**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**

**Neutral Citation Number: [2019] UKUT 273 (LC)**
**Case No: LP/18/2018**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RESTRICTIVE COVENANTS – MODIFICATION – agricultural buildings – permitted development for conversion into two dwellings with garages – hope value – Law of Property Act 1925 section 84(1)(aa) and (c) – application allowed under ground (c) – no sum awarded under section 84(1)(i) or (ii)***

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

**BETWEEN:**

**MARTIN ANDREW JACKSON**
**PATRICIA ANN JACKSON** **Applicants**

**and**

**ROSELEASE LIMITED** **Objector**

**Re: Land adjoining Old Hazelwood Farm,**
**Preston Bagot,**
**Henley-in-Arden**
**B95 5DX**

**Elizabeth Cooke, Upper Tribunal Judge and Mr Andrew Trott FRICS**

**The Royal Courts of Justice**
**on**
**28-29 August 2019**

Mr David Taylor of counsel for the Applicants instructed by Wallace Robison and Morgan

Mr Simon Allison of counsel for the Objector instructed by Capital Law



The following cases is referred to in this decision:

*James Hall and Company (Property) Limited v Maughan and others* [2017] UKUT 240 (LC)
*Re Davies' Application* [2016] UKUT 462 (LC)

## Introduction

1. This is an application for the modification of restrictive covenants pursuant to section 84 of the Law of Property Act 1925. The applicants are Mr and Mrs Jackson, who are the freehold owners of Old Hazelwood Green Farm, and the objector is Roselease Ltd, which owns 26 acres of land to the east and south of the applicants' land.

2. In summary, the applicants wish to convert a dilapidated Dutch barn and farm outbuildings into two houses, with garages. The proposed development is permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015, Schedule 2, Part 3, Class Q ("the 2015 Order"), and was granted prior approval, subject to conditions, on 9 August 2017. The development cannot be carried out without either the consent of the objector pursuant to covenants imposed on the applicants' land in 2008, or the modification of those covenants.

3. The applicants were represented by Mr David Taylor of counsel who called Mr Anthony Baylis as a witness of fact and Mr Peter Cornford FRICS, FNAEA, a partner of John Earle & Son LLP, as an expert valuation witness. Mr Simon Allison of counsel appeared for the objector and called Mr Martin Fitzpatrick as a witness of fact and Mr Ian Holdsworth FRICS, director of Ian Holdsworth Chartered Surveyors, as an expert valuation witness. Mr Peter Frampton BSc, MRICS, MRTPI, a director of Frampton Town Planning Ltd, produced an expert report on town planning issues for the objector. The contents of his report were not disputed and by agreement he was not called to give oral evidence. We are grateful to counsel for their helpful arguments. We had the benefit of a site visit on 13 August 2019 and we are grateful to the parties for allowing us access to their properties.

## The factual background

4. The applicants' property is within the green belt, in an area of farmland, villages, and isolated houses. Old Hazelwood Green Farm is bounded to the north and west by roads. The nearest house is Hazelwood Green House immediately to the west. Mr Fitzpatrick, the sole director of the objector company, lives in Malt House Farm, some 500 metres to the north east. The applicants bought their property in 2016 from Mr and Mrs Baylis, who had lived there since 1976.

5. Until 2008 Mr and Mrs Baylis owned the house at Old Hazelwood Green Farm together with some three acres of land, bounded to the south and east by a 35-acre field, owned by Mr and Mrs Brown who had retained the field after selling Old Hazelwood Green Farm to Mr and Mrs Baylis. In 2008 that field was sold at auction; Mr Brown had died, and the sale was effected by family trustees. Mr Fitzpatrick was the successful bidder at the auction, for a price of £305,000. By prior agreement with Mr Baylis he arranged for 9 of the 35 acres to be transferred to Mr and Mrs Baylis on 4 July 2008; this was an L-shaped area and was the land nearest to Old Hazelwood Green Farm. We refer to it as "the application land". The remaining 26 acres, again roughly L-shaped, were transferred by sub-sale on the same day to the objector, of which Mr Fitzpatrick is

the sole director and, together with his wife, shareholder. We shall have more to say later about the deal done between the Mr and Mrs Baylis and Mr Fitzpatrick.

6. After the transfer, Old Hazelwood Green Farm comprised the house and garden and the application land. On the application land to the south of the house stands a Dutch barn and some outbuildings; they are almost derelict, and are not presently used for any farming purposes. The barn is open-sided, made of steel, and currently contains rubbish. The application land and the objector's 26-acre field are separated by an L-shaped double fence and hawthorn hedge, which Mr Baylis and Mr Fitzpatrick put up after the 2008 purchase. There is a water supply within the application land but not in the 26 acres. Both fields are occupied by a tenant farmer and grazed by sheep; because of the water supply, there are gates on both sides of the boundary which stand open. The land rises from west to east and there is a public footpath over the 26-acre site running in a south-easterly direction from the public highway at the boundary with the application land.

7. When the 35 acres were owned by Mr and Mrs Brown they were not subject to any restrictive covenants. In selling the land the vendors did not seek to impose any; Mrs Brown was moving away and did not retain land nearby. However, the sale was structured to create covenants that bound the two fields sold respectively to the Mr & Mrs Baylis and to the objector.

8. The structure of the sale and of the imposition of the covenants was as follows. Both sales took place on 4 July 2008. The first sale was to the Mr & Mrs Baylis. In clause 16 of the transfer the Mr & Mrs Baylis gave the following covenants for the benefit of the vendors' retained land, i.e. the 26 acres:

> "The Transferee covenants with the Transferor and each of them for the Transferee and its successors in title and for the benefit of the Retained Land and every part of it so as to bind the Property [the application land] and every part of it:
>
> 16.1 Not to construct or place any new building or other erection on the Property or make any external alterations or extensions to any existing buildings or to extend the footprint of the existing buildings on the Property unless plans and specifications showing accurately the layout, design and elevation have first been approved in writing by the Transferor or its successors in title. Provided always that this covenant shall not prevent the Transferee:-
>
> 16.1.1 from refurbishing the existing agricultural buildings on the Property for use as a stables and tack room for horses and/or other animals for noncommercial purposes and or;
>
> 16.1.2 from erecting up to four new stables a hay store and animal shelter and up to two reasonable size private garages for the storage of two private motor vehicles and agricultural equipment for noncommercial purposes.
>
> 16.2 Not to occupy the existing agricultural or any other buildings on the Property for residential purposes and not at any time to carryon in or upon the existing agricultural building on the Property any trade or business or to use the building for any purpose other than stables and tack room for horses or other animals for noncommercial purposes."

9. In clause 17 the vendors gave the following covenants for the benefit of the purchasers' land:

> "The Transferor covenants with the Transferee and each of them and their successors in title and for the benefit of the Property and every part of it:
>
> 17.1 Not to construct or place any building or other erection on the Retained Land unless plans and specifications showing accurately the layout, design and elevation have first been approved in writing by the Transferee or his successors in title. Provided always that this covenant shall not prevent the Transferor or their successors in title from erecting stables, water troughs, animal shelters and agricultural farm buildings required in connection with non intensive use and farming of the Retained Land within fifty metres of the road coloured green on the Plan.
>
> 17.2 Not to carry on any intensive farming activities on the Retained Land which may grow to be a nuisance or annoyance or disturbance to the Transferee or the owners of the Property.

10. The remaining 26 acres – the retained land referred to in the covenants made by, and to, the Baylises – was then conveyed to the objector, and was expressed to be transferred subject to the covenants given by the vendors and with the benefit of the covenants given by the Baylises.

11. This means that although neither party to this litigation was an original party to the covenants, the covenants were created because of an agreement between the Mr & Mrs Baylis and Mr Fitzpatrick. In substance, although not in legal form, the objector is the original covenantee in respect of the covenants that the applicants now seek to modify.

12. Curiously something appears to have gone wrong in the course of the registration of the transfers. One would expect that the sale to the Mr & Mrs Baylis would have been registered with a new title number, the Browns' title number then being retained by the objector who bought the land retained after the sale to the Mr & Mrs Baylis. Importantly, the objector's title should be burdened with the covenants set out in paragraph 17 of the transfer to the Mr & Mrs Baylis. Inexplicably the objector has a new title number and it is not burdened with any restrictive covenants, while the Mr & Mrs Baylis title – now held by the applicants – is burdened by the covenants imposed in paragraph 16 of that transfer while retaining the vendors' title number.

13. Mr Allison for the objector could offer no explanation of how this has happened; nor could Mr Fitzpatrick when the Tribunal asked him about this at the close of his evidence. It appears that the transfers have been registered in the wrong order. However, it is common ground that the covenants were mutual and both parties have proceeded on the basis that the objector's land is burdened by covenants very similar to those that burden the applicants' land. Indeed, in argument Mr Allison attached weight to this mutuality. If Mr Fitzpatrick had simply wanted to make money out of any development on the Baylises' land, why did he not impose a unilateral covenant, or charge more for hope value, or impose overage, instead of taking on mutual covenants that burdened his land? The answer to that rhetorical question, as will be seen, is no doubt that development was not in anyone's contemplation in 2008.

14. The fact remains that the objector's title is not burdened by covenants and should have been. Either party has standing to apply to alter the register of title to put that situation right, and since arguments for the objector have been made on the basis that its land is burdened by the covenants we observe in passing that it is difficult to see how an objection to such an application by the objector could be anything other than groundless.

**The law**

15. The Tribunal's discretionary jurisdiction to discharge or modify restrictive covenants is created by section 84 of the Law of Property Act 1925, which reads (so far as is relevant to this case) as follows:

> (1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—…
>
> > (aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or …
> >
> > (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
>
> > (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
> >
> > (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—
>
> > (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
> >
> > (b) is contrary to the public interest;
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

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

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

**Should the covenants be modified or discharged?**

16. The applicants argue that the covenants should be modified on the basis, first, of section 84(1)(c), and in the alternative of section 84(1)(aa). In looking at both grounds we have to consider the factual and expert evidence given for both parties.

17. For the applicant, Mr Baylis gave evidence about the circumstances in which the application land came to be subject to the covenants and we consider this further below. We found him to be an impressive witness who gave careful and consistent evidence, and we accept the truth of what he says. Mr Fitzpatrick gave evidence for the objector. Although his recollection of events is generally consistent with Mr Baylis's, on some important points he was evasive and vague, and his evidence was at odds with his own email correspondence in two crucial instances. Where his evidence differs from that of Mr Baylis we prefer that of Mr Baylis.

18. As to the expert witnesses, both are experienced valuers. Mr Cornford has practised in Warwickshire since 1980 and has a detailed working knowledge of the local area, being regularly involved in the sale of agricultural land and rural residential properties. He is based in Henley in Arden, some two miles from the application land.

19. Mr Holdsworth has 30 years' experience of property matters and is an experienced expert witness based in Bottesford, Nottinghamshire some 75 miles from the application land. He said his knowledge of the locality was obtained from work undertaken for National Grid plc and he accepted that Mr Cornford had greater local knowledge and experience.

20. It is relevant to both grounds to observe that the effect of the 2015 Order is to allow development that would not otherwise be permitted in the green belt. Class Q permits the change of use of an agricultural building to a dwellinghouse together with building operations which are reasonably necessary to effect the change. The proposed new houses will therefore be the same shape and the same height as the current barn, with the characteristic curved Dutch barn roof. The garages will similarly be built to fit the shell of the existing outbuildings. The drive that will enable their construction, and will serve the dwellings once built, will follow the current stony

track leading into the application land from a gate to the road to the west; it will not cross the objector's land.

***Ground (c)***

21. We consider first section 84(1)(c) which requires the applicants to show that the proposed modification will not injure the objector.

22. The objector is a property development company (although we accept Mr Fitzpatrick's evidence that the 26 acres was not bought for development). Not being a natural person it has no subjective enjoyment of the land; however, the amenity of the land is relevant insofar as amenity has an effect on value. Accordingly we have to consider the evidence given by Mr Fitzpatrick for the objector as to the effect of the proposed development on the land and how he feels about that. We also have to consider the expert evidence as to the effect of the development on the value of the land.

23. Mr Fitzpatrick has owned Malt House Farm since 1998. He said he enjoys living and walking in the countryside and has a keen interest in birdlife and outdoor pursuits. He explained that the adjoining 35 acres of land had always been of interest to him given their proximity to his home and he told Mr and Mrs Brown that he would be interested in purchasing the woodland at the north east of the field (known as Hazel Wood) should they ever wish to sell it. When the opportunity arose to acquire the field Mr Fitzpatrick was keen to pursue it.

24. Mr Fitzpatrick said that the purpose of the restrictions imposed on both the application land and the retained land was to ensure the retention of the unspoilt, undeveloped, agricultural and rural nature of the land "without any residential influences, noises or views". The character of the neighbourhood was unchanged in the years since the restrictions had been in force and they continued to fulfil their original purpose. Mr Fitzpatrick enjoys relaxing walks across the retained land without the disturbance to his amenity that the construction and subsequent occupation of the proposed development would entail. He is dismayed by the prospect of construction noise and traffic, and by the noise, disturbance and visual intrusion of two houses and garages, with their gardens, beyond the fence and hedge. He points out that both sides of the barn are open, and does not wish to lose the "open rural view" from the objector's land.

25. We have to say that we are wholly unconvinced by Mr Fitzpatrick's evidence about the effect the proposed development would have on him. First, the development is scarcely visible from the 26-acre field. As we walked from west to east along the southern boundary of the application land, with the application land on our left, we could see the derelict barn only through the gate. There is no path along that boundary; if the respondent walks along the public footpath he will hardly catch a glimpse of the barn. If he walks close to the boundary he will see it through the gate, and perhaps through the hedge in winter when the leaves have fallen. Getting round to the eastern boundary of the application land involves walking uphill, and there is no path so it is not an obvious route, but of course Mr Fitzpatrick might walk that way. The barn and outbuildings are visible as one ascends the hill, but not particularly noticeable, and they are invisible from the

majority of the 26 acres. They can be seen in the distance down the hill through the gate on the eastern boundary of the application land.

26. Insofar as the development would be visible, we fail to understand why it would be a problem. The barn and outbuildings as they stand are nearly derelict and quite unsightly. A new house there instead would look better. It would be one of a cluster of buildings, scarcely distinguishable at a distance from Old Hazelwood Green Farm itself beyond.

27. As to the open sides of the barn, what is visible from the objector's land through the main structure of the barn – in the very few places where one can see through it – are the buildings of Old Hazelwood Green Farm.

28. Looking further afield the new development would be in keeping with the existing housing scattered throughout the green belt nearby.

29. So we reject Mr Fitzpatrick's evidence about how he feels about the development because we do not think it is plausible. We reject it for another reason: in 2016 when Mr Baylis contemplated getting planning permission for the development of the barn and outbuildings Mr Fitzpatrick made it clear in correspondence that he was interested in doing that development himself. He wrote to Mr Baylis on 11 March 2016 to say that he had heard about the possible redevelopment of the barn and said "This is something that I might be prepared to consider in my capacity as a developer". On 16 April he wrote "I would be more than happy to take on the project and put my rather excellent 'team into bat' with regard to taking on Stratford Planners". He went on to outline some of the financial implications of a sale of the barn, and sounded a note of caution about the difficulties of making a profit in light of the cost of a planning battle. He concluded by saying that he understood that Mr Baylis may well prefer to sell his property as a whole, but that "if it doesn't work out then by all means drop me a line and I would be very keen to have another look".

30. When he was challenged about this in cross-examination Mr Fitzpatrick said that he was trying to make the best of a bad situation and to get into a position of control. But nowhere in the correspondence does he express any concern about the development; nowhere does he raise the matter of the restrictive covenants and indicate that his consent will not be forthcoming. Nor in his discussion of cost does he suggest that there might be a price attached to the release of the covenant. On the contrary, subject to cost-effectiveness he appears enthusiastic.

31. The prospect of the development of the barn clearly did not trouble Mr Fitzpatrick in 2016; we do not believe that it really troubles him now. Nor do we believe, in the light of what we have seen, that it would trouble any owner of the objector's land.

32. We would add that we accept, as do both parties, that absent the 2015 Order the applicants would not have got planning permission for this development. Mr Allison argued that this is a relevant consideration. We do not think it is. The new development is permitted and, as we say, it is entirely in keeping with its surroundings.

33. Mr Allison also argued that there will be a loss of amenity for those who use the public footpath. The Barn is inconspicuous for most of the length of the public footpath, but in any event this is obviously an irrelevant consideration since we have to determine whether the development will injure those who have the benefit of the restriction and not the public at large.

34. We therefore find that there will be no loss of amenity as a result of the development. We have to ask if there will nevertheless be a loss in value to the objector's land.

35. Mr Holdsworth said that the modification of the restrictions to allow the development for which prior approval had been obtained would have a small effect on the value of the objector's retained land which, based upon his knowledge and experience, he assessed at between 2.5% to 5%. He said, without giving any explanation, that:

> "The inequity of all the covenant restrictions persisting across the land held by the Objector must be reflected in the diminution of value."

36. We do not accept that the continued existence of restrictive covenants over the retained land would reduce its value in circumstances where the restrictive covenants over the application land were modified under ground (c). It does not follow that because the application land would be increased in value in the event of the modification of the restrictions the retained land would be injuriously affected. This is not a zero-sum game where the applicants' financial benefit is matched by the objector's financial loss. There is no evidence for this belief and we reject it. We think there is merit in Mr Cornford's view that the value of the retained land, or at least the part of it nearest to the application land, could be increased as the owners of the redeveloped barn might wish to buy more land to extend their boundary.

37. Accordingly, we take the view that the proposed development will cause no injury to the objector, and ground (c) is made out.

***Ground (aa)***

38. For the sake of completeness we go on to consider ground (aa). The questions we have to ask ourselves are whether the proposed development of the land is a reasonable use of the land for public or private purposes, whether the covenants impeded that use, whether the covenants secure to those who benefit from them any practical benefits of substantial value or advantage and, if not, whether money would be an adequate compensation for any loss or disadvantage.

*Is the proposed development a reasonable use of the land for public or private purposes?*

39. There is no planning permission in this case because the 2015 Order permits the development. So there is no presumption that the proposed use of the application land is reasonable. The existence of permitted development rights arguably indicates that the proposed use is reasonable, since it furthers a planning policy to provide homes by making use of disused

and redundant buildings. In *James Hall and Company (Property) Limited v Maughan and others* [2017] UKUT 240 (LC) the Tribunal said at paragraph 31 said that the absence of a planning permission, in a case of permitted development, was "not fatal" to the reasonableness of the proposed development. In *Re Davies' Application* [2016] UKUT 462 (LC) the Tribunal said of a permitted development at paragraph 65:

> "In ordinary circumstances a planning permission might be persuasive that a use is reasonable, but in this case planning permission is not required and an inference can be drawn that the "development" (in planning terms) is less objectionable in principle than one which required planning permission."

40. In the circumstances we can approach this on a common sense basis. The use of derelict buildings for housing appears to us to be reasonable, as does the conversion of unsightly structures into new buildings that are in keeping with their surroundings. We have no hesitation in finding that the use impeded by the covenants would be reasonable.

*Do the covenants impede that use?*

41. It is common ground that in the covenants prevent the development unless the objector approves it, which it does not.

*Does impeding the proposed user secure to the objector any practical benefits of substantial value or advantage to it?*

42. It follows from what we have said under ground (c) above that in preventing the proposed development the restriction does not secure to the objector any practical benefit. Indeed, the evidence indicates that the conversion of the barn into two dwellings could enhance the value of the part of the 26 acres that lies nearest to the new houses and gardens.

*Will money be an adequate compensation for any loss or disadvantage?*

43. It also follows from what we have said above that the objector will not suffer any loss or disadvantage and therefore there is no need for us to consider whether any such loss or disadvantage can be compensated in money.

**The Tribunal's discretion**

44. Ground (c) and ground (aa) have been made out and the Tribunal therefore has a discretion to modify the covenants. In considering whether or not to do so, we are obliged by section 84(1B) to "take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas". As we said above, the picture is dominated here by the 2015 Order. Certainly, absent that order, there could be no development.

But as it is the development is permitted with relatively little scrutiny in accordance with national policy. We take the view that this points in favour of modification, in the interests of making good use of structures that are currently redundant and unsightly.

45. We are also to have regard to "the period at which and context in which the restriction was created or imposed". We have heard Mr Baylis' and Mr Fitzpatrick's evidence about this, and it is particularly important in the context of the level of compensation that might be payable under section 84(1)(ii) and so we analyse the evidence at that point in our decision. Our conclusion is that the imposition of the covenant was done in a way that left Mr Baylis with no choice about it and does no credit to the objector.

46. Accordingly we determine that the restrictive covenants should be modified to permit the development. We revert to the text of the modification at the conclusion of our decision, because what we have to say about the bargain between Mr Baylis and Mr Fitzpatrick has a bearing on the form of modification that we order. First, we look at the payment of compensation under section 84(i) and (ii).

**Payment to the objector**

47. We have already observed (paragraph 37 above) that the proposed modification will not injure the objector; nor do the restrictions secure any practical benefits of substantial value or advantage to the objector (paragraph 42). Therefore no sum is payable under section 84(1)(i) because the objector has suffered no loss or disadvantage.

48. Section 84(1)(ii) provides for payment of a sum to make up for any effect which the restrictions had, at the time when they were imposed, in reducing the consideration then received for the application land. It reflects the common situation where the objector to the release of the restrictive covenants was the party that imposed them on sale, and received a reduced price to reflect the effect of the covenants. In this case, formally, the objector did not impose the covenants and did not receive a price for the land from the Mr & Mrs Baylis. But in reality the covenants were imposed on the Mr & Mrs Baylis land in favour not of the Brown family but of the objector. Mr Fitzpatrick was contractually obliged to pay the entire £305,000 consideration to the Brown family, and therefore whatever the Mr & Mrs Baylis paid reduced what the objector had to pay. So while formally dissimilar, an analogous situation arose to that which is contemplated by section 84(1)(ii).

49. The Brown family received £78,428 for the application land (9 acres) which was a pro rata apportionment of the auction sale price of £305,000, the balance of £226,572 being paid by the objector for the remaining 26 acres. The objector says that this pro rata apportionment reflected the imposition of the restrictions. Without them the application land would have been worth more because the presence of farm buildings gave it hope value for residential development.

50. The objector's case relies upon the parties to the purchase of the 35 acres having agreed the pro rata apportionment of the price in the light of the new covenants to be imposed under their

respective transfers. (The apportionment of the price did not concern the vendors, the Brown family, provided they received £305,000 in total for the 35 acres.)

51. Mr Baylis gave evidence that the pro rata apportionment of the price had been agreed *before* any mention of restrictive covenants, and that the covenants were introduced by Mr Fitzpatrick after the auction and before completion. If that is so then, in our judgment, the restrictions would not have reduced the consideration for the application land and head 84(1)(ii) would not apply. Mr Fitzpatrick's evidence is different, so we have to consider what happened before and after the auction.

52. On the day of the auction, 14 May 2008, Mr Baylis prepared a memorandum of agreement which he invited to Mr Fitzpatrick to sign. This said that if Mr Fitzpatrick was successful in bidding for the 35 acres the cost of acquisition, and all incidental costs, would be "apportioned on a pro rata basis" by acreage transferred. At that time Mr Baylis says he was unaware that Roselease Limited (rather than Mr Fitzpatrick) would be involved or that Mr Fitzpatrick was proposing to impose restrictive covenants on the land.

53. After the auction, at Mr Fitzpatrick's suggestion Mr Baylis agreed to instruct Mr Fitzpatrick's solicitor, Needham & James, to act on his behalf in the transfer. Needham & James sent an engagement letter to Mr Baylis on 3 June 2008 in which they referred to "a price to be agreed but believed to be in the region of £78,428", i.e. a pro rata apportionment of the total price based on a transfer of 9 acres. Legal costs were also to be paid on a pro rata basis.

54. On 9 June 2008 Mr Mason of Needham & James wrote to Mr Baylis enclosing a "revised transfer" for the application land. The amendments were made in favour of both Mr Baylis (clause 16) and Roselease Limited (clause 15.1 and the proviso to clause 17.1). The letter said:

> "Martin [Mr Fitzpatrick] has also asked me to amend clause 16.2 to make it clear that you will not use the buildings for any residential purposes."

55. In a handwritten note on the bottom of page 2 of his copy of this letter Mr Baylis wrote:

> "12/06/2008. Spoke to Roger Mason. Queried percentage of solicitor's costs, price payable as acreage had been reduced [from 10 to 9 acres] and not happy with the further increase in the restrictive covenants. He seemed to think those had been agreed but would speak to Martin."

There is a further handwritten note, in a different pen, which Mr Baylis said recorded a separate conversation with Mr Mason later that day:

> "Roger Mason advised that basically Martin was not prepared to make any alterations, i.e. it was a 'take it or leave it', and we are not in any way in a strong position."

56. That note must refer to the covenants; the apportionment of the price turned out to be correct for a split in the ratio of 9:26. In oral evidence Mr Baylis said the first he heard about the proposed

amendment to clause 16.2 of the transfer, prohibiting residential use, was when he received Needham & James' letter. Mr Baylis said he was not concerned that Mr Fitzpatrick did not sign his memorandum of agreement dated 14 May 2008 because they had previously shaken hands on the arrangement and he thought Mr Fitzpatrick would keep his word.

57. Mr Fitzpatrick said he did not recall any discussion prior to the auction about the division of the price or the apportionment of costs. The priority was to secure the site first and worry about dividing it afterwards. He said the parties had not agreed the specific area of the land to be transferred to Mr Baylis; an agreement in principle had been reached but he did not remember 10 acres being mentioned before he saw Mr Baylis' memorandum dated 14 May 2008.

58. Mr Fitzpatrick exhibited an email which he sent to Mr Mason on 28 May 2008. In it he referred to a site inspection made by Mr Baylis and himself the previous Sunday when they reviewed the proposed boundary between their respective areas of land. Mr Fitzpatrick said it would be difficult to transfer 10 acres to Mr Baylis because of the physical features of the site and he identified instead two options, one involving the transfer of 8 acres and the other 9 acres. Mr Fitzpatrick wrote:

> "With either option I believe we have both achieved our aim which was to protect ourselves from any undesirables, either now or in the future and with the covenants that I suggested to Tony [Mr Baylis] that I would like us to both have imposed, I think our protection is strengthened".

Mr Fitzpatrick went on to say in the email that the 9 acre option would equate to £78,428 "simply calculated as a percentage of 35 acres".

59. Mr Baylis says he knew nothing about the restrictive covenants until he saw the draft transfer which was then amended to introduce further restrictions on residential development. Mr Fitzpatrick says the idea of mutual covenants against development was discussed when he and Mr Baylis met on site to agree boundaries on Sunday 25 May 2008. If Mr Baylis is right the restrictions would not have had any effect in reducing the consideration received by the Brown family for the application land, since a pro rata apportionment of the auction price had already been agreed in the absence of any mention of the restrictions. If Mr Fitzpatrick is right then the pro rata apportionment of the auction price reflected an agreement that mutual covenants would be imposed to prevent intrusive development on any of the 35 acres. No hope value would have been attributed to the price paid for the application land and therefore section 84(1)(ii) would be engaged if the restrictions are modified.

60. We stated earlier that where Mr Fitzpatrick's evidence differed from that of Mr Baylis we prefer the latter. That is the case here. We are satisfied that Mr Baylis's contemporaneous handwritten note in response to Needham & James' letter dated 9 June 2008 accurately reflects his surprise and consternation at the introduction of fresh restrictions and the change of an agreed position on the apportionment of legal costs. However one choses to describe it, we believe Mr Baylis was indeed presented with a fait accompli that gave him no choice other than to accept or lose the opportunity to purchase the application land. But the basis upon which the price for that land was calculated did not change and, in our judgment, was agreed before the restrictions were

introduced. That being so we do not believe the consideration received for the application land by the vendors was reduced because of the imposition of the restrictions and we conclude that it would not be just to award any sum under section 84(1)(ii).

61. We are supported in our conclusion by Mr Fitzpatrick's comment that "at the time we weren't bogged down in the detail" of how to apportion the price. The argument now put forward appears to us to be a rationalisation after the event of a straightforward pro rata apportionment of the price that was agreed at or around the date of the auction and before any of the new restrictions were proposed.

62. In any event we are not persuaded that the evidence supports the view that the auction price of £305,000 included an element of hope value and that in the absence of the restrictions the application land would have been worth more than was paid for it.

63. For the objector Mr Holdsworth assumed that, in the absence of the restrictions, 2.5 acres of the 9 acres of the application land would have been the subject of residential development, including gardens. He took the value of this land subject to the restrictions at £8,714 per acre, which was the price paid by Mr Baylis. This gave a total of £21,786 for the 2.5 acres. He said that should the 2008 restrictions "be modified to enable the permitted development" the value of the 2.5 acres at July 2008 would have been £210,000. He obtained this value from the analysis of a single comparable, the sale of 2.5 acres of land with planning permission for a residential barn conversion at The Old Manor, Church Farm, Morton Bagot for £300,000 in June 2008. He reduced this figure by 30% to reflect the superior quality of the Morton Bagot barn compared to the Dutch barn on the application land. The enhancement in value of the application land at July 2008 had the restrictions not been imposed was therefore said to be the difference between the value of the 2.5 acres assuming the permitted development (£210,000) and its value subject to the restrictions (£21,786), giving a resultant figure of £188,200. We understand this figure to represent Mr Holdsworth's estimate of the sum payable under section 84(1)(ii) albeit Mr Holdsworth did not state this in terms.

64. We pointed out to Mr Holdsworth at the hearing that his analysis depended upon the erroneous assumption that the permitted development had prior approval in July 2008. But the GPDO was not introduced until 2015. What should have been estimated was whether, at July 2008, there was hope value for any form of development for which planning permission might then be granted and, in the absence of the restrictions, implemented. Mr Holdsworth said he had followed his instructions which he recorded at paragraph 6.1(i) of his report as being to estimate "the Market Value of the Applicant's land as at 4th July 2008 with the special assumption that the burden of the 2008 Restrictive Covenant does not apply." But in paragraph 9.1, seemingly of his own volition, he added the further assumption that the "permitted development is allowed". That additional assumption renders Mr Holdsworth's valuation worthless since it does not reflect the facts.

65. During cross-examination when it was pointed out to Mr Holdsworth that in 2008 his comparable had planning permission whereas the application land did not, he said he should have made a further 25% reduction from the value of The Old Manor to reflect this difference. In other

words, he said the developable 2.5 acres of the application land were worth 75% of their value with planning permission. That was inconsistent with the figure adopted in one of Mr Holdsworth's alternative methods of valuing the application land where he only took 60% of the value of a comparable at Studley which had residential planning permission. Mr Holdsworth justified his figures by saying that a purchaser of the application land would "take a chance" about the "opportunity in the long term" and would land bank the site for future development.

66. These comments need to be set in the context of planning policy. The objector's planning expert, Mr Frampton, whose evidence was not in dispute, was instructed to consider whether the proposed development would obtain planning permission in the absence of Class Q permitted development rights. He concluded that:

> "In my opinion any applicant seeking a specific grant of planning permission for the adaptation of these buildings to form a dwelling or dwellings would not have a reasonable prospect of demonstrating 'very special circumstances' to meet the policy provisions of Policy CS10, which are consistent with national planning policy (NPPF)"

67. Mr Frampton considered this question by reference to current planning policy and not that which applied in 2008. But we do not understand it to be in dispute that planning policy towards residential development in the green belt has not materially changed since that time and the prospects of obtaining planning permission in 2008 were effectively the same then as they are today. We think Mr Holdsworth's opinion that a purchaser would pay at least 60% of the residential development value for the application land in the absence of the restrictions is fanciful in the light of the established planning policy against residential development in the green belt and where there were no permitted development rights or any historic or architectural merit in the barn which might have been preserved by its residential conversion. Mr Holdsworth relied upon hindsight by suggesting that a purchaser would have foreseen the introduction of the GPDO (or some similar policy change) in a few years' time. There is nothing to support that view which we consider to be wishful thinking.

68. Elsewhere in his report Mr Holdsworth valued the whole of the 9-acre application site on 4 July 2008 at £320,000 (rounded), being £210,000 for the development site of 2.5 acres (as above) and £110,500 for the remaining 6.5 acres of bare agricultural land, i.e. £17,000 per acre.[1] The difference between £17,000 per acre and the £8,714 per acre paid by Mr Baylis was attributed to the former being the value without the restrictions and the latter being the value with the restrictions in place. But Mr Holdsworth did not explain in his report, if that was so, why he did not therefore include a further sum of £53,859 under head 84(1)(ii), i.e. the difference in value of the 6.5 acres caused by the imposition of the restrictions[2].

69. It should have been obvious to Mr Holdsworth that his 2008 valuation of £320,000 for the application land in the absence of the restrictions made no sense in a situation where the Brown family had sold that land and a further 26 acres for only £305,000, that price also reflecting the absence of any restrictions. Mr Holdsworth considered the results of the auction of the 35 acres to

[1] During cross-examination Mr Holdsworth accepted this figure was too high because it reflected the presence of farm buildings on the comparable site he relied on.
[2] (£17,000 - £8,714) x 6.5 = £53,859

be unreliable, but we note that all his comparables were also sold at auction and therefore subject to the same criticisms.

70. Mr Cornford said hope value for the proposed development, i.e. for two houses, was between £40,000 to £50,000. This means, after deduction of hope value, that he valued the combined site of 35 acres (with buildings) at between £7,286 and £7,571 per acre[3]. In oral evidence he gave a range of between £6,500 to £8,000 per acre for bare agricultural land, i.e. without buildings.

71. At the hearing Mr Cornford provided details of 10 comparable transactions[4] involving the sale of bare agricultural land in 2008. These averaged £8,165 per acre. Mr Cornford said that land with buildings fetched more than bare agricultural land. The three comparables relied on by Mr Holdsworth to establish 2008 agricultural land values without planning permission all had buildings on them. Their values ranged from £9,622 to £17,035 per acre and averaged £14,275 per acre.

72. The 35 acres of land sold at auction in May 2008 were advertised as "attractive pasture and amenity land with buildings" and was said to have a "useful four bay Dutch barn with lean-to". The sales particulars described the buildings as:

> "an open sided four bay Dutch barn with a concrete floor and lean-to and a large brick hovel under a tile roof with a small tin clad lean-to. This may offer a number of alternative uses, obviously subject to obtaining any necessary permission."

73. The buildings were described in evidence as being derelict and dilapidated and we agree with that as an accurate description of their current condition, although this is likely to have deteriorated in the 11 years since 2008.

74. In our judgment the sale price of £8,714 per acre in July 2008 fairly represents the open market value of the subject site of 35 acres of agricultural land with buildings. This is £549 per acre or 6% above Mr Cornford's average bare land price of £8,165 per acre. The average of the three comparable agricultural sites with buildings was 78% higher, the difference in the value margin reflecting the relatively poor condition of the subject buildings. Despite the reference to alternative uses in the sales particulars we do not consider that the overall price of £305,000 reflects any hope value for development.

75. Accordingly we conclude that no sum is payable under section 84(1)(ii).

**Determination**

[3] e.g. (£305,000 - £40,000)/35 = £7,571

[4] The sale details of a further two transactions were illegible.

76. We are satisfied that the applicants have established under ground (c) that the restrictive covenants imposed on the Transferee under paragraph 16 of the transfer dated 4 July 2008 should be modified without payment of compensation.

77. The applicants submitted the text of the proposed modifications which for the most part are self-explanatory. In argument Mr Allison expressed concern that a modification might allow any number of buildings, or buildings of a different style from those presently contemplated. In his closing submissions Mr Taylor offered additional wording to allay this concern.

78. The applicants also proposed additional words in paragraph 16.1 to reflect their concern, in the light of the objector's conduct during these proceedings, that he will seek to extract ransom payments for minor and unobjectionable alterations of the new buildings in the future.

79. We consider the restrictive covenants should be modified as suggested by the applicants so as to permit the proposed development and the following order shall therefore be made:

> The restrictive covenants contained in paragraph 16 of the transfer dated 4 July 2008 between Sally Anne Munroe, Georgina Lucy Brown and Peter Murray Brown (the Transferor) and Anthony Greville Baylis and Christine Susan Baylis (the Transferee) shall be modified under section 84(1)(c) of the Law of Property Act 1925 so as to read:
>
> "The Transferee covenants with the Transferor and each of them for the Transferee and its successors in title and for the benefit of the Retained Land and every part of it so as to bind the Property and every part of it:
>
> 16.1 Not to construct or place any new building or other erection on the Property or make any external alterations or extensions to any existing buildings or to extend the footprint of the existing buildings on the Property unless plans and specifications showing accurately the layout, design and elevation have first been approved in writing by the Transferor or its successors in title (such approval not to be unreasonably withheld). Provided always that this covenant shall not prevent the Transferee:-
>
> 16.1.1 from refurbishing the existing agricultural buildings on the Property for use as a stables and tack room for horses and/or other animals for noncommercial purposes and or;
>
> 16.1.2 from erecting up to four new stables a hay store and animal shelter and up to two reasonable size private garages for the storage of two private motor vehicles and agricultural equipment for noncommercial purposes.
>
> 16.1.3 from carrying out any works which are reasonably required in connection with, or for the purpose of, undertaking the residential conversion of the buildings on the Property in accordance with the prior approval granted by the Stratford-on-Avon District Council under a Notice of Decision dated 9th August 2017 and with Reference No. 17/0513/COUQ or a development in the same form.
>
> 16.2 Not at any time to carry on in or upon the buildings on the Property any trade or business.

16.3 Not to carry on any intensive farming activities on the Property which may grow to be a nuisance or annoyance or disturbance to the Transferor or the owners of the Retained Land."

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

Dated 30 September 2019

Judge Elizabeth Cooke

A J Trott FRICS