**UPPER TRIBUNAL (LANDS CHAMBER)**


**UT Neutral citation number: [2010] UKUT 51 (LC)**
**LT Case Number: LP/4/2007**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RESTRICTIVE COVENANTS – modification-practical benefits of substantial value or advantage***

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

**BETWEEN** **VERTICAL PROPERTIES LIMITED** **Appellant**

**and**

**(1) NEW HAMPSTEAD GARDEN SUBURB TRUST LIMITED**
**(2) MR AND MRS BENNETT**
**(3) MR AND MRS SR COHEN**
**(4) MR M GERRARD and**
**(5) MR AND MRS MOSHEIM** **Objectors**

**Re: 24 Ingram Avenue,**
**Hampstead,**
**London NW11 6TL**

**Before: His Honour Judge Reid QC**

**Sitting at 43-45 Bedford Square, London WC1B 3AS**
**On 23, 24, 25 and 26 November 2009**

*Michael Driscoll QC* instructed by Muscatt Walker Hayim, solicitors for the Applicant
*Jonathan Small QC* instructed by Lee Bolton Monier-Wlilliams, solicitors for the Objectors.

The following cases are referred to in this decision:

*Driscoll v Church Commissioners for England* [1957] 1 QB 330
*Zeenab Al-Saeed* LP/41/1999
*Re Ghey and Galton* [1957] 2 QB 560
*Re Truman, Hanbury, Buxton & Co Ltd* [1956] 1 QB 261
*Re Martin's Application* (1988) 57 P&CR 119
*McMorris v Brown* [1999] 1 AC 142
*Shephard and others v Turner and another* [2006] EWCA Civ 8
*Re Fairclough Homes Ltd* LP/30/2001
*SJC Construction Co Ltd v Sutton LBC* (1975) 29 P&CR 322
*Winter and anor v Traditional & Contemporary Contracts Ltd* [2007] EWCA Civ 1088.
*Re Snaith and Dolding* (l995) 71 P & CR 104
*McMorris v Brown* [1999] 1 AC 142
*Estates Governors of Alleyn's College of God's Gift at Dulwich v Williams* [1994] 1 EGLR 112
*Dobbin v Redpath and anor* [2007] EWCA Civ 570
*Re Calthorpe Estate* (1973) 26 P&CR 120

## DECISION

## INTRODUCTION

1. This is an application to modify restrictions on the Property under section 84(1) of the LPA 1925. The application relies on ground (aa). The Property is 24 Ingram Avenue in Hampstead Garden Suburb. There are two sets of restrictions which the Applicant seeks to modify. They both reflect restrictions entered into in 1936 when a long leasehold interest was granted in respect of the Property on completion of the house that currently stands there.

2. One set is contained in a 1981 Transfer of the freehold of the Property. These restrictions are enforceable by the original covenantees, one of which is the Hampstead Garden Suburb Trust Limited ("the Trust"), and by persons who have acquired title from the Trust to property within the Suburb since the date of the 1981 Transfer. The Trust asserts that it continues to have substantial landholdings in the Suburb (including interests on Ingram Avenue itself) which justify it in attempting to enforce the restrictive covenants.

3. The 1981 restrictions are expressly not imposed pursuant to a building scheme. The first of the 1981 restriction is an absolute prohibition against use for two residences. Thus the Trust has an absolute right to refuse to waive the restriction, whether it is acting reasonably or not in doing so.

4. The relevant restrictions in the 1981 transfer are:

> "(1) Not to use or permit to be used the property or any part thereof otherwise than as a private dwellinghouse in the occupation of one family only and not to use any garage except as a garage for a private motorcar or motorcars in connection with the dwellinghouse….
>
> (3) Without the consent of Ashdale or the Trust which consent shall not be unreasonably withheld:
>
> (a) No garden or yard or forecourt of the property shall be built upon nor shall the general appearance thereof be substantially altered nor any garden substantially paved over
>
> (b) No alteration shall be made to the external appearance of any building for the time being standing on the property
>
> I No boundary or other –walls or fences shall be erected on any part of the property nor shall any trees or hedges growing thereon be cut down or destroyed or removed."

5. Ashdale Land and Property Company Limited was at the time a substantial owner of freeholds in the Suburb. It no longer is.

6. The other set of restrictions is contained in a Scheme of Management established by order of the High Court under section 19 of the Leasehold Reform Act 1967 on 17 January 1974 pursuant to section 19 of the Leasehold Reform Act 1967 and subsequently amended by a further order dated 17 February 1983. This set of restrictions prohibits the construction of two new houses without the consent of the Trust, such consent not to be unreasonably withheld. These restrictions are enforceable only by the Trust.

7. The relevant restrictions are in these terms:

> "(1) Without the prior written consent of the Trust no garden or yard or forecourt of an enfranchised property shall be built upon nor shall the general appearance thereof be substantially altered nor any garden substantially paved over.
>
> (2) Without consent as aforesaid no alteration shall be made to the external appearance of any building for the time being standing on an enfranchised property….
>
> (4) Without the consent as aforesaid no boundary or other walls or fences shall be erected on any part of an enfranchised property nor shall any trees or hedges growing thereon be cut down or destroyed or removed."

8. There are now four objectors, namely, the Trust and three owners of properties within the Suburb (only one on Ingram Avenue). The substantial objector is the Trust. The Trust is, among other things, the owner of the freehold of 9, 20, 23, 30 and 31 Ingram Avenue and of Turners Wood. The other individual objectors adopt the same grounds of objection as the Trust, and are represented by the same lawyers. There were two other objectors, Mr and Mrs Mosheim, the owners of the adjoining property, 22 Ingram Avenue, but they withdrew their objections before the hearing.

9. The objectors accept, at least for the purposes of these proceedings, that the Lands Tribunal has jurisdiction under section 84(1) to modify the restrictions.

10. The application is for an order modifying the restrictions to enable the Property to be developed as two houses notwithstanding that the Trust has withheld its consent to the development.

11. Vertical has owned the Property since 19 December 2002, when it bought the Property for £3.9 million. Initially it applied for planning permission and conservation area consent to build a single large house in the middle of the Property. Planning permission and conservation area consent were both refused. The refusals were appealed but on 5 March 2004 the Planning Inspector dismissed the appeals. Partly as a result of the views expressed by the Inspector a fresh application for the relevant permission and consent was made.

12. Vertical obtained planning permission and conservation area consent for two separate schemes to develop the Property as two houses. On 27 July 2005 the Applicants obtained

planning permission to demolish No. 24 and to construct two houses in its place ("Scheme A"). This planning consent has lapsed. On 9 November 2006 it obtained planning permission for an alternative plan ("Scheme B") to replace the existing house with two houses. The two schemes are similar, the main difference being that the proposed house on No 24 more closely resembles the existing house in its external appearance.

13. The Trust determined to refuse its consent to Scheme A on 6 December 2005. This decision was communicated to the Applicants in a letter of 12 December 2005. In broad terms the expressed reasons for refusal were: (i) that the existing house contributed positively to the character and amenity of the Suburb in a manner which required it to be maintained and preserved; and (ii) the development of the large garden plot would terminate a welcome break in the street and block the only significant view to Turners Wood behind; this view (it was suggested) is an important feature of the amenities in the Suburb which should be maintained and preserved.

14. The Trust determined to refuse its consent to Scheme B on 20 March 2007. This decision was communicated to Vertical by a letter of 29th March 2007. In broad terms the reasons for refusal were the same as the reasons for the refusal of Scheme A. The decision was taken with reference to the Trust's published Design Guidance and Guidelines for the Demolition of Buildings.

15. The decisions were taken by the Trust's Council of eight volunteer members, four of whom are elected from residents in the Suburb and four appointed by the Royal Institute of British Architects, the Royal Town Planning Institute, the Law Society and the Victorian Society respectively. Before considering the application in respect of Scheme A the Trust had received the independent advice of the specialist architectural and building conservation practice, Donald Insall Associates. The decisions were taken with reference to the Trust's published Design Guidance and Guidelines for the Demolition of Buildings.

16. In the light of what the Trust perceived to be a lack of openness on the part of Vertical and a recent unhappy experience where injunctive relief was refused as a result of delay in applying to the Court, the Trust threatened to apply to the Court for an injunction if the development was commenced.

17. Once the application to the Lands Tribunal was underway the Trust undertook an exercise in drumming up support for its opposition by circulating a letter in tendentious terms to a selected number of residents in the Garden Suburb. On 21 February 2007 it was sent to 464 residents: there are over 3,500 residences and 13,000 residents in the Suburb. As Mr Iwi, a former Trustee and not one of those to whom the letter was sent, noted in his comments to the Trust: "Plainly there cannot be genuine consultation when, as is obvious from the letter, the Trust has already decided to reject the application, and is only inviting responses from those opposed to the development, and not from persons who do not care about the development proceeding. Equally there cannot be a genuine consultation when the Trust only sets out the case against the proposal, wholly ignoring all the reasons for which planning permission was granted both for the original proposal and for the revised proposal."

18. The 243 resultant letters of support were no doubt what the Trust hoped to achieve, though perhaps not in the number or to the extent hoped for. For example, Mr Sklar expressed the view: "Logic dictates that, as such types of development and infills have already taken place there seems to be few grounds to object to this particular development. The Trust has already attempted to develop its own land in such a way, so no longer has any moral authority to object." The exercise was of no assistance to the Tribunal and merely cast doubt on the Trust's confidence in its case.

**THE WITNESSES**

19. The Applicant had seven witnesses of fact. Mr Jonathan Lambert was the architect who designed and obtained planning permission and conservation area consent for Scheme B of the proposed developments which form the basis of the application to the Lands Tribunal to modify the restrictions. He came into the project after planning consent had been obtained for Scheme A. As he was the only witness of fact the Objectors wished to cross-examine, only he gave oral evidence. The statements of the other six, all of whom live in Ingram Avenue, were received in evidence unopposed. Their evidence was to the effect that there was no benefit to them or the street in keeping the house and that they would prefer to see the site developed.

20. The Trust has one witness of fact, Jane Blackburn, the Trust's Manager. No other Objector served a witness statement in accordance with the Lands Tribunal's Order of 18 December 2008, other than Mr Mosheim (who later withdrew his objection). No resident of Ingram Avenue gave evidence, either orally or by statement, in opposition to the application.

21. The Applicant called evidence from three expert witnesses: David Peters, BSc (Hons), FRICS, MAE, a partner in Knight Frank LLP, whose evidence is mainly directed to the impact of the proposed development on the enjoyment and value of properties in the immediate vicinity: Paul Chilton, BSc (Hons), FRICS, MCIArb, a partner in Cluttons LLP, whose evidence was of minor importance since it dealt primarily with the objections of Mr and Mrs Mosheim which were withdrawn before the hearing: and Kevin Murphy, B.Arch, MUBC, RIBA, IHBC, whose evidence was directed to the impact of the proposed development on the Suburb from architectural and urban design perspectives.

22. The Trust called one expert witness, Paul Velluet, RIBA, IHBC, Chartered Architect.

23. Mr Murphy and Mr Velluet are both former employees of English Heritage.

24. A view was conducted on the first afternoon of the hearing looking not only at the Property and the remainder of Ingram Avenue but also other parts of the Suburb and other areas near but not within the Suburb which counsel considered relevant. In particular considerable attention was paid to the view from Ingram Avenue of Turner's Wood. Weather conditions for the view were not ideal as there was a cloudburst during the course of it. Nonetheless it was possible to inspect in as much detail as anyone thought was necessary.

**HAMPSTEAD GARDEN SUBURB**

25. In 1951 Sir Nikolaus Pevsner described the Suburb in his volume "The Buildings of England: London 4: North" as "The aesthetically most satisfactory and socially most successful of all C20 garden suburbs". The current editors conclude in their Planning section that "Strict planning regulations and local vigilance have ensured that on the whole the character of the Suburb has been well preserved".

26. The original area of the Suburb was 243 acres purchased from the Trustees of Eton College in 1906 by the Hampstead Garden Suburb Trust Limited ("the Old Trust"). In the same year the Hampstead Garden Suburb Act 1906 was passed to regulate the development of the land (there being at that time no Planning Acts: the Town Planning Act became law in 1909). Development in the Suburb began in 1907, but was halted in 1914 with the outbreak of the First World War. The development at this stage was an attempt to put into practice the opinions of Dame Henrietta Barnett as to the necessity for reforms in housing, both architectural and social. After the War, apart from the completion of areas laid out earlier, the development of the Garden Suburb consisted almost entirely of conventional houses for sale on long lease, though Dame Henrietta continued to take a lively interest in what was effectively her creation.

27. The area of land which includes Ingram Avenue was not part of the original Garden Suburb. It was acquired on long lease from the Ecclesiastical Commissioners in 1930/31 and is known as the Finchley Road Extension. It lies in the south-eastern of the Suburb and comprises 34 acres and includes Turners Wood.

28. The original architect to the Old Trust was Raymond (later Sir Raymond) Unwin, and construction began in 1907. In 1914 Unwin was succeeded as architect to the Old Trust by GL Sutcliffe and then by JCS Soutar who remained consultant architect to the Old Trust until his death in 1951. Christopher Hussey, writing in Country Life magazine on 17 October 1936 (a month before the original lease of 24 and so presumably when its construction was almost complete) said of him:

> "Architecturally, the result [the Suburb] is an outstanding success. For this much of the credit is due to Mr John C S Soutar, -who succeeded Sir Raymond Unwin as Architect to the Garden Suburb in 1914. It is due to him that the original plan and standard of design have been so consistently maintained, in spite of so many difficulties. Besides designing a large number of buildings himself, Mr Soutar has been responsible for the supervision – in many cases the considerable alteration – of all the designs submitted."

29. In the 1960s the Old Trust had become defunct and had gone into liquidation. Its entire estate was acquired at auction by Ashdale Land and Property Company Limited. In 1968 on the coming into force of Part I of the Leasehold Reform Act 1967 the Trust was incorporated on 8 March 1968 as a company limited by guarantee under the name of "New Hampstead Garden Suburb Trust", as a successor to the original defunct company.

30. Its name was changed by dropping the word "New", the change being certified on 15 January 2007. It has the principal object of maintaining and preserving the present character and amenities of the Suburb. To enable it to achieve its aims an application was made to the High Court under section 19 of the Leasehold Reform Act 1967 for a scheme of management and the Scheme was approved on 17 January 1974. The Scheme was amended by a further order of the High Court dated 17 February 1983. In the meantime the Civic Amenities Act 1967 was passed and in December 1968 the Suburb was designated a conservation area. After that legislation was amended in 1972 part of the Suburb (roughly described as the "Old Suburb" and not including Ingram Avenue) was designated an "outstanding" conservation area.

**INGRAM AVENUE**

31. Ingram Avenue on which the Property stands lies forms part of the Finchley Leasehold Extension. In evidence and argument a distinction was drawn between the "Old Suburb" and the "New Suburb" and there was some debate as to whether Ingram Avenue was properly regarded as part of the "Old Suburb" or of the "New Suburb". Vertical submitted that the "New Suburb", in which it said Ingram Avenue falls, consists of substantially inferior architecture to the architecture of the "Old Suburb". Both Ms Blackburn and Mr Velluet asserted it was part of the "Old Suburb".

32. The distinction between the "Old Suburb" and the "New Suburb" seems to originate from the area covered by the map at the back of Unwin's "Town Planning in Practice" published in 1911, the "New Suburb" being any area acquired subsequently. On behalf of the Trust it was noted that Cherry and Pevsner, in the "The Buildings of England", include Ingram Avenue in the "Old Suburb" and not the "New Suburb". It was further suggested that Ingram Avenue would anyway have to be regarded as an anomaly within the "New Suburb", as Ingram Avenue (except the last plots developed, 34 and 36) was developed under the direct control of the Trust.

33. In my view it is immaterial for the purposes of this case whether Ingram Avenue is regarded as part of the "Old Suburb" or of the "New Suburb". However the land was acquired in 1930/1, some twenty-five years after the development of the original Suburb was begun, as part of the Finchley Road Extension. No logical reason was advanced as to how in these circumstances Ingram Avenue could be regarded as part of the "Old Suburb", even if it was developed under the direct auspices of the Trust.

34. What is now Ingram Avenue was previously part of Turners Wood. It was laid out by Soutar, cutting through the northern part of Turners Wood but retaining a central portion. A few oaks that are now in front gardens were retained. 2 to 12 (even), 16, and 18 to 36 (even) – there being no 26 or 28- back onto Turners Wood. Ingram Avenue follows the slope of a hill in a rough 'S' shape. The two entrance sections of the road are on an incline, with the houses stepping up the hill. At its eastern end Ingram Avenue meets Winnington Road, which rises more steeply to Hampstead Lane. Green open spaces around Ingram Avenue include the remains of Turners Wood, the Heath Extension and Hampstead Golf Course. The Heath Extension is public open space.

35. Most of the houses in the original layout by Soutar (ie the layout showing the house and garden of 24 as two separate plots) were built between 1931 and 1937 though two houses were built as late as the mid-1950s (34 and 36) at a time when the Trust was run on a commercial basis. A number were built by the same builder, Robert Hart & Sons. Indeed the builder was a party to the lease in 16 cases, which suggests that a number of these properties were built as speculative developments for sale by the builder, rather than the plots being acquired for individual purchasers who then had houses built to their own requirements. Five of the fourteen leases available to the Trust were signed on behalf of the Trustees by Dame Henrietta Barnett herself. The Trust says it "regards Ingram Avenue as a fine example of the Trust's development of that period for wealthy residents."

36. The nature of the development was controlled by stipulations in the 999 year leases granted by the Trust. These prohibited any building or additions or alterations to be made and insisted that a garden be laid out and maintained. The front boundaries were to be planted up with a "close clipped holly hedge" behind a low York stone wall (something now honoured only in the breach). The plots were to be developed with "a private dwelling-house in one occupation only", thus ensuring that no houses were subdivided into flats.

37. The houses on Ingram Avenue were in the main built in the 1930s in a neo-Georgian style with some Arts and Crafts examples and some having Art Deco influences. Although they were designed by a number of architects the majority of the houses were designed in Soutar's office. Several properties were designed for a specific client and originally incorporated the internal layouts and design details that those clients required. It is apparent that there has been a lot of internal alteration to many of the houses: for example where basements have been excavated. It has to be borne in mind that when points are made about the need or desirability of retaining original houses, it may well be that all that is being retained of the original is the external appearance.

38. The houses are large, detached houses of two storeys. Many have rooms in the roof space. They were originally without basements, but in some cases basements have now been excavated. All now have garages, in many cases (including 24) as extremely unsightly side additions. Each house has a front and a rear garden and is set behind a carriage drive. Although the road is an area of very low density development – less than 3 houses per acre- opinions seem to differ as to whether the gardens are "generous" or whether the houses appear overlarge for the plots on which they are sited, as Ms Hyman, one of those objecting to the demolition, noted in her letter to the Trust.

39. There is only one listed house, 16 Ingram Avenue, by Soutar after a sketch by Lutyens. It is listed Grade II. Apart from houses designed in Soutar's office there are houses designed by the following architects among others: Brian Sutcliffe (13), Guy Church (19), and Evelyn Simmons (37). 41 (an Elizabethan design) is by Forbes and Tate. 27 and 38, both originally houses designed by Soutar have, with the permission of the Trust, been demolished and replaced with what Mr Murphy describes as "replicas". In the case of 38 this was following a fire and 27 had apparently become structurally unsound.

40. Most of the houses are closely spaced. 24 and 30 Ingram Avenue have adjoining garden areas between them. Each of those houses stands (as the numbering indicates- there is no 26 and no 28 Ingram Avenue) on what were in the original layout designated as two plots. The street numbering suggests that someone at some time has anticipated that additional houses might be built at some time on what were originally plots numbered 1044 and 1045. The original layout afforded views of greenery including mature trees (mostly oaks) between the houses and above the buildings. The views between the houses have in general long been at least partly obscured by the erection of garages at the side of the houses, but there are views, so far as they are not obstructed by what is in the larger gardens of 24 and 30, from the street across those gardens to Turners Wood beyond. The silhouettes of the oak trees against the sky are a characteristic of the road visible both between houses and above them.

41. It was suggested on behalf of the Trust that the view across the larger gardens was probably created deliberately. This assertion was based on a map published with a review of the "achievements and significance" of the Suburb by the Old Trust in 1937 (just after the building of 24 Ingram Avenue) which shows these garden areas of 24 and 30 Ingram Avenue coloured dark green, like the other communal open spaces on the Suburb, and in contrast to the paler green used for the gardens. This appears to be no more than a piece of wishful thinking. A second pair of plots, now 34 and 36 Ingram Avenue, which remained as open land until built on in 1955, is also shown in dark green. The obvious inference is that unbuilt plots were shown in dark green.

42. There has been demolition and rebuilding of two other houses in Ingram Avenue and it was common ground that "Ingram Avenue does not comprise a group of pristine designs of uniform quality as there have been many small piecemeal additions and alterations over the years to the original designs including dormer windows, garages, entrance canopies, grander porticoes and similar aggrandizements". The Shankland Cox report commissioned by the Trust in 1971 described Ingram Avenue as an "unimaginative sequence of big Neo-Georgian houses, mostly also by Powell for Soutar." Later the report notes: "Amongst all these rather tired expositions of good taste 16 Ingram Avenue stands out. ..."

43. On 24 November 1977 the Planning Authority (Barnet) made tree preservation orders on a number of trees in Ingram Avenue, including trees in the space between the house on the Property and the house on 30 Ingram Avenue. This was done by reference to a plan. The view revealed that a considerable number of the trees shown on the 1977 order plan no longer exist. There remain a considerable number of mature trees in the gardens of the houses along the Avenue and all trees in Ingram Avenue are now protected as if a tree preservation order had been made in respect of them because they are in a conservation area.

44. Mr Murphy accepted in cross-examination that Ingram Avenue is well-preserved, that the build quality is generally good as far as he could tell and that it was a "nice place". He rejected the far-fetched suggestion put to him that Ingram Avenue was "of national significance". He went so far as to suggest that most of the houses in the street at which he had looked were not so good that he could justify their retention as against a really good replacement. While he accepted that the Suburb had a value, different parts of it and different buildings had different value. He also accepted that the fact the Trustees acknowledged there had been mistakes made in the past, this did not mean that they should perpetuate errors. He maintained his view that

the demolition of the house on the Property and its replacement with the two new houses would not adversely affect Ingram Avenue.

**TURNERS WOOD**

45. Turners Wood (or more accurately the remaining part after Soutar had laid out Ingram Avenue so as to cut through it) is, by restrictive covenant, managed as a nature reserve. It now comprises about eight acres of woodland, mainly oak trees. Residents in the surrounding houses, not only in Ingram Avenue, have access and are responsible for maintaining it through Turners Wood (Management NW11) Ltd. There is no public access. There is an access way (closed by a locked gate and suitable for at least light vehicles) from Ingram Avenue between 22 and 24 Ingram Avenue.

46. It was suggested that the only significant view of the wood available from Ingram Avenue is across the gardens of 24 and 30 Ingram Avenue. This view, and the view of the Heath at the end of the road, were suggested to be crucial in maintaining the character and amenity of Ingram Avenue, differentiating it from the streets with continuous frontages of detached houses with no landscape setting found outside the Suburb. It was submitted that if the garden area of 24 Ingram Avenue were to be built on, it was almost inevitable that development of the garden area of 30 Ingram Avenue would follow and the views of Turners Wood be reduced to "disjointed glimpses." In answer it was submitted that the development of 28 Ingram Avenue (ie the garden of 30) was by no means inevitable and such views as there are of Turner's Wood, at this point in the street, would remain, particularly over the garden of 30 Ingram Avenue, and over the garden of 16 Ingram Avenue, even if two houses were built on the Property. In any event, it was said by Vertical, the protection of those views was never the object of the restrictions, and the views are really nothing special in this case, nor are they the only views of the wood – there are better ones from other parts of Ingram Avenue.

47. There is no covenant specifically directed to the protection of the view. There is a wall in the garden of 24 designed to provide the garden with privacy which at the same time limits the view of the wood. There are trees and shrubs in the garden which obscure the view, and the restrictions do not prevent trees being planted and then growing in the garden to obscure the view.

**THE PLANNING HISTORY AND THE INSPECTORS DECISION**

48. Vertical's first planning application dated 1 November 2002 was for a single larger house to be erected straddling the two plots which form the Property. When the application was rejected Vertical appealed and after a lengthy appeal hearing the Inspector dismissed the appeal by a decision letter dated 5 March 2004. The Trust was represented at the appeal as an interested party, appearing by Dr Mervyn Miller the author (or joint author) of two books about the Suburb.

49. The Inspector considered whether the house made a positive contribution to the area. She noted that "No 24 is the original building on the site, which was designed by the office of the

consultant architect to the Hampstead Garden Suburb Trust, and the main body of the house has remained largely unaltered since it was first constructed." These factors, she considered, gave it "an historic interest, particularly when taken in the wider context of the road, where only two of the other properties have been totally rebuilt." However she continued:

> "15. In my opinion, whilst having some pleasant features, the house at No 24 does not have any great architectural distinction, although it is a good example of its age and type and fits in well with the surrounding properties. Whether 'fitting in' can be considered as making the 'positive' contribution to the conservation area referred to in paragraph 4.27 of PPG15 was the subject of much debate at the Inquiry. A building must make a positive contribution if its demolition is to be considered against the same rigorous criteria that must be satisfied before a listed building can be demolished.
>
> > 52. In this case, I consider that, whilst the building is of some interest and has a group value with its neighbours, within the wider reach of the conservation area the building could not be said to be in any way remarkable. The conservation area is noted for the broad vision of the town planning theories that lie behind its innovative layout, and the cohesion of the area as a whole. Whilst the house respects this consistency and is typical of it, it is not, in my view, special and the particular contribution it makes is, therefore, limited. In these circumstances, I consider that, provided a suitable replacement was put forward, which related to its surroundings in the same sympathetic manner as the appeal property, the existing house does not make a contribution that is so significant, such that it would be clearly beneficial to resist its demolition."

50. She observed that "the house at No 24 already appears somewhat different to others in the road, in terms of its positioning, and this is caused not only by the double width of its plot, but also because there is a track leading to Turner's Wood between it and No 22. ... In my opinion, the rhythm and regularity of the relationship between many of the Ingram Avenue properties is not, therefore, maintained by the existing building at No 24".

51. She went on to consider the particular proposal and concluded that the size and prominence of the new house would not sit well with its neighbours and that the tendency to group properties of a similar size was a typical feature of the original Garden Suburb and contributed to its character. The new house would erode and dilute the original qualities of the surroundings. Because the proposed replacement house was too big for the road it would therefore seriously disturb the restraint and homogeny of Ingram Avenue. She therefore dismissed the appeal.

52. Vertical took the view that it should address the Inspector's concerns and now relies on her decision as showing that the house did not make any positive contribution to the conservation area. The Trust by contrast, while making the point that the test so far as it was concerned was whether the house was positively detrimental to the Suburb drew comfort from her findings that the overall integrity of the original concept in Ingram Avenue had remained largely intact and that although some properties had been extended, this had generally been

done in a sympathetic and sensitive way that ensured the additions remain subservient to the host buildings.

53. Following the dismissal of its appeal Vertical re-considered its position and decided that the better course was to apply for the erection of two smaller houses on the site. It initially put in an application for two houses and to demolish the existing house on 24 August 2004. This application was withdrawn. In February 2005 a new application was put in, which was replaced by the Scheme A application on 17 May 2005, followed by the Scheme B application on 21 September 2006. Permission was granted for both schemes.

**THE PROPERTY**

54. The site comprising the Property was laid out by Soutar as two building plots, 1045 and 1046, each of the same area as the building plots on either side and on the opposite side of the road. The two plots together amount to approximately 0.6 acres. The boundary to the south is the boundary between the Property and the adjoining plot, the boundary to the north is the boundary to a vehicular path which leads to Turner's Wood at the rear of the Property. This separates the Property from 22 Ingram Avenue.

55. The house was designed and built in 1936 (the year of Dame Henrietta's death) in Soutar's office for Mr (later Sir) Arthur Elvin, a wealthy businessman who bought the Wembley site of the 1924 British Empire Exhibition and built the Empire Pool and Sports Arena. He was described by Mr Velluet as "the creative force behind of the development of Wembley Park and the 1948 London Olympics." The initials on the drawings are those of Mr WT Powell who was described by Dr Miller who presented the Trust's case at the 2004 planning appeal as Soutar's assistant who "designed many houses in the Suburb in the 1920s and 1930s for which the drawings were, as was customary, issued in Soutar's name." It was built by Robert Hart & Sons. The house was built exclusively on the part of the site sold as plot 1046, and the application to build was made in respect of plot 1046 alone. Thus (as Mr Velluet conceded) at least initially the future development of plot 1045 may have been considered.

56. That idea must have been abandoned before the grant of the long lease to Mr Elvin of the two plots which contained a covenant "not [to] build or set up or suffer to be built set up or maintained on the demised premises any erection or building other than or in addition to the demised messuage and buildings now erected or in the course of erection thereon and shown or indicated on the said plan…." The long lease of the Property (which was described as "Norfolk House") was granted to Mr Elvin on 18 November 1936.

57. Sir Arthur (as he had become in 1947) was still living at the Property at the time of his death in 1957. On 2 December 1981 Mr P Margaronis bought the freehold from the Trust for £1.

58. The house as originally built had an overall area of 191sq m with a garage of 31 sq m. At some point dormer windows were added in the roof at the front and side and the front door was pushed forward a little. The garage was substantially extended in 1961. Sometime in the

1980s the Trust gave consent for substantial alterations to be made to the rear of the house on the Property. The kitchen was extended and a swimming pool and a gymnasium were built as a flat-roofed ground floor only extension. Though there is no evidence as to this it appears that additional dormer windows were added during the works in the 1980s. The extensions added behind the garage are architecturally undistinguished but not visible from the road. As a result of the various alterations made in 1961 and in the 1980s the house on the Property is not wholly, therefore, the original house as designed and built in 1936. None of the alterations improves the external appearance of the original house.

59. The house was empty for several years before the Property was bought by Vertical on 19 December 2002 for £3.9 million. Since Vertical bought the Property, the condition of the house has deteriorated further. It has been squatted in and has been vandalised. If the house was to remain it would require a considerable amount of work to be done to it in any event to make it suitable for the requirements of the sort of person able to afford to buy it. In its present state Mr Peters' evidence suggested that it would fetch something in the region £7,000,000 to £7,500,000.

60. Mr Peters' unchallenged evidence was that any purchaser would to do very extensive works of refurbishment, such as excavating a basement and removing and rebuilding the present garage and gym. Refurbished he would have expected a price for the house, off the top of his head, in the £12,000,000 to £15,000,000 range.

61. It was not suggested that the condition of the house was a reason why the application should be allowed.

62. The following description of the exterior of the house is taken almost entirely from Mr Velluet's evidence. The overall external design of the original house reflects the conventional neo-Georgian architectural character of the majority of houses in Ingram Avenue. In Mr Velluet's view in its sense of restraint and careful composition, such as the disposition and proportions of the chimney stacks, it reflects some of the subtlety of Lutyens' late, domestic work and "a thoroughly decent example of domestic architectural design of the inter-War years." The house incorporates a number of features which are of distinctly more inter-War 'modernistic' character, such as the reeded, neo-Regency door-surround serving the main entrance and the projecting, circular window bay at the southern corner of the house, with subdivided, painted steel windows set in pre-cast concrete mullions.

63. The front (north-east) elevation comprises a two-storey, symmetrical composition with traditionally detailed, single, tri-partite, double-hung sash windows at ground and first floor levels, above and below a modestly projecting brick stringcourse, to each side of a wide, projecting central bay. The full-height, windows at ground floor level (each comprising 9-over-12 sashes with 3-over-4 wing-lights), and the windows at first floor level (each comprising 6-over-6 sashes with 2-over-2 wing-lights) are, in Mr Velluet's view, original. At the centre of the projecting central bay, the original, reeded door-surround, incorporating the numerals 24, survives. The two-panel front door and the polished marble door-step/threshold appear to be modern. Directly above, at first floor level, there is tripartite, double-hung sash window matching those to either side, which also appears to be original.

Dormer-windows, with leaded lights, matching the original dormers on the north-west side of the house have been added to the front roof-slope to each side of the hipped roof-slopes above the projecting central bay.

64. The south-east side elevation, facing the south-east part of the garden, comprises two substantial projecting chimney-stacks placed symmetrically to either side of centrally aligned windows at ground and first floor levels. The single, 3-over-6, subdivided, double-hung sash window at first floor level appears to be original. The original window at ground floor level has been replaced by a pair of glazed doors. By contrast the independent advice received by the Trust from Mr Shippobottom of Donald Insall Associates Ltd in the Insall Report dated 28 November 2005 (prepared for the Trust) at para 1.3 says: "The side elevation is undistinguished with few windows, but two large chimneys": "a detached house of understated design ... the south front is treated as very much a side elevation with a single opening on each floor symmetrically placed between flanking projecting chimney stacks."

65. At the south-west end of the elevation, a circular bay with original, painted steel, subdivided glazing serving the drawing room, projects from the south corner of the house at ground floor level. Directly above, at first floor level, behind a small terrace, there is a corresponding curved recess containing a pair of glazed doors. A pair of dormer-windows with leaded lights, matching the original dormers on the north-west side of the house has been added to the roof-slope, symmetrically aligned between the chimney stacks.

66. The north-west side elevation comprises a rather more irregular composition with no projecting stacks. The single, 4-over-8, subdivided, double-hung sash window at first floor level, close to the centre of the elevation, the small, 1-over-l sash windows to each side, appear to be original. Also original are the 6-over-6, double-hung sash window and the tripartite window (comprising 6-over-6 sashes with 2-over-2 wing-lights) directly below the first floor windows. The south-west of the elevation at ground floor level has been obscured by the forward projection of the rebuilt garage. At a higher level, the three original dormers with leaded lights survive.

67. The south-west elevation, facing the south-west part of the garden, comprises a group of five, equally spaced of windows at ground and first floor levels, asymmetrically placed. The first floor windows comprising original, matching, traditionally-detailed, 6-over-6, subdivided, double-hung sash windows, and the ground floor windows comprising three, 9-over-12, subdivided, full-height sash windows and two matching glazed doors. All the windows appear to be original. At the southeast end of the elevation the circular bay with original, painted steel, subdivided glazing serving the drawing room, projects from the south corner of the house at ground floor level. This was clearly designed to take advantage of the large garden. Directly above, at first floor level, behind a small terrace, there is a corresponding curved recess containing a pair of glazed doors. The original pair of double-hung sash windows serving the original 'service-wing' of the house towards the north-west end of the elevation at ground floor level have been lost as a result of the rearward kitchen extension. However, the corresponding pair of matching, 6-over-6, subdivided, double-hung sash windows serving a bathroom survive and appear to be original. Further to the north-west, the original garage has been reconstructed and extended into the garden towards the presently disused swimming-pool

and contains a gymnasium, shower and WC. At higher level, the original, wide, dormer at the centre of the roof-slope, survives with its leaded lights.

68. From the four sides of the houses, a clay-tiled, hipped roof slopes up from substantially projecting, classically detailed, painted timber eaves at 45 degrees, with a modest splay at the southern corner, corresponding to the projecting, circular bay directly below. At the front of the house, a hipped projection rises to a central ridge above the projecting central bay.

69. Mr Velluet drew attention to the quality of interior features which survive in the house. These included a main staircase, ceiling cornices doors and architraves which survive to a substantial degree, though Mr Velluet accepted that there had been a considerable amount of alteration to the internal layout. Mr Murphy's more robust view was that there had been extensive internal re-arrangement of the house, that most of the interior was "entirely recent" and that original features had been removed. Given Mr Peters' evidence that it seems likely that most of the surviving internal features, however fine, will not survive a refurbishment if the house is to remain, their quality would not be a major consideration even were it a permissible one. As it was, no party wanted the view to include the interior of the house, on the basis that the state and quality of the interior was not relevant as the restrictive covenants do not prevent any alteration to the interior.

70. Mr Murphy on behalf of Vertical characterises the Property as currently comprising one undistinguished and dilapidated house. The property is a double plot, and (were it not for the restrictions) would plainly be suitable for development as two houses. He describes the existing house as "an ordinary neo-Georgian house built in 1936 and similar in scale and plan to other houses built in the 1930s in the Suburb."

71. Mr Velluet for the Trust responds that Ingram Avenue is part of the Suburb built in the 1930s in a neo-Georgian style and that No.24 is typically 1930s and typical of the Suburb. He adopted the views expressed by Mr Sippobottom of Donald Insall Associates in an appraisal for the Trust in November 2005: "It is not outstanding architecture and from certain angles is handled in a rather heavy way. Neither is it one of the best works of this architect's office, in comparison say with houses on Meadway Close, Meadway and Spaniards Close. It is however a carefully considered design, reticent and calm, and well mannered, quite unlike some of the more showy, newer developments which can be seen nearby" and "By its very nature, the building is quiet, reticent, well-mannered –quality deliberately aimed for throughout the whole Suburb." In his view the loss of an "original, quality house" would set an unfortunate precedent in respect of applications to demolish other non-listed houses and replacing them with attempted replicas.

72. The current overgrown state of the garden is such that the view of Turners Wood from Ingram Avenue is to a substantial degree obstructed. There is no certainty that if the house were restored the garden would be restored in such a way as to offer clear views to Turners Wood: indeed particularly in these days it might be thought far more likely that the garden would be designed so as to give users a degree of privacy and that this would impede the view of Turners Wood from the road.

**THE PROPOSED DEVELOPMENTS**

73. Vertical has obtained planning permission and conservation area consent for two very similar developments. Each Scheme involves the demolition of the existing house and its replacement with two houses. In Scheme A the two houses would be the same. In Scheme B the house on what would continue to be 24 Ingram Avenue will closely resemble the house which is to be demolished. The existing house has to be demolished if there are to be two houses built on the double plot and if at the same time (as both Schemes would secure) the existing established trees to the southern end of the plot are to be retained. To achieve this the house on 24 Ingram Avenue must be relocated slightly closer to the footpath between it and 22 than is currently the case.

74. The two proposed houses will have a similar appearance to, be made with similar but better quality and "greener" materials to, and be positioned as, and occupy plots which will be similar in area to, most of the other houses in Ingram Avenue. There is no increase in density objection as such. Though plainly having two houses on a plot where currently there is only one increases the density of development on this particular plot, the development will not be inconsistent with the density of development elsewhere in Ingram Avenue.

75. Mr Lambert was not the architect who designed Scheme A. He took over after planning consent had been obtained for the scheme and then put in Scheme B. The object of the two schemes was to design two high quality homes with similar spacing to the houses in Ingram Avenue and using a similar palette of materials and compositional elements. He identified the features which were designed to ensure the scheme fitted as being : (a) Large detached houses of similar width to the others in the street; (b) Two storeys plus roof space in keeping with the others; (c) Common eaves line with the others; (d)Set back from the road by the same amount, thereby following the same building line as the others; (e) Carriage driveways in keeping with the others; (f) Familiar mix of materials: (red brick and clay tile with white painted timber windows), and detailing (mock Georgian/ Queen Anne architectural features and compositional order); (g) Front and rear elevations pre-eminent, with relatively blank flank elevations; (h) Large gardens at the rear.

76. The two new proposed houses are similar in appearance, size, and position to the other houses in Ingram Avenue. They have been designed so as to fit in with those other houses and so as to maintain the "rhythm and regularity" of those houses.

77. They have been positioned on the site of the Property so as to ensure the preservation of the mature trees. The new proposed house to replace the existing house on what was Plot 1046 has been positioned slightly to the north of the existing house so as to enable the new proposed house on what was Plot 1045 to be positioned as far over to the west as possible (whilst maintaining an appropriate space between the two new houses), in order to ensure the preservation of the trees. The need to preserve the trees makes it impossible to build a suitable new second house on the Property whilst at the same time leaving the existing house in its current position. The Arboricultural Report confirming this was not challenged.

78. Mr Murphy commented that the replacement for 24 was clearly designed to reflect the existing building. It would not be possible to put another similar house on 26 without the demolition of 24 because of the restraints imposed by the tree preservation order. Speaking primarily of Scheme B he noted in particular the circular bay feature of the existing house being reproduced albeit in a different position.

79. So far as the house to be 26 was concerned his view was that the plan layout of the house is very similar to that of the proposed house at 24 Ingram Avenue. Whereas the proposed 24 Ingram Avenue has three bays in the principal elevation to Ingram Avenue (to match the existing house), 26 is shown as having five. As with 24, the proposed house is entered through the central bay. Behind (and again as in 24) the plan steps backward from left to right (or from south east to north west). The overall scale of 26 Ingram Avenue is similar to that of the proposed 24: two storeys and a pitched roof, contained in a plan that is roughly the same in width and depth. As with 24, tall chimneys are placed at either end of the house. The detailed architectural expression of 26 Ingram Avenue is different from that of 24: the design is slightly more elaborate to the street, with a greater proportion of window to wall. The entrance bay feature is articulated with quoins and architraving. The materials that are proposed to be used are similar to those proposed for 24 Ingram Avenue. The proposed development of two adjacent houses would result in an arrangement in keeping with the grain of Ingram Avenue, and the prevailing scale of the area. The houses would be similar in shape, bulk and mass to the other houses in the street and have the same relationship with their boundaries: the gap created between the new houses, and between 24 and 22, are similar to the quite narrow gaps that exist elsewhere. The result will be that the development will reinforce the regular visual rhythm of the street. Scheme A proposes two houses of roughly similar architectural expression to Ingram Avenue. The proposed replacement of 24 would have had a similar front elevation as the proposed 26, and this would have been a perfectly satisfactory, contextual and well designed solution for the site.

80. It was, in his view, consistent with the intentions of the Suburb's architect and the original architect and builder of 24 Ingram Avenue that these plots are developed, and in his view doing so would not harm the street, its buildings or the Suburb. Importantly, a gap filled with trees would, in any event remain both as part of 26 and as part of 30 Ingram Avenue. There would still be a view of Turners Wood that are not substantially different to what exists now. The Tree Preservation Order regarding trees on the site of 30 Ingram Avenue makes it, in his view, inconceivable that any development such as a new house would be permitted there.

81. He was challenged at length on the desirability of an original house being replaced by something which was no more than a copy. The essence of his reply was that he could see nothing wrong with a reproduction in the spirit of the original which was itself derived from the work of earlier architects. It was pointed out that Southard was himself deriving his designs from Lutyens and others. He saw nothing wrong in this and it would compatible with the adjoining houses.

82. Mr Velluet took a very different view of the proposed new houses. In his view both submitted schemes for replacement development involve the creation of new houses very different in scale, plan and detailed design from the present house. He believes they lack the coherence in plan and understatement and subtlety in external design and the spacious setting

of the present house. His examples were the detailed designs of the prominent entrance porches of the two houses shown in Scheme A, and of 26 in Scheme B, and of the first floor windows directly above the entrances to both houses in both Schemes A and B which he described as "most curious and unconventional". Importantly to him, whilst the front elevation of 24 in Scheme B is closely based on that of the existing house, although narrower and thereby less satisfactorily proportioned, if approved and built, it would entirely lack the essential authenticity and originality of the existing building, and of course, the historical associations with Sir Arthur Elvin. It was noted that an attempt had been made to hark back to the semi-circular bay though not in the same position, and now lacking the purpose of the original of taking advantage of the larger garden.

83. Mr Velluet's evidence was criticised by Vertical as having largely been fed to him by Mr Davidson, the Trust architectural adviser and as comprising great tracts of the opinions of others, simply repeated and adopted. In my view this is not a justified criticism. Mr Velluet is entitled in forming his opinion to take account of the views expressed by others. What matters is that the view he finally expresses is his own view. It was not suggested that Mr Velluet did not genuinely hold the views that he expressed.

84. Mr Velluet exhibited a letter sent to the London Borough of Barnet at the time of the planning applications by Mr Crone of English Heritage and himself a former Trustee of the Trust in which he summarised English heritage's position thus:

> "English Heritage considers that 24 Ingram Avenue makes a positive contribution to the character and appearance of the Hampstead Garden Suburb conservation area, and that its proposed demolition should be robustly resisted. The property lies within the Hampstead Garden Suburb conservation area, which, as one of the first planned estates in England, is of national significance. The house stands on a large garden plot, which affords rare and cherished views through to Turners Wood beyond. These views are an important part of the character of the area and form part of the original layout of this part of the Garden Suburb. The demolition of an attractive, well-detailed house of this quality, which forms part of a wider series in this part of the conservation area by John C S Soutar, and the erosion of the wider landscape composition by infill development, should be unthinkable."

85. A further letter of 8 July 2009 from Philip Davies, Planning and Development Director (South) of English Heritage, in response to an appeal for support from Ms Blackburn said this:

> "I am aware that on occasion the Scheme of Management is challenged, and I am conscious that you have two current cases in Ingram Avenue. No 24 Ingram Avenue makes a significant contribution to the character and appearance of the conservation area and its proposed demolition should be strongly resisted. To lose buildings of this quality should be unthinkable. In addition, the character of the conservation area is engendered as much by the quality of the spaces between the buildings as by the buildings themselves. It is vital that the Trust continues to resist inappropriate extensions, such as that at No 25 Ingram Avenue., if the character of such spaces is not to be eroded, and the integrity of the area harmed."

86. Ms Blackburn similarly had criticism for the proposed new houses. In doing so, although she is herself an architect, she relied upon the advice given to the Trust by its architectural adviser, David Davidson, and the independent advice it received from Donald Insall Associates Ltd in the Insall Report. She noted that under the proposals, the proposed new dwelling houses were sited towards the right of the plot in order to avoid some mature trees close to the boundary with 30, and that in Scheme B there had been design changes to keep one of the proposed designs more like the current house. The two houses proposed appeared from the front to be of comparable size and massing to others in Ingram Avenue. Although their styles were loosely classical, the Trust's advice from their internal architectural advisers, was that the rear elevations of both houses were particularly poor being "an assemblage of mismatched architectural elements clearly resulting from a desire to squeeze as much onto the plots as possible." Both houses had basements and these were expressed as raised terraces at the rear of the houses. An open area to the side of each house lights the basement and was used for access. These features she considered undesirable

87. She noted that the depth of houses was greater than others in the road, and this was compounded by the single storey elements which extended well into the rear garden. This increased depth would, in her view, be visible from the road. Each house had been given a carriage drive, a feature common to most houses in the road. This would have meant four breaks in the front boundary hedge (there are, of course, already the two breaks for the existing carriage drive to 24). The basement at No.24 was closer to the boundary with No.26 Ingram Avenue than the current.

88. She did not resile from her view that there would not be space for a planted boundary between these properties as the Trust would normally expect, though there appeared to be no factual basis for the assertion. In her letter on behalf of the Trust to Vertical dated 26 March 2007 by which the Trust refused permission for Scheme B she expressed the view that although the amendments to the design were an improvement they did not address or overcome the Trust other objections. Even so she criticised the Scheme B saying that the front elevation of the proposed dwellinghouse was based on that of the existing Soutar house, with the centre of the front elevation projecting forward under a hipped roof. However, the house would have been 1450mm narrower than the existing and so the proportions would have changed. To accommodate this, the windows were pushed towards the centre bay, which in the view of the Trust's architectural advisers gave the elevation a rather mean appearance.

**GUIDELINES FOR DEMOLITION**

89. A part of the Trust's case has depended on its guidelines for demolition. In July 2001 the Trust published Guidelines for Demolition/Rebuilding. They go further than the government guidance in PPG 15.

90. By PPG 15 at para 4.27 the following guidance is given to local planning authorities in relation to conservation area control over demolition: "4.27 The general presumption should be in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area. The Secretary of State expects that proposals to demolish such buildings should be assessed against the same broad criteria as proposals to demolish

listed buildings (paragraphs 3.16-3.19 above). In less clear-cut cases – for instance, where a building makes little or contribution – the local planning authority will need to have foil information about what is proposed for the site after demolition. Consent for demolition should not be given unless there are acceptable and detailed plans for any redevelopment. It has been held that the decision-maker is entitled to consider the merits of any proposed development in determining whether consent should be given for the demolition of an unlisted building in a conservation area."

91. By contrast the Trust guideline starts from the premise: "It must be made clear that there will always be a presumption against proposals to demolish and rebuild". At para 2.1 the message is spelt out clearly: "The first step in establishing whether a house may be demolished is to assess its contribution to the present character of the area – whether that contribution is positive or detrimental. Only those houses that are detrimental to the area could be considered appropriate for demolition."

92. In the present case Mr Murphy took the view, in line with the view expressed by the Inspector at the 2004 planning appeal that the house in issue was "neutral". It did not in his view make a special contribution. By contrast on behalf of the Trust it was suggested, in accordance with its guidelines, a building should not be demolished unless it was detrimental to the area. The guidelines note that the character of the Suburb is largely defined by the unlisted buildings. In this case there is, it was said, an original Soutar house which fitted well with the street scene and although not outstanding was certainly not detrimental to the Suburb.

**THE LAW**

93. It was common ground that (a) that the existing covenants (unless modified) will impede the development of the Property by the demolition of the existing house and the construction of two new houses and (b) in order to succeed in its application for the modification of the covenants under section 84(1)(aa) of the Law of Property Act 1925 Vertical has to establish the following matters:

> 53. that their proposed development is a reasonable user of the land for public or private purposes;
>
> (ii) that the covenants do not secure to the Trust or other objectors any practical benefits of substantial value or advantage; and
>
> (iv) that money will be an adequate compensation for the loss or disadvantage (if any) which the Trust will suffer from the modification of the covenants.

94. Section 84(1B) provides that the Tribunal shall take into account not only the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant area but also "the period at which and the context in which the restriction was created or imposed and any other material circumstances". The period at which the restrictions were created was the period following the passing of the Leasehold Reform Act 1967 and its working out. The context in which the covenants under the Scheme were taken

was to preserve the Suburb, as set out in paragraph 1 of the Scheme. The context of the covenants in the transfer is that they were taken to benefit both the Trust and the adjoining landowners with an eye to the covenants in the original building lease. It is against this context that the covenants in the application fall to be considered.

95. The jurisdiction given to the Tribunal is discretionary. Even if the various factors are established the Tribunal has an overall discretion as to whether or not to modify or discharge the covenants as asked: see per Denning and Morris LJJ in *Driscoll v Church Commissioners for England* [1957] 1 QB 330 per Denning LJ at 342, Hodson LJ at 346 and Morris LJ at 357.

96. The burden of proof is upon Vertical to establish that the covenants should be modified as it desires. The law was set out by Mr Clarke FRICS when he observed in *Zeenab Al-Saeed* LP/41/1999 at paras 51 and 52:

> "51. As to the burden of proof I cannot accept Mr Harper's submissions on this point. He said that the application will only fail if all the evidence is against the applicant: if it is evenly balanced, or even weighted towards the objectors, I should permit the modification because this would not show the existence of substantial practical benefits to the objectors. In my judgment the burden of proof is on the applicant to show that the requirements of section 84(1)(aa) or I of the 1925 Act are satisfied. Only then do I have jurisdiction to modify the restrictions and, even then, I have a discretion whether or not to grant the application. In *Re Ghey and Galton* [1957] 2 QB 560, Lord Evershed MR, after referring to part of the judgment of Romer LJ in *Re Truman, Hanbury, Buxton & Co Ltd* [1956] 1 QB 261 at 270, said (at 659-60):-
>
> > "... it indicates that what has to be done, if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called, as such, a good and reasonable thing: he must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is so, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting in his own proprietary interest, is entitled to continue to enjoy that proprietary right."
>
> 52. In this application therefore the burden of proof is on the applicant to show that the requirements of paragraph (aa) or I are satisfied and that burden is, I suggest, greater due to the existence of a building scheme on the Estate."

97. The fact that the necessary planning permissions have been granted is merely a circumstance that the Tribunal should take into account when exercising its jurisdiction to modify or discharge the covenants. The grant of the permission does not necessarily require the Tribunal to discharge the covenant. The Lands Tribunal's task is separate from the planning process and requires an independent exercise of judgment. The fact that the proposed development has the benefit of planning permission does not determine the outcome of the application under section 84: see *Re Martin's Application* (1988) 57 P&CR 119 at 124-5 (CA).

It is for the Tribunal to determine whether the requirements of section 84 have been complied with and if they have to decide whether to exercise its discretion.

98. Since there is no evidence that the proposed development will prejudicially affect the value of any other property in the Suburb the question is whether the proposed development will deprive the Trust and the other objectors of a benefit which can be described as a "practical" benefit (ie real not theoretical) of "substantial" (not merely "some") advantage. In *Gilbert v Spoor* [1983] 1 Ch 27 the Court of Appeal accepted that a view might be a practical benefit. In that case the Court held the Tribunal was entitled to hold that the view as well as being of practical benefit was of substantial advantage. In *Shephard and others v Turner and another* [2006] EWCA Civ 8 Carnwarth LJ having set out the statutory background considered the meaning of the "protean" word "substantial" and concluded that it was probably best not to seek a substitute for the statutory word, though he approved the judicial descriptions for "substantial" in the Rent Act context viz "considerable, solid, big" by Stephenson LJ in *SJC Construction Co Ltd v Sutton LBC* (1975) 29 P&CR 322 at 327.

99. There is no requirement under the section that if a covenant is discharged or modified then compensation must follow. The statue provides for compensation by way of "A sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification" but there is no obligation to make any award: see for example *Winter and anor v Traditional & Contemporary Contracts Ltd* [2007] EWCA Civ 1088.

100. There will always be arguments to the effect that the modification of a covenant will prove to be the thin end of the wedge and prevent covenantees from enforcing their rights in other cases. As Mr Clarke FRICS observed in *Zeenab Al-Saeed* at para 69 "The position adopted by this Tribunal as to the thin end of the wedge was explained in *Re Snaith and Dolding* (l995) 71 P & CR 104. The former President (H H Judge Marder QC) said (at 118):-

> "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see *Re Ghey and Gallon* [1957] 2QB 650 and *Re Farmiloe* (1983) 48 P&CR 317. It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example *Re Henman* (1972) 23 P&CR 102, *Re Saviker (No.2)* (1973) 26 P&CR 441 and *Re Sheehy* (1992) 63 P&CR 95.
>
> Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

This part of Judge Marder's decision was adopted "as correct in principle" by the Privy Council in *McMorris v Brown* [1999] 1 AC 142 at 151-2 in dealing with a case on very similar Jamaican statutory provisions

101. More recently in *Shephard and others v Turner and another* Carnwarth LJ considered the point and noted at para 28 that the effects of the first modification might not be all one way. He suggested that the effect of the first modification might strengthen the objectors hand on a subsequent application to modify and concluded at para 29 that the thin end of the wedge argument is relevant but the issues it raises are issues of fact and not of law. He went on, referring to *Re Fairclough Homes Ltd* LP/30/2001, to recognise that a comparison had to be made between what the position would be if the modification were allowed and what the position would be, looked at practically, if the modification were not allowed. The Tribunal will only look at the worst that might happen if that is likely to happen: not at the worst that could be envisaged.

102. *Shephard and others v Turner and others* also contains dicta as to the situation where a benefit is derived from the covenant but it is not the intended benefit but "an incidental and uncovenanted benefit". "[T]hat does not mean that such a benefit is irrelevant. It does, however, mean that it is a factor that the tribunal is entitled to give less weight in the overall judgment of substantiality".

103. In my judgment it is not material that the Trustees were reasonably entitled to withhold their consent to Vertical's proposal. The test for a statutory modification of the restrictions is not the same as the test for a reasonable withholding of consent. Even if the Trust has reasonably withheld its consent to the proposed development, that does not mean that the proposed user is not reasonable. It only confirms that the restrictions impede that user.

104. The Section 19 Scheme requires the Trustees to act reasonably in determining whether or not to grant consent. Where a Court is required to determine a dispute between the Trust and a resident as to whether the Trust was entitled to refuse consent to a development the issue for the Court is not one at large as to whether or not consent should be granted but simply whether the Trustees had acted unreasonably in refusing consent. There may be reasonable views to the contrary, but this does not affect the matter: see *Estates Governors of Alleyn's College of God's Gift at Dulwich v Williams* [1994] 1 EGLR 112. If Vertical had felt that the Trust had acted unreasonably in refusing consent it could have made an application to the Court, though this would not have achieved its objective in that the absolute covenant in the 1981 transfer would still have barred the proposed development. By contrast, if Vertical can establish the relevant criteria under section 84(1)(aa), the discretion as to whether or not to allow a modification of the covenants to permit the development is the Tribunal's. The Trustees' view that permission should be refused under the covenant may be a reasonable one, but it is for the Tribunal and not the Trust to determine whether the covenant should be modified.

105. The fact that the covenants sought to be modified are contained not only in a private document (ie the 1981 transfer) but also in a public document (ie the Scheme approved and later modified by the Court under the 1967 Act) is material. In considering the modification of the covenants under the latter document there is a strong analogy with cases in which there is an application to modify or discharge covenants enforceable under a building scheme. In *Dobbin v Redpath and anor* [2007] EWCA Civ 570 the Court of Appeal held that there was a difference in approach to the application of the discretion under s 84(1) of the 1925 Act consequent upon the finding of a building scheme, but the expression 'increased presumption' was apt to mislead. It would be better for the Lands Tribunal to consider the matter in terms of

the weight to be attached to objections in the light of the special interest of the beneficiaries of covenants of the building scheme. In that case, the building scheme was a highly material factor in the exercise of professional judgment by the member in his consideration of the outstanding issues. The question of weight had been one for him and there were no grounds for interfering with his decision.

106. Similarly in my judgment the existence of the Scheme is a very material factor. If anything, it should carry more weight than a building scheme, which is purely contractual creating (as it is sometimes called) "a system of local law". By contrast a scheme under the 1967 Act is not contractual. It has been subject to considerable external consideration. It will only be approved by the High Court after a certificate has been granted by the appropriate Minister (the Minister of Housing and Local Government) that the scheme is "in the general interest". The Minister in granting the certificate and the Court in approving the scheme were required to "have regard primarily to the benefit likely to result from the scheme to the area as a whole … and the extent to which it is reasonable to impose, for the benefit of the area, obligations on the tenants so acquiring their freeholds…."

**Vertical's argument**

107. The real issue, in Vertical's submission, is whether the covenants secure to the Trust or other objectors any practical benefits. It characterised the Trust's objections as being (i) the modification would undermine the Trust's control over development in the Suburb (though it was not expressed in this way); (ii) the modification would result in the destruction of views to Turners Wood; (iii) the modification would result in the destruction of a house which is part of a group of similar houses in Ingram Avenue and in the Suburb and (iv) the Suburb is a conservation area. None of the Trust's objections, it submitted, amount, in the circumstances of this case, to a loss of a practical benefit of substantial value or advantage.

108. The Trust and the other objectors were confined to the objections which they raised in their Notices. They could not raise for the first time at the hearing objections not raised in their Notices. If it were otherwise, the Notices would serve no purpose and there would be an element of surprise which could lead to unfairness. In their notices the objectors did not raise a "thin end of the wedge" argument and they could not therefore rely on it.

109. As to (i), it is wrong as a matter of fact and law. As a matter of fact, there is no other double plot like this one, with only one house on it, anywhere else in the Suburb apart from for 30. Further the objection is misconceived as a matter of law. It can be said generally that every person who has the benefit of a restriction over the property of another has control over the development of it, and that an order of the Lands Tribunal will undermine that control, but that control can never be treated as a practical benefit for this purpose. Otherwise the purpose of the Lands Tribunal's jurisdiction to discharge or modify the restriction would be defeated. "Control" by itself is not a relevant benefit. It must relate to and secure the protection of some relevant amenity.

110. As to (ii): there is no covenant specifically directed to the protection of the view. There is a wall designed to provide the garden with privacy which at the same time limits the view of the wood. There are already trees and shrubs in the garden which obscure the view. The restrictions do not prevent trees being planted and then growing in the garden so as to entirely obscure the view. This is a claim to a benefit of which was not the object of the restrictions and is, at best, an incidental and uncovenanted benefit.

111. The one house was built on the one plot thus leaving it open at some time for another house to be built on the garden plot with the appropriate consents. The design of the flank wall of the house on 24 is to be contrasted in this respect with the houses on 16 and 14 Ingram Avenue (where the side elevations clearly show that the space between them was intended to be left open). Had the plot been intended as a plot for one house alone, then the probability is that the house would have been built in the middle of it, and not, as it is, on one side of it.

112. Not only is it impossible to build a suitable second house on the site of the Property without demolishing the existing house, but the existing house would in any event need substantial alterations to be made to it in order to provide the sort of accommodation internally that an occupier of such a house would expect today (new basement development, extensions for a new kitchen/family room and so on).

113. As to (iii), it is not capable of being a practical benefit. There is no evidence of any diminution in value of other houses elsewhere or that the quality of enjoyment of their properties or of the street will be affected in real terms in any way by the demolition of this house and its replacement with two houses which will be built in the same style and of the same size as other houses in the road. There have been similar developments before in the same street, and they do not stand out from other 1930s developments. Further, the house at No 24 is dull and undistinguished in its appearance.

114. The Trust sought to put before the Tribunal much of the evidence it and other objectors put in 2003 before the Planning Inspector to support its contention that the house at 24 should be preserved. It has to be noted that (even if the evidence were relevant to this application), it was not, in material respects so far as this application is concerned, accepted by the Planning Inspector.

115. However much weight is given to the views of the witnesses for the objectors, their views cannot amount to a description of a loss of a practical benefit of substantial value or advantage. There is no evidence that the loss of the house will reduce the value of any other property. A preference to see the house remain cannot be described as a practical benefit or a benefit of substantial advantage, particularly when it is to be replaced by a house the external appearance of which will be much the same. The houses which it is proposed to build on the Property will “fit in” with the other houses in the street, and do so more than the existing house does.

116. .The restrictions may secure “practical benefits of substantial value or advantage” in that for example it may be a practical benefit to have the Trust control development within the

Suburb to ensure that houses are not given inappropriate cladding or painted an inappropriate colour and so on. However, the ultimate question for the Lands Tribunal is not: "Do the restrictions secure practical benefits of substantial value or advantage?" but "Does the prevention of this particular development secure practical benefits of substantial value or advantage to the objectors?" Put another way: what value will the objectors lose or what disadvantage will they suffer if the development is permitted, and is that a loss or disadvantage such that they will be deprived of some practical benefit of substantial value or advantage?

117. The modification of the covenants sought by the Trust would enable a house built in 1936 to a design by Mr WT Powell who worked in the office of Mr JCS Soutar to be demolished. The house on the Property, unlike 16 Ingram Avenue, designed by Lutyens, is not listed. The existing house, in the view of the Inspector, does not have "great architectural distinction", it does not make a "positive contribution to the conservation area" and is "not in any way remarkable". It is "not special" and its "particular contribution" is "limited". Although she was making a planning decision, the criteria she applied are the same criteria as are to be applied by the Tribunal.

118. With all the evidence and argument before her the Planning Inspector decided that the house made no positive contribution. While the decision on the application before the Lands Tribunal is for the Tribunal to make and the test is different, if a building does not make a positive contribution, then it cannot be a practical benefit of substantial advantage to retain it. The planning authority did not consider that this presumption applied in the case of the existing house, for it gave planning permission and conservation area consent for its demolition. The planning authority and the Planning Inspector provide independent views of the arguments advanced by the parties on this application, free of any suspicion of "party loyalty".

119. In granting planning permission, the local planning authority stated that the proposal is acceptable because it "preserves the character and appearance of the Hampstead Garden Suburb Conservation Area, the street scene and preserves the amenities of neighbouring occupiers. The proposal does not adversely affect trees of special amenity value and provides adequate parking."

120. Neither the architect who designed the original house, Powell, nor Soutar, his employer, is regarded as a distinguished architect, unlike Unwin and Lutyens. It cannot really be said, though it is said, that the house should be preserved because it is the work of Powell and/or Soutar. There are, in any event, many other examples of their architectural design in Ingram Avenue and elsewhere. There are over 100 other, and better examples of the work of both, some listed. The buildings in Ingram Avenue were not all designed by the same architect but by a number of different architects. The 4 houses between 18 and 24 are the work of 4 different architects: They each used the same basic format but so too will the proposed development.

121. The existing house on the Property is materially different from, and not in harmony with, other houses in Ingram Avenue. It is separated from the adjoining property at 22 Ingram Avenue by a vehicular access way to Turner's Wood and from the house on the adjoining

property at 30 Ingram Avenue by an expanse of garden and woodland. This is in contrast to the rest of the street, and to its "rhythm and regularity".

122. One so-called practical benefit of substantial value or advantage to the objectors is stated to be that "Hampstead Garden Suburb is a conservation area". This cannot be relevant. The proposed modification will not deprive the Suburb of its status as a conservation area. Additionally, this is a planning concept, and not a property concept. The right to enforce the development principles enshrined in an area designated as a conservation area is vested in the local planning authority. In this case it has granted conservation area consent.

123. The retention of the house because it was originally the home of Sir Arthur Elvin (then Mr Arthur Elvin) cannot be a practical benefit of substantial advantage. The architecture of the building is not improved by the fact that almost sixty years ago a particular person lived there. Whatever his undoubted achievements, Sir Arthur Elvin is not what might be described as a famous person.

**The Trust's argument**

124. The Trust's case as set out in its Notice of Objection was that (i) the covenants do not "impede some reasonable user of the land" since in withholding consent to any development, the covenants expressly provide that the Trust must act reasonably and Vertical had not commenced proceedings for a declaration that consent is being unreasonably withheld; (ii) the proposed development is not reasonable (within the meaning of section 84(1)(aa) of the Law of Property Act 1925) in that (a) it involves destroying the amenity afforded by the views to Turner's Wood; (b) it involves destroying a house which is part of the harmonious Garden Suburb landscape, being part of a group of such houses in both Ingram Avenue and in the wider Garden Suburb; and (c) Hampstead Garden Suburb is a conservation area.

125. The Trust asserted that the covenants afford the Trust "practical benefits of substantial value or advantage to them" in that they enable the Trust to control development on the Garden Suburb for the purpose of preserving the amenity of the Garden Suburb and also for the purpose of maintaining and preserving the character and amenities of the Garden Suburb in accordance with the Scheme.

126. Further the Trust submitted that money would not be "an adequate compensation for the loss or disadvantage" which the Trust would suffer from the modification of the covenants. No monetary value could sensibly be put on green space and vistas within a semi-urban environment (particularly a garden suburb) nor on the ability to preserve its architectural harmony.

127. The Trust's primary case as put at the hearing was that it does not matter who is right in the debate over whether the house at 24 is worth retaining. The issue for the Tribunal is the worth of the covenants in enabling the Trust to prevent the proposed scheme. The covenants themselves are qualified (consent is not to be unreasonably withheld). Thus what has to be judged is the worth of the Trust's ability reasonably to withhold consent. Were Vertical to

attempt to argue in court that the Trust had unreasonably withheld its consent, they would fail: it is plainly a reasonable view that the house should not be demolished and that the garden should not be built upon.

128. The Trust submitted that the case is concerned with the legitimacy of its vigilance to enforce the Scheme and preserve the character of the Suburb. Where the application has already been given careful consideration by the body set up to preserve the Suburb and where that body has not acted otherwise than in seeking to preserve the amenities of the Suburb, that decision to be respected, even though alternative views may properly be held. A failure to do so could be expected to have very serious consequences for the future of the Suburb. Indeed Ms Blackburn asserted in her evidence that "the very purpose of the Trust will be fundamentally undermined: every unlisted house will be jeopardy."

129. The practical benefits of substantial value or advantage which the covenants help preserve are the integrity, ambience and character of the Suburb. The Suburb is highly valued by society in general. This can be seen from not only from the fact that it originated in an Act of Parliament (The Hampstead Garden Suburb Act 1906) but also the existence of the approved scheme of management under the 1967 Act.

130. In any event, the proposed development is not "reasonable" for the purpose of ground (aa) because "(a) it involves destroying the amenity afforded by the views to Turner's Wood; (b) it involves destroying a house which is part of the harmonious Garden Suburb landscape, being part of a group of such houses in both Ingram Avenue and in the wider Garden Suburb; and (c) "Hampstead Garden Suburb is a conservation area": this last point was raised in the Trust's notice of objection but was not mentioned in the counsel's skeleton argument or in course of oral argument.

131. The scheme involves destroying the amenity afforded by the views to Turner's Wood. If the garden area of 24 is built upon it is inevitable that development of the garden area of 30 will follow and the current fine view will be reduced to disjointed glimpses. The gap between 24 and 30 may have been left by chance, but the gap remained intact now for some 75 years. It is an established feature of the road, affording views to the woodland beyond which is effectively seen from few other gaps in the perimeter line of building which otherwise divorces and conceals this private area from public view. Historic 'accident' has frequently provided some of the happiest and most memorable architectural and town planning incidents, and the view across the gap makes a unique contribution to Ingram Avenue giving the road a very special feature, in contrast to other suburban roads and avenues which are fully built-up.

132. In the context of the Suburb as a whole, submitted the Trust, 24 is worth preserving and those who would sanction its demolition for a replica or something "respectful to the Soutar architectural tradition" are simply wrong. The understated, reticent style of 24 fits in with the character not only of Ingram Avenue but of the Suburb as a whole. The loss of an original house would set an unfortunate precedent. The Suburb could never be preserved if the original houses are replaced by shiny new ones. Ultimately the qualities of the Suburb – the "practical benefits" – are something intangible. It is of the very essence that their loss could never be compensated by money.

133. The Trust's 2001 Guidelines for Demolition go further than PPG 15 Para 4.27 in their protection of existing buildings from demolition. "The first step in establishing whether a house may be demolished is to assess its contribution to the present character of the area – whether that contribution is positive or detrimental. Only those houses that are detrimental to the area could be considered appropriate for demolition."

134. It has recently drafted a Conservation Area Character Appraisal and specifically identified the existing house as a building of "Architectural or Historical Interest".

135. The fact that the property is in a conservation area is a factor which militates against the relaxation of the covenants.

**Discussion**

136. The Trust's first argument goes to the general discretion of the Tribunal. If the relevant facts have been made out, then the Tribunal may (not must) modify or discharge the covenant. The Trust's argument that it is the body which has been entrusted with the obligation of determining what demolition and construction is permissible and that its decisions should be respected is, in my judgment, correct as far as it goes. But it is not the whole story. Respect does not involve slavish acceptance of the Trustees' decision. The Tribunal is the body which has to exercise its own discretion, rather than just rubber-stamping the Trustees' decision. There is statutory provision which gives the Tribunal which landowners the right to come to the Tribunal to obtain a modification of or release of covenants, and it is then for the Tribunal to make its own decision.

137. Just as the fact that all relevant planning consents have been obtained does not mean that the Tribunal must allow such modification as will permit a development to take place, so the refusal of consent by the Trustees is not conclusive against allowing the modification sought.

138. As I have already said, in my judgment the existence of the Scheme is a very material factor. If anything, it should carry more weight than a building scheme which is purely contractual creating, "a system of local law". In this case paragraph 1 of the Scheme stated that it was made "for the purpose of ensuring the maintenance and preservation of the character and amenities of Hampstead Garden Suburb." Since the Trustees were the persons entrusted with the management of the Scheme their views are entitled to great weight. That does not mean that their views must outweigh all other considerations. Were that so it would effectively oust the jurisdiction of the Tribunal contrary to what was held by Foster J in *Re Calthorpe Estate* (1973) 26 P&CR 120. In that case he held that it was not necessary to include the words "such consent not to be unreasonably withheld" in a provision of the Scheme because of the jurisdiction of the Tribunal under section 84.

139. In order for the Tribunal to be able (if it thinks it appropriate to exercise its jurisdiction) to modify the covenants as Vertical wishes, Vertical must show (1) that the restrictions unless modified would impede the development of the Property as two houses; (2) that the development of the Property as two houses is some reasonable user of the land for private

purposes; (3) that in impeding that development the restriction does not secure to persons entitled to the benefit of the restrictions any practical benefits of substantial value or advantage to them and (4) that money will be an adequate compensation for the loss or disadvantage (if any) which any person will suffer from the modification.

140. As to (1): unless a modification is obtained, the scheme cannot go ahead. The issue for the Tribunal is not whether the Trust has reasonably withheld its consent. The test for a statutory modification of the restrictions is not the same as the test for a reasonable withholding of consent. Even if the Trust has reasonably withheld its consent to the proposed development, it does not follow that the proposed user is not reasonable. It only confirms that the restrictions impede that user.

141. As to (2): each of the proposed development schemes is for "some reasonable user" (to use the statutory wording) of the land for public or private purposes. It is not necessary that the proposed use should be the best possible use of the land, only that it is a reasonable use. Vertical has obtained planning consent and of the criteria. While it is not in every case that the fact that planning permission has been obtained will satisfy a Tribunal that the development is a reasonable private user of land, there is nothing in this case to suggest that the demolition of a dilapidated house and the erection on the site of two houses is not a reasonable use of the Property, particularly in circumstances where the site was originally laid out as two building plots.

142. The real issue is as to (3). This case is concerned with the identification of a practical benefit of "substantial value or advantage" enjoyed by the Trust and its fellow objectors which would be affected by the modification. The distinction between "value" and "advantage" is, it seems to me the distinction between those benefits which have a readily ascertainable monetary value and those that do not. The section is concerned not only to protect those practical benefits which have a financial value but also those substantial benefits to which no monetary value can be readily ascribed. However a theoretical benefit of some advantage is not enough. A mere preference to see the house remain cannot be described as a practical benefit or a benefit of substantial advantage.

143. The Trust's general argument on this point is that to allow the demolition and development would be to undermine the Trust and the entire Scheme. This is in effect a "thin end of the wedge" argument expressed in hyperbolic terms. It does not seem to me that Vertical's argument that the point is not open to the Trust because it is not taken in the Trust's Notice of Objection is a sound one. The argument is a variant expression of the Trust's first ground of opposition.

144. In my judgment the Trust's argument is fallacious. The Trust has to consider each case on its merits. The fact that in one instance a covenant has been modified does not mean that in other cases a covenant will be modified. The Tribunal, if an application is made to it following a refusal of consent by the Trustees, will have regard to the scheme of covenants as a whole and assess the importance to the beneficiaries of maintaining the integrity of the scheme. If the application, if successful, would have the effect of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would deprive

the objectors of a substantial practical benefit, namely the assurance of the integrity of the scheme.

145. In the case of the Suburb the area covered by the Scheme is extremely large. The restrictions are not absolute restrictions. They do not contemplate that no new development will ever take place on any property. There is a steady stream of applications for permission to effect developments and alterations of one sort or another. This is not a case like those in which a single new house will have a dramatic impact on a small housing scheme. It might be that, if the application were successful, other persons bound by the Scheme might feel encouraged to try their luck before the Lands Tribunal but it does not seem to me that the outcome of this application ought to be seen either as an encouragement to other prospective applicants or to the Trust. It is a case which turns on its own special facts. As Mr Shaw FRICS writing to Ms Blackburn said: "I believe that it is too simplistic to suggest that permitting development of 2 houses at 24 Ingram Avenue would create a serious precedent. The issues surrounding each application are usually unique to the particular proposal." He went on to express the view that there was no really good reason to refuse approval for two houses at 24 and that the Trust would have the leverage to negotiate the design of two fine houses.

146. Turning to the specifics of this case: it is concerned with a proposal to develop what was originally laid out as two plots with two houses. Vertical submitted that "all that Soutar did was lay out the Property as two building plots only to see his original layout subsequently ignored. The present proposal will give effect to Soutar's original lay out." In my judgment this is not a persuasive point. It is clear that Ingram Avenue was developed as a commercial venture. All Soutar was doing was laying out the Avenue in one-third of an acre (roughly) plots. It seems unlikely that he or anyone else was much concerned at the time to see a single house on each plot.

147. For over seventy years only a single house has stood on this two plot site. It is not clear at what point the decision was taken to use the two plots for a single house. The house as built stands on only one of the plots, but it has the particular feature of the circular bay at the south-east end of the elevation which was clearly designed to take advantage of the large garden. Given Mr Elvin's business career as a developer it would be surprising if he had not considered the possibility of building a second house on the garden plot, but by the time he signed the lease he had evidently resiled form any such idea. The lease precludes him from doing so. Thus one can say that from at any rate November 1936 the intention, whatever Soutar thought when he laid out the Avenue, was that the two plots should be used for a single dwelling house.

148. The exterior of the house as it now stands is still very recognisably the house originally designed by Powell in Soutar's office. There are excrescences which have been added, such as the dormers and the unsightly 1980s single storey extension building attached to the main house which does not match the main house in style. They are, compared with some of the additions which have been made elsewhere in Ingram Avenue, of minor importance. So far as the interior is concerned, the experts are at odds as to how much of the original remains, but it is accepted that if the house is to be restored to a habitable state the interior will be entirely remodeled so that it is unlikely that any original features will survive. It is therefore in any terms inaccurate to talk about the preservation of an original house: the issue is the preservation of what is largely the exterior appearance of the original house.

149. I accept the view that there are plenty of other Soutar houses in the area, a number of which were designed by Powell in Soutar's office. I also accept the view that Soutar is a minor architect, in particular when compared to his predecessor Unwin and with Lutyens. In my judgment his importance was overstressed by the Trust in its evidence.

150. It is common ground that this house is not one of Soutar/Powell's best houses. As was apparent from my view it is an undistinguished building, even making allowance for the fact that I was seeing it in its present dilapidated state. It is not listed and in my judgment the identification of the existing house as a building of "Architectural or Historical Interest" in the Trust's recently drafted a Conservation Area Character Appraisal is best described as startling. Insall's Report (which Mr Velluet commended) stated that the house was "not outstanding architecture and from certain angles is handled in a rather heavy way", and "Neither is it one of the best works of this architect's office in comparison say with houses on Meadway Close, Meadway and Spaniard's Close." The identification of the house's special merit is contrary to the view of the Inspector and also views expressed in earlier years by other experts. Indeed Mr Velluet himself in the course of his evidence did not make any great claims for the house's architectural merit.

151. In these circumstances Vertical submitted that there is no practical benefit, let alone one of substantial advantage in keeping this particular house, when it is built in a style which after all was intended only to mimic the style of an earlier age. It is not a statement of 1930s design. It may be overstating the case to say (as Vertical did) it is a pastiche, but there is force in the submission that there is no real benefit in retaining this particular house when it is perfectly possible (as Mr Velluet accepted) to build a 21st century house in the same style and quality (probably better so far as both are concerned). The new houses, it was submitted, will be original houses, built in 2010 to copy a house built in a Georgian style in 1936 and that, it was said, does not mean there would be any benefit in keeping the 1936 house rather than replacing it with something similar.

152. Those residents of Ingram Avenue who did give evidence did not favour the house's retention. While it is clear from their statements that they were influenced in their views by the present condition of the Property, they had no desire to see the house remain whatever condition it was in. Thus one of the witnesses, Mr Witzenfeld, who owns 21 Ingram Avenue stated: "the character of the existing house is out of place with the majority of houses and ... the grounds surrounding the existing house does (sic) not reflect the "right feel" with respect to all the other plots in the street, it is completely out of style". Similarly Mr Munford of 35 Ingram Avenue stated: "I do not believe that building a second house on the land at 24 Ingram Avenue would adversely impact conservation issues within the Hampstead Garden Suburb because the style of the house on the application seem to fit very well within the street scape of the road, in fact much better than the existing house that exists on the plot."

153. So far as historic interest goes, the fact that Sir Arthur Elvin lived there cannot in reality be a ground for ascribing historic significance to the house. Sir Arthur's magnum opus, Wembley Stadium has been demolished, and in that context it would be somewhat odd to say that his history requires that the exterior appearance of his home should be preserved.

154. Taken in isolation it seems to me that it could not be said that the Suburb as a whole would suffer from the disappearance of the house. The house can best be described as being neutral. In these circumstances the house, as the inspector found, satisfies the criteria of PPG 15 for demolition. It does not however satisfy the criteria of the Trust itself. The Trust's guidelines require that it is shown that a house has a detrimental effect before it can be demolished. It does not follow from the fact that a house does not have a detrimental effect that therefore its continued existence is a practical benefit.

155. If the house by itself is not of such quality that its demolition should be prevented, is its place as a part of the street scene worth preserving? The Trust's case is that the demolition would involve destroying a house which is part of the harmonious Garden Suburb landscape, being part of a group of such houses in both Ingram Avenue and in the wider Garden Suburb.

156. It is not part of a group of houses by the same architect. Nor does it have any notable affinity with the adjoining houses. There is a similarity in the houses in the street, and they are for the most regularly spaced and position in the street. But 24 was described as "the gap in a regular set of teeth". It is further away from 22 than other houses are from their neighbours. This is of necessity because of the access way between 22 and 24, but there is a much larger gap to the south. In essence this part of the argument is that the group of houses have stood together for a long time and so should be allowed to remain together. In this regard I prefer the view expressed by the Inspector: "The house at No 24 already appears somewhat different to others in the road, in terms of its positioning, and this is caused not only by the double width of its plot, but also because there is a track leading to Turner's Wood between it and No 22....In my opinion, the rhythm and regularity of the relationship between many of the Ingram Avenue properties is not, therefore, maintained by the existing building at No 24".

157. So far as the wider Suburb is concerned, there was no evidence that the demolition of the existing house and the construction of two new houses would have any real effect on the suburb as a whole. Indeed Ingram Avenue as a whole (except 16) seems to have been regarded by Shanklin and Cox as rather lowering the architectural tone of the Suburb as a whole.

158. The value of the gap between 24 and 30 is put in two ways: one the value of the break in the street scene and the attendant impression of space and greenery, and the other in the view that the gardens of 24 and 30 are said to afford of Turners Wood. While there is some force in the point that this is a Garden Suburb and anything which detracts from the level of visible greenery is to be deprecated, it is not in general terms a point of any great weight. Such weight as it has is in relation to the specific assertion that the diminution of the gap between 24 and 30 would amount to the loss of a substantial advantage.

159. So far as this is concerned, were it not for the "views of Turners Wood" point, it would be of minimal weight. Ingram Avenue is a pleasant enough road with plenty of greenery readily visible around its large and opulent houses, but the break between the houses and the view in the gardens of two of them is hardly a matter of importance. Indeed the Inspector seems to have taken the view that if anything the gap detracted from the street.

160. The real gravamen of this objection is that it is said to block a view to Turners Wood. The objectors submitted that the proposed development "involves destroying the amenity afforded by the views to Turner's Wood" and that this will amount to the loss of a practical benefit of substantial value or advantage. There was no evidence to show that the value of any property will be affected by the proposed development. The question is therefore whether the views to Turner's Wood amount to a practical benefit of substantial advantage. A view, or the right to preserve a view, can clearly amount to such a benefit, even if the view is not enjoyed directly from the objector's property but whilst passing or driving down the street: see *Gilbert v Spoor*.

161. It was objected that the proposed development would block the only significant view to Turners Wood behind and that this view is an important feature of the amenities in the Suburb which should be maintained and preserved.

162. In my judgment, after viewing the area with counsel and solicitors, this is not a point of substance. The view of Turners Wood over the gardens 30 is a better view than the view over the garden of 24. There is substantial obstruction and lower level growth in the garden of 24 which impedes a decent view of the Wood. There is the higher level view (ie the view of tree tops) and there is a general feeling of greenery behind the row of houses on each side of the road, but there is nothing which would make the passer by pause on the road looking over the garden of 24 and say "Just look at that view". The view over the garden of 30 will remain, as will the views of the wood between buildings all down the Avenue: between 24 and 22, where the access way to Turners Wood runs, between 20 and 18 (though impeded by low level development, then between 18 and 16 and between 16 and 14. The view of Turners Wood from Ingram Avenue is not the sort of view anyone is going to come to see and ponder: it is much more a pleasant background reminder of rusticity to those walking or being driven down the Avenue. The proposed development will not in my judgment cause any such harm to the views of the Wood available that it could properly be described as depriving either the Trust or any of the individual objectors of a practical development of substantial advantage.

163. Then it is said by the Trust that if the application succeeded there would be a danger of infilling elsewhere in the Suburb. I do not accept that there are no other double plots in the Suburb apart from 30. The maps of the Suburb suggest that there are a few others, but they are few and far between. There may also some other places where there would be the possibility of infilling, but there was no evidence to suggest that were a second house to be allowed on this double plot, it would be a forerunner to any great number of applications to develop. If there are applications to infill elsewhere in the Suburb, and it did not seem from the evidence that there were many prospective infill sites, they must each be dealt with on their merits.

164. The real gravamen of the Trust's case on this point was Ms Blackburn's assertion that the large garden of 30 Ingram Avenue (itself built on a double plot) was a prime candidate for development. "If the garden area of 24 ... is built upon it is inevitable that development of the garden area of 30 ... will follow and the current fine view will be reduced to disjointed glimpses". In my judgment this is not correct: there are substantial trees the subject of preservation orders in the garden of 30 which would prevent any such development. This was Mr Murphy's evidence: Mr Velluet agreed with it and I accept it. There is no evidence that

any attempt to obtain permission to have trees removed in order to enable another house to be built on the site would have any prospect of success.

165. The final supposed practical benefit of substantial value or advantage to the objectors is said to be that "Hampstead Garden Suburb is a conservation area". This is not a relevant consideration. The proposed modification will not deprive the Suburb of its status as a conservation area. In any event the right to enforce the development principles enshrined in an area designated as a conservation area is vested in the local planning authority. In this case it has granted conservation area consent.

166. I conclude therefore that the modification of the Scheme and the covenants to enable the fulfillment of Vertical's schemes would not deprive the Trust or the individual objectors of any benefit of substantial value or advantage.

167. That leads to the question of compensation. This case is not about money. It is not suggested that the Trust will be a penny the worse off if the existing house is demolished and two new houses erected on the site. There is no evidence that the loss of the house will reduce the value of any other property. Nor is there any evidence that the financial interests of the other remaining objectors who, so to speak, cling to the Trust's coat tails, have any financial interest in the prevention of this development. Although they live in the Suburb there is no suggestion any of them live in such proximity to the Property that they will be in any financial way affected by the outcome of the case. There is no requirement that when a modification or discharge is ordered there must be an order for compensation. In this case there is no basis for making any monetary award.

168. The remaining point is whether the Tribunal, having the jurisdiction to do so, should exercise its discretion to modify the covenants and the Scheme and, if so, how.

169. In *Re Calthorpe Estate* Foster J was concerned with the need to include words such as "such consent not to be unreasonably withheld" in the scheme covenants and would not do so on the basis that an aggrieved party could always go to the Lands Tribunal. I considered whether this suggested that the Tribunal should, as a general rule, only exercise its jurisdiction where it was of opinion that the scheme managers were acting unreasonably. I do not, on reflection, think that the intention to suggest any such restriction can be implied into his judgment.

170. The fact that the Scheme restrictions have been imposed as part of a section 19 Scheme is an important factor. It does not mean that a modification is impossible, but it does require the Tribunal can look at a broader picture. It is unlikely that the Tribunal will frequently exercise its jurisdiction where the managers entrusted with the management of the scheme will not permit a relaxation of a covenant, but it has to be borne in mind that the purpose of this Scheme is for "ensuring the maintenance and preservation of the character and amenities of the Hampstead Garden Suburb". If the proposed modification is not going to affect the character or amenities and the applicants have satisfied the Tribunal that all the criteria required by

section 84 of the 1925 Act have been satisfied, it is difficult to see why, the necessary criteria having been met, the Tribunal should refuse to exercise its discretion to allow the modification.

171. There is no persuasive evidence that to exercise the discretion in this case will open the floodgates to further applications. Still less does the permission of the modification in this case undermine the position of the Trustees. The right to apply to the Tribunal has existed throughout the existence of this Scheme. The fact that this is, so far as the Tribunal is aware, the first successful application in almost forty years suggests that applications will remain rare. This is a very large estate with some 3500 residences in it. Its architecture and history is very varied. The architecture of houses around Central Square, for example, cannot be compared to that in Ingram Avenue. The circumstances affecting a house in the Old Suburb or near the A1 cannot be compared to those affecting a house in Ingram Avenue. It cannot sensibly be suggested that the modification permitting the demolition of 24, a single house built on one half of a plot originally laid out for two houses, will set a precedent elsewhere. Others minded to seek a modification should be well aware that in doing so they are likely to face a very uphill task.

**Conclusion**

172. In my judgment the covenants in the Scheme and the 1981 transfer should be modified. They should be modified only so far as is necessary for the achievement of the appropriate scheme. In this instance Vertical has proposed two alternative schemes. The latter scheme is presumably thought by it to be the more appropriate of the two, and appears to be regarded by the Trust as the less objectionable to it. I shall therefore permit the appropriate modifications to permit the realisation of Scheme B.

**Costs**

173. Any party wishing to make any application as to costs must in the first instance make its submissions in writing within 28 days of the date of handing down of this decision.

Dated 1 March 2010

His Honour Judge Reid QC

## Addendum on costs

174. A party which seeks the discharge or modification of a binding covenant is seeking to obtain for itself an advantage which it regards as valuable and to remove from the objector property rights which the objector has. Whilst it is true that Parliament has created the statutory right which the applicant seeks to exercise this does not mean that the applicant is not seeking to obtain an advantage for itself. The Practice Directions recognises that the general rule that a successful party will recover its costs does not apply to such applications and that in general (subject to any offers which may have been made) a successful applicant will not recover any costs from an unsuccessful objector unless the objector has conducted itself in an unreasonable manner. The Practice Direction does not fetter the discretion of the Tribunal as to how it will exercise its discretion in any particular case but merely gives valuable guidance as to how, other things being equal, the Tribunal is likely to exercise its discretion.

175. In the present case the objectors conducted their case at considerable length and with great pertinacity. In my view, subject to two points, that is not sufficient to entitle the successful applicant to its costs. While it could be said that the objectors over-egged the pudding in the way in which they put some parts of the case it does not seem to me that it can be said that the objectors' case was conducted so unreasonably as to justify an award of costs.

176. The first point on which it can properly be said that the objectors are open to criticism is in their early attempt to assert that the Lands Tribunal did not have jurisdiction to entertain an application for the discharge or modification of covenants imposed by a scheme under the Leasehold Reform Act 1967. The point was taken and then abandoned unargued at the directions hearing. This conduct must have given rise to some additional costs on the part of the applicant, and on the directions hearing the costs of the issue were specifically reserved to the Tribunal. In the overall scheme of the case those costs are likely to be of little significance, but no properly arguable reason has been advanced by the objectors as to why they should not pay the costs incurred by their conduct in taking the point and in my judgment the objectors should pay the costs of that issue subject to detailed assessment on the standard basis if not agreed.

177. The second point relates to the **Calderbank** offer made to the objectors. The offer was to pay each of the objectors The Hampstead Garden Trust Limited and Mr Gerrard (the only objector living on Ingram Avenue) £25,000 plus their reasonable legal costs conditionally on the application succeeding providing that they withdrew their objections. The offer was rejected.

178. In this regard it is important to recall that the application related not only to the variation or discharge of restrictions imposed by agreement but also restrictions imposed by a statutory scheme under the Leasehold Reform Act 1967. Whilst it might have been comparatively simple to obtain the unopposed variation or discharge of a covenant imposed by agreement, rather different considerations apply to cases in which what is sought is to vary or discharge a restriction imposed as part of a statutory scheme imposed by the Court for the benefit of a defined area.

179. In such a case the Tribunal will look very closely at the proposed variation. The essence of the objectors' argument was that in these circumstances a **Calderbank** offer has no real place. In my judgment that is a misguided view. In the appropriate case a **Calderbank** offer will have considerable importance, though it can never result in a settlement of the application in the way in which the acceptance of a C**alderbank** offer will settle civil litigation. Even if the **Calderbank** offer had been accepted it would still have been up to the applicant to satisfy the Tribunal that a variation should be granted.

180. In this particular case the result of the refusal of the offer was that the application was conducted at greater length (and with considerably more animosity) than would have been the case had the offer been accepted, but the Tribunal would still have had to be satisfied as to the appropriateness of the relief sought. Although the Trust did lay considerable stress of what it regarded as the reasonableness of its own decision, it is not correct to suggest, as the applicant does, that the Trust did not address the requirements of section 84 in making its case.

181. Taking an overall view of the case, bearing in mind the sensitivity of this particular scheme, that this is the first occasion in which an attempt to vary the scheme has come before the Tribunal, that the applicant would have had to make a detailed case to the Tribunal in any event, and that in general the conduct of the objectors was not such as to justify an award of costs against them, it does not seem to me that this is a case in which the failure of objectors to "beat" the **Calderbank** offer justifies an award of costs. It does not follow from this decision that there may not be other cases in which it will be found to be appropriate to make an award following failure to accept a **Calderbank** offer.

182. In my judgment therefore the appropriate course is to direct that there should be no order as to costs of the proceedings, including the application for costs, except that the objectors pay the costs of the issue as to the jurisdiction of the Tribunal, such costs to be assessed on the standard basis if not agreed.

183. Since writing this judgment on costs I have received a further letter dated 26 April 2010 from the objectors' solicitors in which they say that "if the Tribunal is minded to award any costs to the Respondent, we must insist on an oral hearing, we would hope that this however would not be necessary." My direction was that matters of costs should be dealt with by written representation. The objectors are in no position to "insist" on an oral hearing. An oral hearing and the costs which would result from such a hearing would in any event be disproportionate to the sum of costs likely to be involved in the only issue in respect of which I have made an award of costs. There will be no oral hearing.

Dated 6 May 2010

His Honour Judge Reid QC