusions which led to the refusal of consent were justified, only that they were conclusions which might he reached by a reasonable person in the circumstances. Nor need the

covenantee generally have regard to the interests of the covenantor when deciding whether to grant or refuse consent (except in cases where the detriment to the covenantor would be extreme and disproportionate to any benefit to the covenantee). These statements of general principle are derived from the decision of the Court of Appeal in *International Drilling Fluids v Louisville Investments* [1986] Ch 513 (a landlord and tenant case).

63. In an application under section 84(1)(aa) the relevant question will be whether the restriction secures for the covenantee any practical benefit of substantial value or advantage. Any benefit or advantage which is less than substantial will not prevent the modification or discharge of the covenant, yet such a benefit may be sufficient to justify a refusal of consent on reasonable grounds. Even if it was necessary for the applicant to concede that the refusal of consent was not unreasonable (which it is not, for the reason we have given) there would therefore be no impermissible inconsistency in the applicant's case that the restrictions fail to secure practical benefits of substantial value or advantage.

64. We would finally add on this issue that we were referred to two previous decisions of the Tribunal which were said to support Mr McCreath's submissions.

65. The first was the Tribunal's recent decision in *Hennessey v Kent* [2017] UKUT 243 (LC), in paragraph 41 of which the Tribunal confirmed that, in principle, a covenant requiring the prior approval of plans and specifications was capable of impeding an intended use of land for the erection of a new building. That was because:

> "The owner's ability to use the land as she wishes is inhibited by the need to obtain consent and, subject to the breach of any implied condition, is prevented altogether by a refusal of consent. Where consent was withheld unreasonably (or capriciously if that be the correct test) the condition to which the restriction is subject would not be satisfied and the restriction itself would cease to apply and would not prevent the particular use for which application had been made."

66. The application in *Hennessey* was concerned with a proposal to erect two further dwellings in the grounds of a house which had been destroyed by fire and then rebuilt to a different design. The qualified covenant which impeded the building of the new dwellings without first obtaining the approval of the covenantee to the plans and elevations had applied equally to the rebuilding of the original house. The applicant had requested consent but it had been refused, without any specific reasons being given. Having seen the new house and considered the absence of any reasoned objection the Tribunal concluded that there were no grounds on which the objector could reasonably have refused consent. In paragraph 44 the Tribunal concluded:

> "As there are no grounds on which the objector could reasonably have refused consent, and as the applicant has proceeded without consent, the consent restriction cannot be said to have impeded the use of the application land for the construction of High View."

67. We do not think *Hennessey* assists Mr McCreath's argument, although it confirms the underlying premise that, once consent has been refused unreasonably, a qualified covenant can no longer be relied on. The distinction between this case and *Hennessey* is that in the latter case the objector's refusal of consent had been so unjustified that the applicant felt sufficiently confident that the covenant no longer bound her, so far as the replacement house was concerned, that she proceeded to build it before applying to the Tribunal for the modification of the covenant to enable the additional houses to be constructed. The restrictions had not, in practice, impeded the use of the application land for the replacement property. The same cannot be said in this case.

68. The second Tribunal decision relied on by Mr McCreath was *Re: Wild's Application* [2012] UKUT 306 (LC) which concerned a covenant against carrying out alterations to a building without the consent of a neighbouring owner. The covenant was not qualified by the words "such consent not to be unreasonably withheld", or the like, but it was accepted by the covenantee that a qualification to that effect was to be implied. The modification sought by the applicant was to introduce the qualifying words expressly and to permit alterations for which the covenantee had already refused consent. After an application had been made to the Tribunal for the modification of the covenant the objector issued proceedings in the High Court for a declaration that his refusal of consent had been reasonable. Those proceedings were then stayed to await the determination of the application to the Tribunal, and it was no part of the either party's case to the Tribunal that consent had been withheld unreasonably (see paragraphs 29 and 39). It was therefore common ground that the covenant impeded the proposed use (see paragraph 73).

69. Before considering the issues which had to be determined the Tribunal (Mr P.R. Francis FRICS) noted the relevant legal principles, and said this:

> "Ground (aa) in terms only applies where the restriction impedes some reasonable user of the land. If consent to the alteration could not reasonably be withheld, the restriction would not impede the alteration. Therefore, if, on the evidence, the Tribunal concluded that it would be unreasonable for the covenantee to refuse consent to the alteration, the application on ground (aa) would fail."

Mr McCreath relied on that passage in particular, but once again we do not think it assists him. It does not consider the practical impediment which a refusal of consent, even one which is subsequently found to have been unreasonable, is likely to have on a proposed use of land. Nor was it a statement which reflected the facts of the case or the Tribunal's conclusions (which were that, by impeding the proposed use, the restrictions secured a substantial benefit for the objectors). The Tribunal's observations on the consequences of a different set of facts did not form part of its core reasoning. Finally, and to the extent that the passage quoted above was intended to apply to a case where the refusal of consent was arguably reasonable, and not so unreasonable as to make the threat of an injunction illusory, we do not agree with it.

70. For these reasons we are satisfied that, whether the refusal of consent was reasonable or unreasonable, the restrictions impede the use of Burnt Barn Cottage for the construction of the proposed new house and garage.

Does impeding the proposed use secure practical benefits to the objectors?

71. By way of reminder, section 84(1A)(a) provides that ground (aa) may be relied on where the Tribunal is satisfied that, in impeding some reasonable use of the land, the restriction: "does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them". This question gave rise to a number of discrete issues which we will consider in turn.

Which land benefits from which restrictions?

72. Mr Francis submitted that while the proposed new house is to be on land burdened by the 1971 Covenant, the benefit of which is annexed to the whole of Mr and Mrs Buttacis' land, the proposed new garage and the summerhouse will be on land which is burdened only by the 1994 Covenant, the benefit of which is enjoyed by the amenity land to the rear of Burnt Barn, and not by the house and garden themselves. It followed that, when considering whether the covenants secured practical benefits to the objectors, the question was whether they secured such benefits to the objectors in their capacity as owners of the particular parcel of land with which the benefit of the restrictions was enjoyed.

73. Mr McCreath submitted that it was not a requirement of ground (aa) that the benefit in question must be enjoyed from a particular piece of land; the only qualification in the statute was that the objectors must be "persons entitled to the benefit of" the restriction. He referred to the Court of Appeal's decision in *Gilbert v Spoor* [1983] Ch 27, in which the land of the applicant and the objectors was within a scheme of mutual covenants which prevented the construction of more than one house per plot. The Lands Tribunal found that the additional houses which the applicant wished to build on his own land would not be visible from the objectors' land, but would interrupt "a resplendent landscape view" which the objectors were able to enjoy from a short distance away, where seats had been installed to enable the public to enjoy the view, and from the road leading to the objectors' properties. The interruption of this view was the basis of the Lands Tribunal's refusal to modify the scheme of covenants. Eveleigh LJ said, at page 32H -33A:

> "In my judgment the tribunal was entitled to hold that the view was a benefit whether or not that benefit could be said to touch and concern the land. However, I am also of the view that the land of the objectors is, in each case, touched and concerned by the covenant. The covenant is intended to preserve the amenity or standard of the neighbourhood generally."

74. In closing, Mr Francis accepted that a practical benefit was capable of being secured to a person having the benefit of a covenant by reference to a wider area than that to which the benefit was strictly annexed; the existence and extent of the benefit would be a question of fact in each case. We accept Mr McCreath's submissions and are satisfied that Mr and Mrs Buttaci may rely on the impact which Mr Lamble's proposal to construct the summerhouse on land at the rear of his property will have both on their house and garden, which benefit from the 1971 Covenant, and on their amenity land, which enjoys the benefit of the 1994 restriction.

Views, seclusion and "light spillage"

75. Mr McCreath submitted that the proposed new house would involve a substantial mass of building to the west of Burnt Barn on a part of the adjoining plot which is currently used only as an area of garden. At its highest point there would be a 7m high ridge, visible directly from the first floor windows of Burnt Barn.

76. In answer to the applicant's case that the view of the new building would be alleviated by screening, Mr McCreath made several points. First, Mr Buttaci's preference was that there should be neither screening nor a tall house, so that he could enjoy the afternoon and evening sun. Secondly, the effectiveness of screening would be governed by the seasons and, as Mr Harrap had accepted, there would be less screening in winter. Thirdly, the maintenance of a foliage screen was entirely outside the Buttacis' control – a new owner of Burnt Barn Cottage might decide to remove it, or it might deteriorate with age. These were not speculative possibilities – the extent of the tree cover in the grounds of Burnt Barn Cottage had been reduced over the years, in particular by Mr Lamble. Fourthly, the mass of the building would be apparent from glimpses through the vegetation. Whilst an occasional glimpse might in itself seem insubstantial, Mr Buttaci's evidence had been that these glimpses would be a reminder to him of the substantial building which would stand on the other side of his boundary, and would thus destroy the impression of seclusion which he currently enjoys. They would therefore be a much wider impact on the outlook from Burnt Barn.

77. Mr Francis emphasised Mr Buttaci and Mr Derbyshire's acceptance that the key views of Burnt Barn were to the north and east. There were views to the west, but between the two houses themselves they were interrupted by the considerable barrier formed by hedges, shrubs and trees. From the principal rooms of Burnt Barn, the views are over the garden and amenity land towards the undeveloped heath land to the north and east. Upstairs, the views from a dressing room and from the landing are not of primary importance, while from the bedroom the primary views are to the east. There would be no effect on the Buttaci's privacy, no overlooking, no shadows would be cast over their garden, and no issues of rights of light.

78. Mr McCreath acknowledged that the principal windows of Burnt Barn faced away from the proposed new buildings, but that did not mean that the preservation of views from the windows on the western side of the house, especially upstairs, did not confer a practical benefit. These views, which would be passed and enjoyed every day as one moved around the house, did contribute significantly to the sense of openness and relative isolation of Burnt Barn.

79. We give some weight to Mr Buttaci's concern that the presence of a neighbouring house on the other side of the boundary will be more obvious if the new house is built, and that the impression of seclusion will be diminished somewhat as a result. Nevertheless, in our judgment he underestimated the density of the existing boundary hedges and trees (some of which he has recently reduced in size) and the effectiveness of the screening they will provide. He may also have been misled by some of the visual representations prepared for the hearing which omitted the screening in order to show the relationship between the neighbouring buildings. There is no reason to think that the screening will be deliberately reduced, since the

trees, shrubs and hedges are likely to be valued as much by the applicant and his successors as by Mr and Mrs Buttaci. With the existing screening the new house will be apparent only in glimpses from windows on the western side of the upper floor; in winter there may also be some limited visibility from the garden of the roof of the house. To this extent it will be more obvious than the existing building, and Burnt Barn will appear a little less secluded.

80. Mr McCreath also pointed to Mr Derbyshire's evidence about significant light spillage from the glazing to the north elevation of the new house, which would be evident from Mr and Mrs Buttaci's house and terrace. We are not persuaded that light spillage is a significant issue. The existing terrace and rear windows of Burnt Barn Cottage already cast light into the rear garden, and while this will be increased by the new building (and brought closer to the line of sight of someone sitting on the terrace behind Burnt Barn) the glazing on the north elevation has been significantly reduced from the original design, and any direct interference will be diminished by the vegetation on the boundary. Light spillage will only be apparent from the terrace of Burnt Barn in the gloom or dark of evening, which would be likely to be artificially lit itself. While we do not discount the impact of additional light absolutely, we give it little weight.

81. Mr McCreath submitted that, by preventing the erection of the proposed summerhouse, the covenants plainly secured a practical benefit, in that the open views to the northwest of Burnt Barn would be maintained. Mr Harrap accepted that the summerhouse would have an adverse impact on the sense of openness enjoyed from Burnt Barn. We agree. The intended location of the summerhouse is on part of the land at the rear of Burnt Barn Cottage which is not screened by a hedge, trees or other significant vegetation. The views to the northwest, across Mr Lamble's land to the countryside beyond, contribute to the openness of the outlook and the sense of seclusion enjoyed by Burnt Barn. The preservation of these aspects is a real practical benefit (and the adverse impact of the summerhouse on the openness of the countryside contributes to our conclusion that it is not a reasonable use of the land in this Green Belt location).

82. If implemented, the suggestion made by Mr Francis in closing that the summerhouse could be made smaller and located to the western side of the Lambles' plot might reduce the impact on the outlook from Mr and Mrs Buttaci's property, but it may come at a cost to their privacy; under the current proposal the glass doors and windows would face in to Mr Lamble's garden, and away from the Burnt Barn; the new proposal would move the building to the opposite boundary but would turn it through 180 degrees, so that the windows would look across the amenity land beyond the boundary. The proposal to relocate the summerhouse and to reduce it in size came too late in the day to be considered by the experts, and it would not be fair to Mr and Mrs Buttaci if Mr Lamble were permitted to change his case significantly at that stage. We therefore exclude it from consideration.

Noise

83. Mr McCreath submitted that the effect of Mr Lamble's proposals would be to bring potentially noisy activities closer to Burnt Barn. At present, noise from the use by the Lambles

of their driveway and house was limited as the drive was located are as far away from Burnt Barn as possible. Under the proposed arrangement, the activities that give rise to noise would be moved to the east and north, closer to the boundary, and Mr Derbyshire's evidence was that this would have a greater impact on the enjoyment of the neighbouring property. As well as being closer, the significant increase in the size of the house would inevitably lead to an intensification of use, with more guests, more visitors, more cars, more animals, more children and more activity all contributing to additional noise. The proposed summerhouse would also be a new source of noise further down the garden, in a location where screening is sparse, whereas at present the main area of external activity at Burnt Barn Cottage is immediately behind the house.

84. Mr Francis reminded us that there is no application to modify the restrictions in either of the 1971 or 1994 conveyances which limit the use of the land to use as a private dwellinghouse for the occupation of one family only. The proposal is for a replacement family house. There is no covenant in either title against nuisance or annoyance, and in any event, such noise as there might be would be from the normal activities of the everyday life of a family with three children. Mr Lamble's children currently enjoyed their large garden without complaint from Mr and Mrs Buttaci, and the nature of the family's activities will not change. By any robust and common-sense assessment noise of this type cannot be considered unusual or objectionable to a person of reasonable sensitivity. We also accept Mr Harrap's evidence, on behalf of the applicant, that any additional noise attributable to the relocation of the drive closer to the boundary will make only a marginal difference, particularly having regard to the shielding effect of the new garage itself.

85. On this aspect of the supposed benefit of the restrictions we agree with the submissions of Mr Francis.

Summary

86. Mr McCreath stressed that the effect of the proposed development should be considered in the round. The combined effect of loss of views, privacy, potential light pollution and noise would be significantly detrimental to the current feeling of seclusion, quiet, and sense of openness. The ability to prevent this was a clear practical benefit to the Buttacis. Mr Francis agreed that the matter should be considered holistically, but his submissions went more to the question of whether the value of such practical benefits was substantial.

87. We are satisfied that by impeding the proposed use of Burnt Barn Cottage for the new buildings the restrictions do secure a practical benefit to Mr and Mrs Buttaci. That benefit comprises the enhancement of their sense of seclusion by the preservation of views of the surrounding countryside to the northwest, and to a lesser extent, their sense of isolation from their immediate neighbours because at present, even in winter, the presence of the adjoining house is not apparent. We are not persuaded that the restrictions secure practical benefits in terms of preventing substantial interference by noise caused by the ordinary activities of daily life carried on beyond the western boundary. There is no reason why these should be any more intrusive than at present.

Are those benefits of substantial value or advantage, and would money be adequate compensation?

88. The extent of the benefit which the restrictions secure to the objectors and the adequacy of money as compensation for their modification are closely related and can be considered together. In view of the way the application was presented, we are concerned only with the suggested modification of the restrictions to enable Mr Lamble to build the house, garage and summerhouse as proposed, and not with their general discharge for all purposes.

89. The expert evidence on this point was limited. For the objectors, Mr Derbyshire, whose expertise is as a town planner and who was not able to speak to value, confined his evidence to the extent of the loss of amenity which would result from the modification.

90. Mr Michael Harrap FRICS, a Chartered Surveyor and Partner in Knight Frank, gave evidence for the applicant. His original report was prepared in August 2017, before he had been given access to Burnt Barn. In it Mr Harrap concluded that, by impeding the construction of the proposed new house, the restrictions did not secure any practical benefits of substantial value or advantage, and that money would adequately compensate the objectors for any adverse consequences of modification. His views concerning the summerhouse and garage were to the same effect, on the assumption that the relevant restriction only benefitted the amenity land and that any effect on the house and garden could be disregarded. These views did not alter after he had visited Burnt Barn, and were reiterated in a further report written in October 2017. Having made a second inspection, in March 2018, Mr Harrap said that he "could be convinced" that there might be some nominal diminution in the value of Burnt Barn as a result of the implementation of the planning permission and because of a perception that there will be a larger house on the Burnt Barn Cottage plot. He quantified the maximum extent of this diminution at 2-2.5% of Burnt Barn's market value which, in his oral evidence, he assessed as being in the order of £2.25 million.

91. Mr McCreath's primary submission was that the impact on Mr and Mrs Buttaci was incapable of being quantified. His fall-back position was that since Mr Harrap was ready to be persuaded that the value of the benefits secured by the restrictions was something in the order of £45,000 - £56,000 that must mean that there was some practical benefit in the restrictions. Whether that amount was substantial was a matter of fact and degree. He suggested that one feature of significance in this case was that the result of the modification would be a permanent and continuous disturbance of Mr and Mrs Buttaci's enjoyment of their own home by their knowledge of the new development, rather than an occasional irritant which might be present from time to time. We do not consider that submission has any merit. Whether the benefit secured by a restriction is of substantial value, or confers a substantial advantage, must be judged by objective standards, and not by the standards of a hyper-sensitive individual which, in any event, we do not consider Mr Buttaci to be.

92. In paragraph 87 above we have summarised our conclusions on the nature of the benefits secured by the restrictions. To the extent that these comprise the preservation of views of the surrounding countryside to the northwest, contributing to the semi-rural aspect of the

setting, we do not need to quantify them. We have already concluded that the construction of the substantial new summerhouse close to the boundary would not be a reasonable use of the land. The request for modification of the restrictions under ground (aa) to permit that building will therefore be refused.

93. The other benefit secured by the restrictions comprises the preservation of the sense of isolation of Burnt Barn from its immediate neighbour, which will be diminished by the construction of the new house and garage. The new building will be larger and will not be completely concealed, particularly in winter. There will be, as Mr Harrap put it, a "perception" of the presence of a larger house. We do not accept Mr McCreath's submission that the value of this benefit is unquantifiable. We consider it to be small, and for many occupiers it may not matter at all. We are therefore satisfied that practical benefits secured by the restrictions are not of substantial value or advantage.

94. Nevertheless, we were impressed by Mr Harrap's evidence on this issue, which was contrary to the interests of his own client and a modification of his original view, with the benefit of a second inspection at a different time of year. We accept his evidence that a buyer of a £2.25 million house in this area might pay slightly less as a result of the proposed change. The extent of that reduction in market value is an appropriate measure of the sum required adequately to compensate Mr and Mrs Buttaci for the modification of the restrictions. We assess that sum to be £50,000.

95. Our conclusion is therefore that the application under ground (aa) is made out in respect of the new house and garage (on the assumption that the carport will be omitted), but not in respect of the summerhouse.

Ground (c)

96. A restriction may be modified under ground (c) only if the modification will not cause injury to those entitled to the benefit of the restriction. We have already concluded that there will be some small injury as a result of the construction of the new house and garage on the Burnt Barn Cottage plot, so while ground (aa) is made out for that aspect of the application, ground (c) is not.

97. Nor is ground (c) made out in relation to the proposed summerhouse. We are satisfied that the construction of the new building on the open boundary would be a substantial intrusion on Burnt Barn, for the reasons we have given in paragraph 81 above.

Conclusions

98. For these reasons the application succeeds on ground (aa) only in relation to the new house and garage, subject to the payment of compensation of £50,000 before the construction of either building commences. The application fails on both grounds in relation to the

summerhouse. If the applicant is prepared to accept the condition as to compensation he should so indicate within one month of the date of this decision.

99. The practice in the Tribunal is that, in the absence of unreasonable behaviour, a successful applicant for an order under section 84(1) is not ordinarily entitled in addition to an order for the payment of costs by an unsuccessful objector, whereas a successful objector will ordinarily be entitled to recover the costs incurred in the proceedings from an unsuccessful applicant. If either party wishes to make an application in relation to the costs of the application they may now do so within 14 days of the date this decision is sent to the parties. If the other party wishes to respond to such an application they may do so within a further seven days.

Martin Rodger QC

Deputy Chamber President

Peter McCrea FRICS

Member

29 May 2018