IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 0154 (LC)
Case No: LP/32/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – proposed conversion of barn into dwelling house – whether practical benefits of substantial value or advantage – application allowed under s.84(1)(aa) Law of Property Act 1925 – compensation assessed at £65,000

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

By

SUSAN MARGARET GEALL

Re: Solitude,
Vine Cross,
Heathfield,
East Sussex.
TN21 9HH

Before: A J Trott FRICS

Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
On
11 April 2018

David Lonsdale, instructed by Rix & Kay Solicitors LLP, for the applicant
Edward Francis, instructed by Warners Solicitors, for the objectors

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The following cases are referred to in this decision:

Re Drummond's Application [2018] UKUT 0008 (LC)
Shephard v Turner [2006] 2 P&CR 28
Jones v Rhys-Jones (1975) 30 P&CR 451
Cresswell v Proctor [1968] 1 WLR 906
Re SJC Construction Co Ltd [1974] 28 P&CR 200
Re Kerai's Application [2014] UKUT 0153 (LC)
Re Diggens and others' Application [2000] 3 EGLR 87
Re Chandler's Application (1958) 9 P&CR 512
Re Dean's Application [2017] UKUT 0203 (LC)
Re Kennet Properties Limited's Application (1996) 72 P&CR 353
Ridley v Taylor (1965) 16 P&CR 113

DECISION

Introduction

1. Mrs Susan Geall ("the applicant") purchased with her husband the semi-detached cottage known as Solitude, Vines Cross, Heathfield, East Sussex, TN21 9HH ("the application land") on 9 February 1987.

2. The cottage is located at the north of a long, narrow plot measuring approximately 150m x 25m. At the southern end of the plot is a barn. On 2 April 2015 the applicant applied for "planning permission to convert the barn to provide ancillary [residential] accommodation". The local planning authority required the application to be amended to one for the creation of a separate dwelling since it did not accept, given the distance of the barn from the cottage and the size of the proposed development, that it could properly be described as ancillary accommodation.

3. Planning permission was granted on 15 July 2015 for the "conversion of redundant agricultural barn to dwelling, including change of use of the land to residential curtilage."

4. The applicant is prevented from implementing the planning permission by restrictive covenants imposed under the transfer of the application land to her in 1987. The applicant covenanted with Mr and Mrs Maltby (which expression includes their successors in title), the then owners of the neighbouring properties to the west and south known as Cowden Hall and Cowden Hall Farm respectively, that insofar as relevant to this application:

> "6.1.1 Nothing shall be built or erected upon the land hereby transferred without the consent of Mr and Mrs Maltby; save that this provision shall not prevent the erection and keeping upon the land of a greenhouse or plastic polytunnel in a position as near as reasonably possible to point "B" on the said Plan "A" and save that this restriction shall not apply to the interior of any building now on the land hereby transferred.
>
> …
>
> 6.1.4 The Transferee [Mr and Mrs Geall] will not use or permit to be used the land hereby transferred for the carrying on of any trade or business whatsoever other than that of an agricultural or horticultural small holding and (except as aforesaid) will use the same as a single private dwelling house grounds and outbuildings only."

5. On 6 September 2017 Mrs Geall applied to the Tribunal to modify covenant 6.1.4 under grounds (aa) and (c) of section 84(1) of the Law of Property Act 1925 so as to allow her to implement the 2015 planning permission.

6. Mr Michael Hammond purchased Cowden Hall and Cowden Hall Farm in 1993 and is the successor in title to Mr and Mrs Maltby. He therefore has the benefit of the restrictive covenants under the 1987 transfer. On 21 November 2017 Mr Hammond and his wife, Mrs Diane Hammond, objected to the application.

7. Mr David Lonsdale of counsel appeared for the applicant and called Mrs Geall as a witness of fact (her witness statement being admitted at the hearing with the permission of the Tribunal) and Mr Peter Hodges, FRICS, FAAV of Lambert & Foster Ltd, as an expert valuer.

8. Mr Edward Francis of counsel appeared for the objectors and called Mr Hammond as a witness of fact and Mr Leon Hickish, FRICS, MBIAC, a partner and Head of Professional Services in Batcheller Monkhouse, as an expert valuer.

9. I made an accompanied inspection of the application land and the objectors' property on 18 April 2018.

Facts

10. The application land is located in a remote rural area midway between Heathfield to the north and Hailsham to the south. It is accessed from Cowden Hall Lane which leads to the A267 at Horsham approximately 2km to the north west.

11. The cottage at Solitude is one of a semi-detached pair (the other being "Nightingales") with access from a private driveway leading to Cowden Hall Farm and Dill Hundred Cottage, some 300m to the south. From the evidence it appears that the two plots were created from a single field at the time of their transfer in 1986 (Nightingales) and 1987 (Solitude). At the far (southern) end of the plots, and straddling the boundary between them, there used to be an agricultural building variously described in the evidence as a poultry shed and an intensive pig rearing unit. A few courses of the rear blockwork wall remain but it appears that this building was not in use at the time of the transfer.

12. Part of the building (on the Nightingales side) was destroyed by the hurricane of 1987. The applicant boarded up her part of the structure and thereafter used it for housing a small flock of sheep overnight, for lambing and for over-wintering. That use continued until around 1999 when the council notified the applicant that the building was a dangerous structure which should be repaired or demolished.

13. The applicant applied for planning permission for the "construction of a replacement agricultural storage barn" which was granted on 25 February 1999. That planning permission was implemented and the replacement barn remains in situ today although apparently unused for agricultural purposes. As part of the works a septic tank was installed to the north west of the barn.

14. The barn is of timber frame construction clad externally with stained boarding and a pitched roof clad with plain tiles. There is a pair of full height doors situated in the middle of the west elevation.

15. The proposed development for which planning permission was granted on 15 July 2015 comprises the conversion of the barn into a three bedroom dwelling within the envelope of the existing building. The ground floor accommodation consists of a living room, study, kitchen and utility/shower room. The full height doors to the west elevation (which faces Cowden Hall) would be retained with a glazed screen and double doors inserted behind them. There would be a window on each side of the central doors and a door and a single ground floor window in each gable end (south and north). The east elevation would have three ground floor windows. A central staircase leads to the first floor which comprises three bedrooms (one en-suite) and a bathroom. There are no first floor windows on the west elevation. Each gable end would have a window serving a bedroom and there would be three high level velux windows inserted into the sloping roof on the east elevation.

16. There is provision for parking two vehicles on site, but the planning permission did not include a garage. The maximum depth of the residential curtilage would be approximately 45m. The building is well set back from the gated entrance to the plot. Adjoining the property to the south east is a large wooden shed/workshop in the grounds of Nightingales. A number of cars and vans (eight at the time of inspection) are parked on the adjoining land next to the private driveway.

17. The private driveway, which is owned by the objectors, runs southwards from Cowden Hall Lane to Cowden Hall Farm and Dill Hundred Cottage. It is narrow and concreted. There is a five-bar gate across the driveway just south of the cottage at Solitude. There is a grass verge on either side of the drive beyond which are substantial boundary hedges to Cowden Hall (3m high beech) and Solitude (5m high Leylandii).

18. The objectors' house at Cowden Hall is a large detached period dwelling set in extensive grounds. Its front elevation faces west, away from Solitude. It is located approximately 35m west of the driveway and is screened from it by the beech hedge and other mature vegetation. It is directly opposite the semi-detached properties to the east which are situated on higher ground. To the north east of Cowden Hall is Cowden Hall Cottage which is also owned by the objectors and let out.

19. In the grounds of Cowden Hall, between the house and the driveway, is a swimming pool, to the south of which is a tennis court and an unoccupied oast house. There are several buildings in the grounds which are largely used by the objectors for storage. The driveway continues to Cowden Hall Farm which comprises a number of barns and outbuildings, some of which are used for storage by the objectors and others of which are used by a farmer who has a licence to use the objectors' pasture land and grazes some 60 or so sheep. There are also woodlands under management on the estate.

20. The objectors own Dill Hundred Cottage under a separate title which does not have the benefit of the restrictive covenants. They use it for holiday lets for about 40 weeks of the year. The cottage has five bedrooms and sleeps up to eight people. Guests may use the objectors' tennis court by prior arrangement. It has its own small swimming pool.

21. The objectors' total estate extends to over 90 acres. There are no public rights of way over the estate.

22. The experts produced a statement of agreed facts. The value of the property (Cowden Hall and Cowden Hall Farm) with the benefit of the covenants was agreed at £2.6m. They said the "following nuisances" would be created by the proposed development but disagreed about their magnitude and effect:

(i) Noise from the development;

(ii) Access and traffic along the driveway – mainly noise and light;

(iii) Smoke and fumes;

(iv) Visibility; and

(v) Amenity within the gardens and grounds of Cowden Hall.

In addition, Mr Hickish considered that the proposed development would represent an increased security risk to the objectors.

The evidence for the applicant

23. Mrs Geall said that due to ill health she could no longer manage the cottage at Solitude alone. In her statement of case she said that she had wanted to convert the barn into annexed accommodation for herself to live in with her son and daughter living in the existing cottage. In her witness statement these arrangements appear to have been reversed with the barn being "converted into annexed accommodation for my children to reside in".

24. Mrs Geall's intention was, in effect, for the existing arrangements to be maintained whereby it was only her and her family who would occupy Solitude and the new dwelling. She had not sought planning permission for a separate residential unit; that had been the requirement of the local planning authority. In practice there would be no additional residents and no intensification of vehicular traffic.

25. Mr Hodges, with the permission of the Tribunal given at the hearing, adopted the expert report of his former colleague at Lambert & Foster Ltd, Mr William Mathias, who had now left the company. He gave an oral declaration of his duty to the Tribunal and of the independence of

his opinion. Mr Hodges said he agreed with what Mr Mathias had written and was entirely of the same mind.

26. Mr Hodges considered the impact of the proposed dwelling on the assumption that it would be in separate occupation to the applicant's family and suitable for independent use by a family with two or three children. He said that any noise arising from outside the new house would not be significant because its curtilage would be comparatively small, and in any event the house would not necessarily be occupied by a young family.

27. Mr Hodges acknowledged that he had not considered the possibility of children playing on the private driveway and that if they did so then noise would be "a bit more relevant" than was stated in his report and would be audible in the garden and grounds of Cowden Hall. He said the impact was difficult to assess since neither Mr Mathias nor himself had visited the objectors' property. They had been denied access for the purpose of undertaking a valuation prior to the making of the section 84 application and had not asked again after the application was made.

28. Mr Hodges accepted that the new house would generate some six or seven vehicle movements per day which would create noise and exhaust fumes. But he said that for as long as the new house was occupied by the applicant's family this would not represent a net increase. In any event the garden and grounds of Cowden Hall were well protected by a thick hedge which would reduce the impact of such vehicles. Traffic already went to and from Cowden Hall Farm, Dill Hundred Cottage and to the end of the Nightingales plot and Mr Hodges considered that any increase in vehicular nuisance would not be substantial and would not affect the value of the objectors' property.

29. Although he had only been able to see the outlook from the barn at ground floor level Mr Hodges did not think Cowden Hall would be visible from the proposed development, even at first floor level because there were no upper floor windows in the west elevation facing that direction. He acknowledged that the large central windows were unlikely to be curtained and might emit a significant amount of light. There could also be security lights although Mr Hodges thought vehicle lights would not be a problem because they were directed downwards. Mr Hodges did not consider that light pollution from the proposed house would affect the value of the objectors' property.

30. Mr Hodges accepted that the objectors' property was private and secluded and that the objectors could control the use of Dill Hundred Cottage. But he did not agree that the conversion of the barn into a dwelling would materially affect the quality of such amenity and he did not think the proposed development would have a substantial adverse impact.

31. Mr Hodges agreed it would be more difficult for the objectors to keep track of legitimate users of the driveway if the development went ahead. It would be harder for them to police such usage which might lead to a small increase in the risk of an intruder gaining access to the property. He felt that any loss of a feeling of security would be subjective.

32. Taken individually or collectively Mr Hodges did not believe that noise, traffic, light pollution, privacy, seclusion and security would be adversely affected to a substantial extent if the application were to be granted and he thought there would be no impact on the value of Cowden Hall and Cowden Hall Farm. The quality of total seclusion on an estate such as this would command a premium but such properties were rare and this was not one of them. Mr Hodges agreed that the presence of a nearby main road or a public footpath or bridleway could diminish the value of a landed estate, although he thought Mr Hickish's 15% adjustment in value to his comparable at Beech Mill to reflect the presence of a public bridleway and a public footpath was too high. Mr Hodges did not think the proposed house would reduce the number of prospective purchasers for the Cowden Hall estate because third party use was already made of the private driveway and the change which such a development would bring would not result in a reduction in value.

The evidence for the objectors

33. Mr Hammond said that only limited farming activities took place on the Cowden Hall estate comprising the grazing of pasture under licence to a local sheep farmer, and woodland management. No lambing took place on the estate. The farmer typically visited the farm buildings once a day. Sometimes he would use a separate gate leading to the upper fields that did not require him to use the driveway.

34. There were numerous farm buildings most of which were in poor condition. Mr Hammond occupied the best buildings himself for storage purposes. There was an open barn used for the storage of hay and straw but other than the farmer nobody else had access and Mr Hammond derived no income from the buildings. Dill Hundred Cottage was let through an agency for about 40 weeks a year. There were weekly lets in summer and weekend lets in the winter. Vehicle movements were infrequent. The objectors purchased the cottage to gain control over its use and they could stop using it for holiday lets whenever they wished.

35. Mr Hammond felt somewhat misled about Mrs Geall's intentions when she sought his permission to replace the original agricultural building with the present barn. He had not been shown any plans and it was not until construction started that he realised how large it would be. His suspicions about the future use of the building were aroused when Mrs Geall installed a septic tank. The proposed residential conversion of the barn was likely to increase vehicular traffic along the driveway. Both the swimming pool and the tennis court were close by and more vehicles would be noticeable in terms of noise and fumes. This would detract from the peace and tranquillity of Cowden Hall. Since the driveway was only wide enough to allow one vehicle to pass at a time the increase in traffic would lead to cars going onto the adjoining grass verges and churning them up.

36. The residential use of the barn would create occupational disturbance which would damage the peace and tranquillity of Cowden Hall and intrude upon the objectors' sense of privacy and seclusion. Furthermore the ability of the objectors to monitor and control legitimate users of the

driveway would be weakened and the security of the estate and its buildings would be jeopardised.

37. Mr Hammond said the applicant's current use of Solitude had not given him cause for complaint, but he was worried about the potential for disturbance from a new family moving into the proposed house. He was occasionally disturbed by car movements but generally the current level of use of the driveway was not a problem. In any event, if it became so he could always stop letting out Dill Hundred Cottage.

38. Mr Hickish said the proposal would lead to a significant loss of amenity in terms of noise, light, fumes, visual intrusion, privacy and increased traffic and concluded that the proposed development would diminish the value of the Cowden Hall estate by not less than 5%. In his report he quantified this loss at £145,000 based upon an open market value of £2.9m. Applying this percentage to the agreed open market value of £2.6m gives £130,000.

39. The ambient noise level in this remote rural location was currently very low and the proposed development would create several new noise sources: internal (house), external (garden) and traffic using the driveway. The overall effect would be significant. Similarly the ambient artificial light level was presently very low but a new house would increase this considerably through light spillage from windows (especially the large, fully glazed cart doors), external lighting, security lighting, and from traffic using the driveway. Mr Hickish suggested that fumes from domestic cooking, internal fires and bonfires would have a minor impact. The new house would be visible from several vantage points which "must impact" upon the objectors' amenity and privacy. There would be a significant increase in traffic and a corresponding nuisance from noise, lights and conflict with other vehicles using the driveway. The security of the estate would also be compromised since more people would use the driveway.

40. Mr Hickish emphasised that the value of landed estates such as Cowden Hall depended primarily upon their privacy and seclusion. The presence of a public footpath or bridleway could have a significant adverse effect on value and would reduce the number of potential purchasers.

Submissions

41. For the objectors Mr Francis submitted that Mr Hodges' concession that the proposed development would create a number of nuisances had not been followed by him to their logical conclusion; namely that the cumulative effect would be substantial. Mr Hickish's evidence about the impact of such nuisances was to be preferred. The covenants conferred practical benefits of substantial advantage and whether or not they sounded in monetary terms was not the key factor.

42. The objectors had taken considerable steps to secure the tranquillity and seclusion of Cowden Hall including limiting the commercial use of the farm and acquiring Dill Hundred Cottage, the use of which for holiday lets was entirely within their control. Mr Francis said the

test of whether practical benefits were of substantial advantage was properly a subjective one: see *Re Drummond's Application* [2018] UKUT 0008 (LC) at 65:

> "'Substantial'… does not have to relate to value in pecuniary terms, but can include the personal convictions and wishes of the objectors."

In *Shephard v Turner* [2006] 2 P&CR 28 Carnwath LJ said at 620[21]:

> "The 'substantiality' of the benefits, as I understand [section 84(1A)(a)], is to be judged by their practical value to the covenantee, not by comparison with the importance of the proposed development to the applicant."

43. It was not to the point that Mrs Geall and her family intended to occupy the new house together with the existing cottage at Solitude. The planning permission was not for ancillary accommodation and the applicant would be free to sell to anyone she wished. The prospect of such a sale had to be taken into account when considering the substantiality of the practical benefits secured by the covenant.

44. Mr Francis submitted that, even if it found there were no substantial practical benefits, the Tribunal should exercise its discretion to refuse the application. Mrs Geall was an original covenantor, the covenant was relatively recent and there had been no material change in circumstances since it was made. The construction of what the objectors understood to be a replacement barn had in fact allowed a conversion into a residential use which would not otherwise have been possible. Mr Francis said it was now clear that it had been Mrs Geall's intention all along to develop a house. She had done so by a process of stealth and without revealing her intention to the objectors whose permission had been granted on the basis that the replacement barn was to be used for agricultural purposes. It was only when Mrs Geall put in a septic tank that her true motivation was revealed.

45. The fact that the applicant was the original covenantor and the covenant was a relatively recent one were relevant factors to take into account and weighed against the exercise of discretion in favour of the applicant. In *Jones v Rhys-Jones* (1975) 30 P&CR 451 Stevenson LJ said at 459:

> "Without the assistance of authority I would have thought that the shortness of time which has elapsed since the burden of a covenant was imposed on an original covenantor or was transferred to a subsequent purchaser was a factor which could properly be put into the scale against modification or discharge whether the application under section 84 be made by an original covenantor (when it would weigh more) or by a subsequent purchaser (when it would weigh less). The older the covenant, however, the more time there will have been for other factors such as changes in the property benefited by the restriction to come into the reckoning in favour of modification and the easier it may be for the tribunal to relieve an applicant of a burden which he has recently shouldered."

Ormrod LJ said at 461:

> "[The Court of Appeal in *Cresswell v Proctor* [1968] 1 WLR 906] were doing no more than formulating a proposition of good sense, namely, that where an original covenantor is applying for a modification of a restrictive covenant recently entered into by him this is one of the matters, and an important one, which the Lands Tribunal can, and must, take into account and to which it must give due weight in deciding whether or not, in its discretion, to modify the covenant. If the judgments go any further they go beyond what was necessary for the decision of that case."

Mr Francis said there was no evidence of any relevant change in circumstances affecting the neighbouring area since Mrs Geall had entered into the covenant. The protection to the Cowden Hall Estate afforded by the covenant was as important now as it was when the covenant was given in 1987 and all that had changed was that the original agricultural outbuilding had been replaced by a barn.

46. Mr Francis submitted that compensation could not make up for the loss and disadvantage that would be suffered by the objectors were the application to be granted. The change in the character of the surroundings and the impact on the privacy and sense of seclusion enjoyed by the objectors were intangible benefits not capable of adequate recognition in monetary terms.

47. Mr Francis denied that Mrs Geall's covenant against causing a nuisance on the application land under clause 6.1.5 of the transfer gave the objectors all the protection they required. That was no substitute for the restricted user covenant given under clause 6.1.4. It would be difficult, expensive, uncertain and time-consuming to litigate under the nuisance covenant.

48. The applicant's reliance on ground (c) was unsustainable in view of Mr Hodges' acceptance that the proposal would have a number of injurious impacts.

49. For the applicant Mr Lonsdale denied that the application concerned a recent covenant. It was 30 years old and there was no justification to place weight on the age of the covenant or the fact that the applicant was the original covenantor. The applicant's circumstances had changed in that time and what was proposed was an ideal solution to the situation in which she now found herself. The applicant had not behaved stealthily; she had told Mr and Mrs Hammond what she intended to do. They could have checked the plans at the time the application for the barn was made in 1999 but they chose not to do so. All Mrs Geall had done was to act in her own best interests. She had not been furtive and had not misrepresented the position to the objectors.

50. Mr Lonsdale said the effect of the proposed development on the amenity of the objectors would be trivial. Traffic already used the driveway and the objectors did not find the use of it by guests at Dill Hundred Cottage to be a material disturbance. There would be no disturbance to anyone inside Cowden Hall itself. This was not a property which currently enjoyed total solitude and there was no evidence that young children, even if there were to be any living at the new house in the future, would devalue a neighbouring property that was 150m away. There would be no effect on the privacy of the objectors. The barn was well protected from view by hedges and shrubs and the planning officer had described it as "well enclosed" and set sufficiently far away

from other properties to prevent any significant loss or privacy. Concerns about light pollution were ill-founded; the new house would just be a "twinkle in the distance". The covenant did not secure any substantial practical benefits by impeding the conversion of the barn to a dwelling.

51. Mr Lonsdale submitted that Mr Hodges' evidence on value was to be preferred to that of Mr Hickish whose evidence of a 5% effect on value might be appropriate where a house was close to a major arterial road but not in respect of a private, single carriage driveway the use of which would only be marginally increased and over which the applicant already had rights of way. Mr Lonsdale said that a diminution of 5% in the value of Cowden Hall if the application succeeded was an unrealistic estimate. Any compensation should be very modest since the impact of the development would be very limited. The effect of the building work would also be limited in time and extent. Any compensation for temporary disturbance should be in the region of £1,000.

Discussion

52. It is not disputed that by impeding a reasonable user the covenant secures practical benefits to the objectors, i.e. the prevention of noise from the development, disturbance from increased traffic using the driveway, smoke and fumes, outlook over a new house, detriment to the amenity of the garden and grounds of Cowden Hall. The objectors also consider that by preventing a new dwelling the covenant helps maintain the security of their property.

53. Although the prevention of smoke and fumes was identified and agreed as a practical benefit neither expert considered this to be a potentially significant problem and the issue was not put to either expert in cross-examination. In my opinion this is not a practical benefit of substantial value or advantage either individually or collectively with other practical benefits.

54. In considering the issue of occupational noise from the proposed dwelling the objectors assume that it could be occupied by a family with young children. The applicant explained her intention that the new house would remain in her family's ownership and occupation. I think it is right to consider this issue by reference to the potential use of the proposed house by people other than the applicant's family given the unrestricted planning permission. I agree that the proposed dwelling would be suitable for family occupation.

55. There are two main factors when considering the potential impact of noise from the proposed development. Firstly, the ambient noise level is currently low. This is a quiet, secluded, rural location and the objectors value and protect the amenity this affords them. They have taken steps to control the sources of noise and disturbance by purchasing Dill Hundred Cottage in 1998 and by not fully exploiting the commercial potential of Cowden Hall Farm. The objectors also offered to purchase the barn from Mrs Geall for £45,000. Secondly, the proposed dwelling is a significant distance (150m) from the house at Cowden Hall and is screened from it by hedges and vegetation on either side of the driveway. The cottages at Nightingales and Solitude are both very much closer to Cowden Hall than the proposed house.

56. Mr Hammond said that he was not sufficiently disturbed to complain about existing noise from the two cottages but he was concerned at the prospect of disturbance from an additional house located away from the public highway and audible from the grounds of his property which the objectors use daily. In particular the objectors were concerned about children riding bicycles up and down the driveway immediately adjacent to his swimming pool.

57. I do not think the normal concomitants of residential occupation of the converted barn within its curtilage would be a source of noise such that their prevention could fairly be described as a practical benefit of substantial advantage. By "substantial" is meant "considerable, solid, big", per Carnwath LJ in *Shephard v Turner* at 621[23]. Mr Hodges said the possibility of children playing on the driveway was not something he had considered but he accepted that if they were to play there (which seems to me likely) then "noise would be a bit more relevant than it says in my report." In my opinion the effect of any such noise would be most noticeable in the garden at the rear of Cowden Hall where the swimming pool and tennis court are located and which are close to the existing cottages in any event. I think this would be an irregular and localised noise source that would not substantially affect the amenity of the objectors' property.

58. The new dwelling would generate additional traffic which Mr Hodges accepted would be up to seven trips per day and conceded could be an annoyance. He emphasised that traffic already used the driveway and this increase would not be substantial. Neither party produced any quantitative evidence about the existing vehicular use of the driveway but both the applicant and the owner of Nightingales have the right to go and return over it with or without motor vehicles for all usual and reasonable purposes connected with the use and enjoyment of their property. That right is currently exercised by the occupiers of the cottages. The driveway is also used by the farmer and by guests staying at Dill Hundred Cottage. The driveway is screened from the garden of Cowden Hall by a high hedge and is not visible from the house itself. In my opinion the likely level of traffic arising from the use of the new cottage would not be significant in this context and would not materially alter the amenity of the objectors' property.

59. The proposed house would not overlook Cowden Hall but would be set back in its own garden bordered by a tall hedge. The west elevation faces Cowden Hall but would have no windows at first floor level. The outlook from the objectors' property would not be materially affected. The proposal is for the conversion of an existing barn the size and height of which would not change. The barn is almost invisible from within the house at Cowden Hall and I do not consider that artificial lighting would be a nuisance to the objectors. The extent of the mature hedge and tree screen and the distance between the properties means this factor would be insignificant.

60. The objectors emphasised the importance to them of the privacy and seclusion of their property and the benefit they derive from being able to prevent any intrusion upon the peace and tranquillity that it affords. But they willingly allow up to eight visitors to stay at Dill Hundred Cottage which is located at the heart of the estate and to let them use their tennis court by prior arrangement. It is true they can stop holiday lets at any time but that they have not done so after 20 years suggests that limited residential use in and around the Cowden Hall estate does not constitute a material nuisance to the objectors.

61. Mr Hickish thought the presence of a new house within what he described as an otherwise "ring-fenced property" represented an increased security risk. But the use of Dill Hundred Cottage by third parties already exposes the objectors to that risk to some extent and, in my opinion, a permanent resident living halfway along the driveway might help improve the policing of the estate or at least offset the risk of unauthorised intruders going undetected.

62. I therefore do not consider that the identified practical benefits, either individually or collectively, are of substantial advantage.

63. Protection from nuisance during construction work is not normally a practical benefit of substantial advantage because such work is of relatively short duration and the primary consideration is the value of the covenant in providing protection from the effects of the ultimate use: per Carnwath LJ in *Shephard v Turner* at [58]. But he went on to say:

> "There may, however, be something in the form of the particular covenant, or in the facts of a particular case, which justifies giving special weight to this factor."

64. There is a separate covenant at clause 6.1.5 of the 1987 transfer under which "the Transferee will not do or cause to permit anything to be done on the land hereby transferred which shall be a nuisance to [the objectors]". That covenant is not the subject of this application and the applicant suggested it could be relied upon by the objectors to protect their amenity, a suggestion that was rejected by the objectors (see paragraph 47 above).

65. I do not consider that the prevention of short-term construction work would be a practical benefit of substantial advantage to the objectors, particularly as the proposed development is the conversion of an existing barn and does not involve the construction of a new or extended building.

66. The objectors were particularly concerned to retain control over who could use the private driveway and gain access to the estate. Mr Hammond rigorously enforces the covenant against parking cars on or adjoining the driveway and emphasised his ability to stop using Dill Hundred Cottage for holiday lets should that use become a nuisance. Furthermore Mr Hammond has put a gate across the driveway just south of the concreted turning area used by the applicant in connection with her occupancy of the cottage at Solitude. This doubtless added to Mr Hickish's impression that the estate is "ring-fenced". The objectors did not refer in terms to control of the estate as being a practical benefit of substantial advantage but I think it is relevant to the question of whether the covenant secures practical benefits of substantial value to the objectors.

67. Mr Hickish said that purchaser of country estates such as Cowden Hall placed a premium upon privacy and seclusion. The existence of third party or public rights of way over the property would diminish its value and reduce the number of prospective bidders. He illustrated his opinion by reference to the sale of two comparable properties with which he was personally involved. Beech Mill, Battle, sold for £2.262m in May 2016. This was a 75 acre country estate with a half mile long private drive. But, as the sales particulars noted, a bridleway ran along the entrance

drive and a public footpath ran across the farm. Mr Hickish said that the effect of "the bridleway was estimated at 15% in analysis of this sale". The other comparable was Rette Farm, Battle, a 93.5 acre estate which sold in October 2016 for £2.25m. The sales particulars noted the absence of any footpaths or rights of way across the estate but, said Mr Hickish, the presence of the main A2100 road 400m to the east reduced the value of the property by 5%.

68. Mr Hodges accepted that, in principle, the presence of public rights of way over a landed estate could affect its value. He thought 15% was too high but he had experience of sales where a 10-12% adjustment had been made. But he said a premium was paid for *total* seclusion and that was not available at Cowden Hall where rights of way over the driveway already existed.

69. The experts agree that the value of a landed estate such as this is sensitive to the integrity of its quiet enjoyment. Although third party rights of way already exist over the private driveway these are for limited purposes only and I consider that its future use as an access to a separate dwelling would be different in kind and likely to sound in a diminution in the value of the estate even though the practical benefits secured by the covenant are not of substantial advantage. It is therefore necessary to consider the effect of the proposed user upon the value of the objectors' property to ascertain whether, by impeding that user, the covenant secures a substantial practical benefit.

70. I do not accept Mr Hodges' view that any effect on value would be de minimis. The market dislikes uncertainty and in my opinion it is likely that the presence of a new dwelling within the ring-fenced estate would be viewed unfavourably by prospective purchasers even though its effect on amenity would not be material. Mr Hickish said that the value of the estate would be reduced by 5% or £130,000 (based on the agreed valuation). I think that would be more appropriate had there been no existing third party use of the private driveway. But the applicant and her neighbour at Nightingales use the driveway at present and I think Mr Hickish's figure is too high. I consider that the proposed residential user of the application land would diminish the value of the objectors' property by 2.5% or £65,000. The question then becomes whether the covenant secures a practical benefit of substantial value by preventing the diminution of the objectors' property by that amount.

71. In relative terms I do not consider a diminution in value of 2.5% to be substantial but nevertheless £65,000 is a significant sum. In *Shephard* Carnwath LJ said at 620[19] that 'substantial' "is a Protean word, which must take its meaning from its context". At 621[23] he regarded the words "considerable, solid, big" as a safer guide to the meaning of 'substantial' than that which had been suggested by Sir Douglas Frank QC in *Re SJC Construction Co Ltd* [1974] 28 P&CR 200, but then continued:

> "However, I would prefer not to seek a substitute for the statutory language, nor to seek a degree of precision which Parliament has avoided. It was no doubt thought appropriate to leave it to the Tribunal, as an expert body, with the statutory function of promoting 'uniformity of decision'…, to apply the section in a commonsense way."

72. In *Re Kerai's Application* [2014] UKUT 0153 (LC) the Tribunal, Mr P D McCrea FRICS, determined that a reduction of 5% in the value of the objector's house worth £1.5m, i.e. £75,000, was not substantial for the purposes of section 84 of the 1925 Act. Likewise in the present application I do not think the diminution in the value of the objectors' property by £65,000 in the context of a landed estate worth £2.6m is substantial for the purposes of ground (aa).

73. I therefore find that by impeding the proposed user the covenant does not secure to the objectors practical benefits of substantial value or advantage. I consider that money will be an adequate compensation for the loss which the objectors will suffer to the value of their freehold interest and I am satisfied that ground (aa) has been established. That being so I have discretion to modify the covenant to allow the proposed development.

74. Mr Francis submitted that I should not exercise such discretion for the reasons given in paragraphs 45 to 46 above. Neither the circumstances of *Jones v Rhys-Jones* upon which Mr Francis relies, nor those of and *Cresswell v Proctor* to which it refers, are similar to those of the present application. In *Jones* the Tribunal refused the application not on consideration of its merits but because of a general principle that it said had been enunciated by Harman LJ in *Cresswell*. The alleged principle appeared to be that purchasers who applied to modify a restrictive covenant within a matter of months of having agreed to be bound by it must be refused any modification of it. In *Jones* the applicant agreed in September 1971 to be bound by a covenant imposed in 1961 and which he sought to modify in April 1972. But *Cresswell* concerned an application by the original covenantor to modify a covenant that he had entered into just two years previously and Stephenson LJ said that the circumstances of *Jones* could not be said to be so similar to those of *Cresswell* that the guidance given in the latter helped, still less compelled, the Tribunal to dismiss the application in *Jones*.

75. In the present application Mrs Geall is the original covenantor but the covenant was entered into 30 years ago and cannot, in my opinion, be said to be recent. The fact that the applicant is the original covenantor is a matter to be given weight but I do not consider the circumstances are such that my discretion should be exercised against the applicant who has otherwise satisfied ground (aa).

76. Mr Francis also submitted that Mrs Geall had deliberately misled the objectors by asking them for permission to construct a barn whereas her real intention all along had been to convert such a barn into a dwelling. Had the objectors realised her true intentions, said Mr Francis, they would never have given their consent under clause 6.1.1 of the 1987 transfer. When asked about this in cross-examination Mrs Geall said that at the time of the planning application for the construction of the barn she had no intention of converting it into a dwelling although "the thought was at the back of my mind". She said barns had septic tanks, that the cost of installing one had not been a huge amount and that she could not remember whether she had told the objectors that she was proposing to install it. She said "maybe I didn't tell them" because she was going through a divorce at the time.

77. I do not think the evidence conclusively shows that the applicant had an ulterior motive when applying for planning permission to construct the barn, although I think that such a two-stage approach to obtaining residential planning permission was more likely to succeed than a direct application to replace the derelict agricultural building with a house. If Mrs Geall's intention was ultimately to convert the barn into a dwelling she did not act upon it for 16 years after planning permission was granted for the construction of the barn which suggests there was no strong motivation to do so.

78. I see no reason not to exercise my discretion to allow the application under ground (aa).

The scope of the application

79. At the hearing I said it appeared the application only sought in terms to modify clause 6.1.4 and not clause 6.1.1, the relevant part of which states "Nothing shall be built or erected upon the land hereby transferred without the consent of [the objectors]". I speculated this might be because the applicant had been given permission by the objectors to construct the barn and that its subsequent conversion to a dwelling, whilst constituting development requiring planning permission as a material change of use, might not involve anything new being built or erected on the application land. I asked counsel to comment on the scope of the application and whether the proposed modification should be restricted to clause 6.1.4. They were given the opportunity to make further submissions in writing.

80. In section 11 of the application form the applicant gave only the restriction in clause 6.1.4 as the subject of the application. The application was for modification and in answer to question 16 it was said to have been made on grounds (aa) and (c). In part B of that question the applicant said she applied to have the restriction(s) modified as follows:

> "To add at the end of clause 6.1.4 'provided nothing herein shall prevent the conversion of the barn on the plan attached and shaded red from being converted into a dwelling house and thereafter being used as a dwelling house'."

A case summary dated 18 May 2017 refers to the "applicable restrictive covenants" as being those contained in clauses 6.1.4, 6.1.1 and 6.1.5 of the 1987 transfer but does not elaborate upon the proposed modification. In a later statement of case dated 2 August 2017 the applicant says she was applying for the discharge or modification of the restrictive covenant referred to in paragraph 11 of the application, i.e. clause 6.1.4 under grounds (aa) and (c).

81. Mr Lonsdale submitted that reference to "herein" in the applicant's proposed proviso was obviously to the 1987 transfer as a whole and not just to clause 6.1.4. He said that until the hearing that is how both sides had understood the application. The applicant had clearly understood it that way because she had no interest in making an application that would have been of no effect even if granted. The objectors clearly had the same understanding because they had objected on the basis that the modification would result in loss or damage that could not be compensated by money. They would hardly have done so if the application made no difference to their ability to prevent the proposed development under clause 6.1.1. Mr Lonsdale said "out of an

abundance of caution" the applicant was applying to amend the application so as to substitute the words "in this Transfer" for "herein" and, on the suggestion of the objectors, to add the words "in accordance with the planning consent granted by the Local Planning Authority on 13th (sic) July 2015". Mr Lonsdale thought it would be remarkable if the Tribunal, unlike any court or other tribunal, had no powers to grant such an amendment. He said that rule 5(3)(c) of the Tribunal's Procedure Rules 2010 allowed the Tribunal to give permission to amend a document; the document in this case being the notice of application under section 84 of the 1925 Act.

82. Mr Francis said it was clear the application had only been made to modify the restriction in clause 6.1.4 and it was not possible to construe it as having been brought for the modification of all or any of the restrictions contained in clause 6 of the 1987 transfer insofar as they may restrict the proposed development. The question was therefore whether the Tribunal had the power to amend the application as sought and, if so, whether it should do so at this late stage.

83. Mr Francis relied upon *Re Diggens and others' Application* [2000] 3 EGLR 87 in which the President, George Bartlett QC, said the Lands Tribunal Rules 1996 did not contain any provision that would allow the application to be amended to include within it a second restriction not previously included. Under those circumstances a further application would be required. Mr Francis acknowledged that *Diggens* was concerned with the 1996 Rules and that these had been superseded by the 2010 Rules, but he said it was clear from the decision that there was no general power on the part of the Tribunal to allow applications to be amended arising simply from the fact that the Tribunal had power to regulate its own procedure.

84. Part 6 of the Tribunal's 2010 Rules dealt with applications under section 84 of the 1925 Act. Mr Francis said that it was implicit in rule 32 that an applicant must identify the restriction in respect of which he invoked the Tribunal's section 84 jurisdiction. Part 2 of the 2010 Rules contained general powers, including case management powers in rule 5. Rule 5(3)(c) provided that the Tribunal may permit or require a party to amend a document. Mr Francis said that a document in this context did not extend to the original application itself which could not be amended under this rule so as to introduce an additional restriction into the application. To do this would require clear and express words within the Tribunal's rules which the Tribunal was unable to identify in the 1996 Rules in *Diggens* and which could not be found in the 2010 Rules.

85. Mr Francis said that if the Tribunal has the power to allow the proposed amendment the objectors oppose the application. It was not a question for the Tribunal whether the proposed development would involve works to which the restriction in clause 6.1.1 applied and the objectors' position in this respect was fully reserved. Mr Francis submitted that clause 6.1.1 gave the objectors some degree of control over the form, design and exterior appearance of any buildings erected or to be erected on the application land and was an additional protection to that contained in clause 6.1.4. The application was made far too late and no reason had been given why it had not been made earlier.

86. Rule 5(3)(c) of the Tribunal's 2010 Rules contains a general power that was not in the 1996 Rules to permit or require amendments to a document. In my opinion this power is not restricted

to amending the ground upon which the application is made but can also be used to add another restriction to an application under section 84 provided that by so doing the Tribunal's overriding objective of dealing with a case fairly and justly is not compromised.

87. The objectors did not suggest the application was nugatory for the reason that clause 6.1.1 would continue to impede the proposed user regardless of the outcome of the decision on the restriction in clause 6.1.4. They have treated the application throughout as though, if successful, the applicant could proceed with the development for which she has planning permission. Until I sought clarification of the scope of the application the objectors did not say that clause 6.1.1 would still prevent the development.

88. If a new application were to be made to modify clause 6.1.1 the evidence would almost certainly be the same as that considered at the hearing. No other person has the benefit of the covenants and might be entitled to object to a wider application. The modification sought is to enable a specific form of development to progress and that form of development was the subject of the expert evidence before me. There is nothing in the restriction in clause 6.1.1 that would require consideration of anything new concerning the proposed user. The impact of the proposed development upon the amenity and value of the objectors' property has been fully explored. Mr Francis has reserved the objectors' position on the point but the reality is that nothing would be achieved, apart from delay, in making a new application. Rule 2(2)(e) of the 2010 Rules says that dealing with a case fairly and justly includes avoiding delay, so far as compatible with proper consideration of the issues. Those issues have been fully explored and nothing useful would be achieved by incurring delay and extra cost by rehearsing them at another hearing. The proposed amendment avoids these problems and I do not consider that the objectors will be prejudiced if it is allowed. The restrictions in both clauses 6.1.1 and 6.1.4 would, of course, continue to apply to any other form of development subsequently proposed by Mrs Geall or her successor in title.

89. It is not "quite obviously" the case, as submitted by Mr Lonsdale, that the words "nothing herein" in the applicant's proposed modification of clause 6.1.4 refer to the 1987 transfer as a whole. That is one interpretation, and perhaps the more natural reading of the words, but a more limited one would be that they refer just to clause 6.1.4. It could also be said that the words apply to clause 6.1 as a whole, i.e. to all of the transferees' covenants under that clause, including 6.1.1. Regardless of which interpretation is correct I am satisfied that the intention of the applicant that this application should, if successful, enable her to proceed with the proposed development was so understood by the objectors and that they presented their evidence accordingly.

90. I therefore allow the application to amend the application.

Determination

91. I am satisfied that ground (aa) has been established and that it is appropriate to exercise my discretion and allow the application. Under section 84(1)(1C) of the 1925 Act the power conferred on me by section 84 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 me to be

reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant. The following order shall therefore be made:

The restrictions in clauses 6.1.1 and 6.1.4 of the transfer dated 9 February 1987 are modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words at the end of clause 6.1 after clause 6.1.5:

> "PROVIDED that in respect of covenants 6.1.1 and 6.1.4 the development permitted under planning permission reference WD/2015/0742/F granted by Wealden District Council dated 15 July 2015 may be implemented in accordance with the terms, details and approved drawings referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached to such permission."

92. An order modifying the restrictions shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have:

(i) signified her acceptance of the proposed modification to the restrictions in clauses 6.1.1 and 6.1.4 of the transfer dated 9 February 1987; and

(ii) paid the sum of £65,000 to the objectors.

93. 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 7 June 2018

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)

Addendum on Costs

94. Practice direction 12.5(3) of the Tribunal's Practice Directions dated 29 November 2010 states that because the applicant is seeking to remove or diminish particular property rights enjoyed by the objector, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs.

95. The applicant submits that she has succeeded in her application and asks that the objectors should pay her costs due to their unreasonable conduct. She says the objectors' conduct was unreasonable because they:

(i) refused to negotiate about the proposed modification to the covenant;

(ii) refused an offer of mediation;

(iii) denied access to their property to the applicant's expert;

(iv) made a wholly unrealistic offer to purchase the application land; and

(v) refused to disclose a copy of their surveyor's report.

96. The objectors submit that the applicant should pay their costs because:

(i) the objectors successfully opposed the application under ground (c);

(ii) the Tribunal awarded compensation of £65,000 under ground (aa) whereas it was the applicant's case from the outset that no compensation was payable;

(iii) the applicant offered £5,000 as compensation before the application and made a sealed offer of £45,000 inclusive of costs as late as 3 April 2018, barely a week before the hearing at a time when a substantial amount of costs had already been incurred. The compensation awarded substantially exceeded both offers;

(iv) it was reasonable for the objectors to oppose the application in circumstances where the restrictions secured practical benefits to them, as the applicant's expert conceded; and

(v) the applicant, through her solicitor, conducted the case in an unreasonable and careless manner for which there was no excuse and which was contrary to the norms of litigation.

97. I do not consider that the objectors' conduct was unreasonable for the following reasons.

98. Mr and Mrs Hammond opposed the principle of converting the barn into a residence for the reasons given in detail above. As such they were not prepared to negotiate or to go to mediation about the details of such a residential use since their opposition to the proposal was

absolute. I do not think they can be criticised for wanting to maintain the covenants as drafted; their reasons for doing so were cogent and the fact that I have allowed the application does not mean their steadfast opposition to it was unreasonable. In *Re Chandler's Application* (1958) 9 P&CR 512 the Lands Tribunal, Mr J P C Done FRICS, said at 517:

> "The objectors are clearly entitled to ask for the enforcement of restrictions calculated to retain the *status quo*, and any action which would facilitate a change would deprive them of something which they value."

I agree with the Tribunal, Mr P R Francis FRICS, in *Re Dean's Application* [2017] UKUT 0203 (LC) at paragraph 99:

> "In my judgment, an objector is entitled to rely upon their property right, and an unwillingness to bargain it away is not evidence of unreasonable conduct."

99. Mr Hammond explained in cross-examination why access to the objectors' property had been denied to the applicant's surveyor. The request to allow access had been made before the application was submitted and was said to have been for valuation purposes. Mr Hammond said that he was not interested in negotiating or considering a price to release the covenant. He would have had no problem in granting access once the application was made but the request was not repeated. Mr Hammond's conduct in this respect was not unreasonable.

100. Mr Hammond offered £45,000 to purchase the application land, an offer which Mr Lonsdale describes in his submissions as "wholly unrealistic" but which in cross-examination Mr Hickish said was "low but not derisory". The applicant said she did "not wish to sell her barn and adjoining field" to Mr and Mrs Hammond. The making of an offer which Mrs Geall rejected in principle does not constitute unreasonable conduct.

101. There was no obligation on Mr and Mrs Hammond to "disclose a copy of their surveyor's report". The request for them to do so was made on 24 October 2016, over 10 months before the application was made. That report was not an expert report that was to be served as part of the proceedings in this application and Mr Hammond was entitled not to show it to Mrs Geall. The objectors' expert evidence was subsequently served and filed in accordance with the Tribunal's directions.

102. Subject to paragraph 106 below, I do not consider that the applicant's conduct was unreasonable.

103. The objectors submit that they were successful under ground (c) and that the circumstances were on all fours with those in *Re Kennet Properties Limited's Application* (1996) 72 P&CR 353 in which the Tribunal, HHJ Rich QC said at 365:

> "Amongst the circumstances which, in my judgment, may make an order for costs against a successful applicant appropriate are when the application is made *inter alia* on the ground contained in paragraph (c) of section 84(1) because it is denied that compensation

should be awarded, and modification is then granted only on an alternative ground and compensation is awarded."

104. Ground (c) is often relied upon in tandem with ground (aa) and is generally considered to be "a long stop against vexatious objections to extended user", per Russell LJ in *Ridley v Taylor* (1965) 16 P&CR 113 at 126. There were some aspects of the objectors' case which I think can reasonably be described as frivolous, for instance the suggestion that smoke and fumes from the proposed development would adversely affect their amenity (an argument which Mr Francis sensibly did not pursue at the hearing). Indeed I did not consider that any of the five "nuisances" identified by the experts were such that their prevention by the covenant would confer practical benefits of substantial advantage to the objectors. Ground (c) was not actively pursued at the hearing since Mr Lonsdale "substantially confined" his argument to ground (aa). The objectors were not put to extra expense as a result of the applicant pleading both grounds since the evidence relating to ground (aa) effectively subsumed that required to deal with ground (c). In my opinion it was not unreasonable for the applicant to plead ground (c) as well as ground (aa) and I do not consider they should be sanctioned in costs for doing so.

105. The objectors say that the applicant argued throughout that there should be no compensation whereas the Tribunal awarded £65,000. But the objectors' case was that there would be a reduction in the value of the Cowden Hall Estate of £130,000, which was twice the amount of my award. The objectors made no sealed offer (although the compensation awarded exceeds both the offers made by the applicant) but instead offered to purchase the application land for what their expert Mr Hickish described as a low figure. I do not consider the objectors' arguments about the level of compensation justify the award of their costs.

106. However, I accept the objectors' submission that the applicant's conduct in not adducing Mrs Geall's evidence until immediately before the hearing; the failure of Mr Hodges to produce his own report or to endorse that of his predecessor, Mr Mathias, by his own expert declaration; and in making an application to amend the application at the end of the hearing, added to the length and cost of the hearing and led to the need for further written submissions. In my opinion the objectors' costs in dealing with these matters should be paid by the applicant and I assess those costs summarily at £5,000.

107. I therefore order that the applicant shall pay the objectors' costs in the sum of £5,000.

Dated 23 July 2018

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)