UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Number: LP/24/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – proposed mosque and madrasah – whether objector acting as a custodian of the public interest or as a landowner of adjoining and adjacent land – whether substantial practical benefits – traffic, parking, noise – breach – whether discretion should be exercised to refuse application – application granted subject to acceptance of further provisions by applicants – Law of Property Act 1925, ss84(1)(aa) and (c)

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

BY

THE TRUSTEES OF THE GREEN MASJID AND MADRASAH

Re: 713 Yardley Wood Road
Moseley
Birmingham
B13 OPT

Before: A J Trott FRICS

Sitting at: Birmingham Magistrates Court, Victoria Law Courts, Corporation Street, Birmingham, B4 6QA
on 23-25 April 2013

William Hansen, instructed by Hadgkiss Hughes & Beale, for the Applicants
Justin Bates, instructed by Birmingham City Council Legal Services, for the Objector.

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The following cases are referred to in this decision:

Re Bass Limited's Application [1973] 26 P&CR 156
Re Martins' Application [1988] 57 P&CR 119
Re Thames Valley Holdings Limited's Application [2010] UKUT 325(LC)
Re Vertical Properties Limited's Application [2010] UKUT 51 (LC)
Re Thames Valley Holdings Limited's Application [2010] UKUT 325(LC).
Re Willis's Application [1998] 76 P&CR 97
Re Wards Construction (Medway) Limited's Application [1994] 67 P&CR 379
Shephard v Turner [2006] 2 P&CR 28
Re Felton Homes Ltd's Application [2004] Lands Tribunal LP/3/2003 (unreported)
Re George Wimpey Bristol Limited's Application [2011] UKUT 91 (LC)
Re Lee's Application [2012] UKUT 125 (LC)
Re SJC Construction Company Limited's Application [1974] 28 P&CR 200
Ridley v Taylor [1965] 1 WLR 611
Re Houdret and Co Ltd's Application (1989) 58 P&CR 310.
Re Loves' Application (1994) 67 P&CR 101
Zenios v Hampstead Garden Suburb Trust Limited [2011] EWCA Civ 1645
Stockport Metropolitan Borough Council v Alwiyah Developments (1986) 52 P&CR 278
Re Ecclesiastical Commissioners for England's Conveyance [1936] Ch 430
Mayor of Wellington v Mayor of Lower Hutt [[1904] AC 773,775]

The following further cases were referred to in argument:

Crest Nicholson v McAllister [2004] 1 WLR 2409
Dobbin v Redpath [2007] 4 All ER 465
Re Stanborough's Application [2012] UKUT 21 (LC)
Gilbert v Spoor [1983] 1 Ch 27

DECISION

Introduction

1. The Trustees of the Green Masjid and Madrasah (the applicants) own the freehold interest in 713 Yardley Wood Road, Moseley, Birmingham, B13 OPT (the application land or the property).

2. The application land was previously owned by Birmingham City Council (the council or the objector) who granted a 99 year lease of the property in 1937. That lease apparently allowed the application land to be used as a doctor's surgery. In September 1967 the council sold the freehold reversion to the then leaseholders. The conveyance of the freehold stated at clause 2:

> "The Purchasers HEREBY JOINTLY AND SEVERALLY COVENANT with the Corporation [the council] for the benefit and protection of so much of the adjoining or adjacent land of the Corporation as is capable of being benefited thereby that the Purchasers will observe and perform the stipulations and restrictions set out in the Fourth Schedule hereto."

Paragraph (2) of the Fourth Schedule stated:

> "Not to use or allow or cause the said land and premises hereby conveyed to be used for any purpose other than that of a private dwelling-house and the premises hereby conveyed shall not be occupied by persons in excess of the permissible number as defined by the Sixth Schedule to the Housing Act 1957."

3. In November 1998 the then owners of the freehold interest, who also owned the leasehold interest, wrote to the council and asked it to vary the freehold covenant to allow them to use the application land in conformity with the user clause in the 1937 lease, thereby allowing them to merge the freehold and leasehold interests. The council agreed and on 2 May 2000 the parties entered into a deed of variation. That deed stated:

> "2. The Council grants the release herein contained in respect of those parts of the adjoining or adjacent land which remain within its ownership at the date hereof.
>
> 3. The Owner hereby covenants with the Council for the benefit of the adjoining and adjacent land of the Council not to use or allow or cause the Said Land [the application land] to be used for any purpose other than that of a private dwelling-house and or for the practice of a medical practitioner dentist solicitor or other professional person."

4. The applicants applied under section 84 of the Law of Property Act 1925 on 21 October 2011 to modify the restrictive covenant contained in clause 3 of the deed of variation. They relied upon grounds 84(1)(aa) and (c). They applied to have the restriction modified so as to permit the use of the application land as a mosque (masjid) and madrasah or, alternatively, as a place of worship including associated or ancillary religious education.

5. The council objected to the application on 20 January 2012 as the original covenantee. A second objection, made by Dennis Darlington, a resident of a house in Yardley Wood Road close to the application land, was struck out by order of the Tribunal on 13 April 2012 due to the objector's failure to comply with a previous order of the Tribunal.

6. Mr William Hansen of counsel appeared for the applicants and called Mr Mohammed Ramzan and Mr Mohammed Imtiaz Dawood as witnesses of fact; Mr Azher Shareef BSc, BEng, MRICS, FPENG, FBENG, of Property Link Professional Surveys Limited, as an expert valuation witness; and Mr Philip Jones BSc, CEng, MICE, MCIHT, FIHE, MIHT, a director of Phil Jones Associates Limited, as an expert transport planning witness.

7. Mr Justin Bates of counsel appeared for the objector and called Mr Mike Stackhouse, Councillor Susan Barnett, Councillor Alexander Buchanan and Mr Stephen James McCabe MP as witnesses of fact.

8. I made an accompanied site inspection on the afternoon of 23 April 2013. I made a further unaccompanied inspection of the site and the surrounding area on Friday, 24 May 2013 between 12.30 pm and 2.30 pm.

Facts

9. I derive the following facts from the statement of agreed facts, the evidence and my site inspections.

10. The property is a two-storey building built in the 1930s with single-storey extensions on three sides of the original building. The boundaries of the property to the rear and side are formed from 2 metre high concrete panels topped with razor wire. To the rear (west) of the building is an area of surface car parking which extends along the side (south) and to the front (east) of the building. The property is set back from Yardley Wood Road and is separated from it by an area of greensward. The property has its own vehicular access from Yardley Wood Road.

11. To the north of the application land are three residential terraces, comprising a total of 11 houses, 689 Yardley Wood Road, which is a detached house, and a tabernacle, outside which is an unmade car parking area for approximately 15 to 20 cars. These houses and the tabernacle are served by a service road leading from Yardley Wood Road and which runs from opposite the northern end of the property northwards to opposite 689 Yardley Wood Road. It appears that originally there was an access from the service road to an entrance at the north of the property but this has now been blocked off.

12. Immediately to the south of the application land is a community centre beyond which are a pair of semi-detached houses and then a row of terraced and semi-detached housing leading southwards to the junction of Yardley Wood Road and Haunch Lane. There is a modern church at 765 Yardley Wood Road. The properties to the south of the application land are also served by a

service road. The greensward outside the application land and the community centre separates the two service roads. Cars can be parked without restriction along both service roads.

13. To the west of the application land is Billesley Common which is a large area of public open space. There is a pedestrian access to the common from Yardley Wood Road which leads between the application land and the community centre. To the east of Yardley Wood Road are residential properties both fronting that road and in the streets to the rear. There is a parade of eight shop units (some combined into larger units) which is divided by the junction with Bondfield Road. There is forecourt car parking outside the shops and a pedestrian crossing over Yardley Wood Road is located almost opposite the property. There are four more shops a little further north at the junction of Yardley Wood Road and Trittiford Road.

14. The council owns the properties on either side of the application land, namely the community centre to the south and 711 Yardley Wood Road to the north. It also owns a significant number of other properties in Yardley Wood Road and in the residential streets to the east.

15. The property was used for many years as a doctor's surgery but was placed on the market in 2008. The solicitors acting for the freeholder wrote to the council on 12 November 2008 informing it that the proposed purchaser wished to use the property as a mosque and community centre and asking whether the council would agree to vary the restrictive user covenant to allow such a use. The council refused on 11 December 2008.

16. The property was sold to Olton Developments Limited (Olton) on 24 April 2009. Despite being the legal owner Olton was in fact only a bare trustee for the Green Masjid and Madrasah Charity. On 2 June 2009 Olton's solicitors wrote to the council saying that Olton intended to let the property "for educational purposes with the view to running classes in partnership with 'Oxford College of Management Sciences' of Manchester." They asked the council to confirm that this use would not breach the restrictive user covenant and, if this was not accepted, expressed the intention to apply for the covenant to be varied.

17. The council replied on 27 August 2009 and said that it did not consider the property was suitable for the proposed educational use due to the likely volume of traffic that would be generated and the limited on-street parking provision. It said that it was not prepared to vary or remove the existing restrictive covenant.

18. Despite this response the applicants proceeded to use the property as a mosque and madrasah and have done so continuously since 2009.

19. On 20 September 2011 the property was transferred from Olton to the Trustees of the Green Masjid and Madrasah Charity.

20. On 14 September 2011 the council issued proceedings in the High Court to obtain an injunction to stop the use of the property as a mosque and madrasah. These proceedings were

stayed to allow the present application to be made and determined. The terms of the stay were not put in evidence.

21. It is accepted by the applicants that the current use of the property as a mosque and madrasah is in breach of the restrictive covenant contained in clause 3 of the deed of variation dated 2 May 2000.

Evidence

Evidence for the applicants

22. Mr Ramzan described his knowledge of the local area and of the growth of the Muslim population in Billesley. There was no other masjid in the vicinity and it was "incredibly important" to the community that there should be one locally given the religious requirement to attend and pray at the masjid five times a day. From his experience he did not think that the traffic generated by the masjid would cause delay or have an adverse impact on nearby properties. Speaking as a local property developer (a director of Olton) he said that he was unable to think of another building in Billesley that might be suitable for the masjid.

23. Mr Ramzan said that Olton had purchased the property in April 2009. He was not a trustee of the Green Masjid and Madrasah Charity and did not attend the mosque at the property on a regular basis. He acknowledged that when Olton bought the property he knew that, following the vendor's approach in November 2008, the council were not willing to vary the covenant and that the trustees had been so advised. After Olton had purchased the property it had asked the council directly to vary the covenant but this request had also been refused. He accepted that, notwithstanding this refusal, the property had been used as a mosque and madrasah within months of its acquisition by Olton.

24. Mr Ramzan explained that before Olton bought the property a planning application had been submitted for the change of use to a masjid and madrasah. The local planning authority had advised that planning permission was not required and the application had therefore been withdrawn. The trustees had planning permission to use the property as they wished and they received legal advice that in the light of the planning permission there should not be a problem with varying the restrictive covenant given that the council was also the local planning authority. But certain people began to hound councillors about the issue and the council did not agree to vary the covenant. Mr Ramzan said that it was not until the council initiated proceedings for an injunction that he was made aware of the possibility of applying to the Tribunal to modify the covenant.

25. Mr Dawood gave evidence as a trustee of the Green Masjid and Madrasah Charity. He explained that the activities currently taking place at the property were prayer sessions and lessons. Prayers were held five times a day from morning (about four to five attendees) to evening (10 to 20 attendees). The busiest prayer session "by far" was on Fridays between 1 pm and 2 pm which attracted about 100 attendees. Two separate classes were held simultaneously on weekday evenings with about 40 to 50 children attending each. There were two special religious events at

Eid (twice a year) and Ramadan (30 days each year). The maximum capacity of the property was about 205 people, with 100 in the main hall and the remainder in seven other rooms. These activities were now well established and Mr Dawood said that the local Muslim population would be much inconvenienced if they were unable to continue using the property.

26. Mr Dawood said that the trustees had been researching the number of Muslims living in the locality of the property since 2008. They had so far visited houses in 109 roads and identified 450 "Muslim houses". There was no other mosque in the Billesley district or the surrounding area. The nearest mosques were in Moseley, Kings Heath and Sparkbrook but none of them were convenient for Billesley residents and the closest was some two miles walk. Mr Dawood produced an analysis of the attendees of the mosque which showed that the majority of them came from the Billesley district and the area immediately surrounding the application land.

27. Mr Dawood said that the next door community centre was unaffected by the use of the property as a mosque and madrasah. The neighbour to the north at 711 Yardley Wood Road, a council tenant, had indicated that he had no problem with the activities at the property. Nobody had complained directly to the trustees about any problems caused by on-street parking or otherwise.

28. Before purchasing the property the trustees considered several other buildings in the locality but those properties which might have been suitable were not for sale. They reached the firm conclusion that the property was the only suitable and available building for use as a mosque in the locality.

29. Mr Dawood acknowledged that the trustees had known that they were in breach of the restrictive covenant when they acquired the property. But their main concern had been to ensure that they had planning permission for the proposed use. They thought that the council, having confirmed there was no need for planning permission, would reach an agreement with the trustees about the variation of the covenant in due course. The council were both the local planning authority and the beneficiary of the covenant and the trustees thought that it was sufficient that the planning position had been resolved. The trustees had been told that planning permission was "the bigger issue". They had not been informed about the possibility of modifying the covenant by an application to the Tribunal until the council took proceedings to injunct the trustees.

30. There were certain times of the year when prayers would be held late at night and these might continue until 11pm or later. But Mr Dawood said that no complaints had been made directly to the mosque about any problems of noise when people left the premises. When Mr Dawood led the prayers he always announced that people should leave without disturbing local residents or causing a nuisance. The trustees were at pains to promote good relations and to bring benefits to the area.

31. Mr Shareef considered that the application land was located in a mixed residential and commercial area. He said that a mosque in this location would encourage Muslims to live, work and establish businesses in the locality. This was a recognised pattern that occurred in many areas

where mosques had been built. He concluded that the value of local properties would increase as a result of the mosque being established on the application land.

32. The conversion of the property into a mosque was unlikely to have any effect upon the value of the adjoining community centre because the centre "serves members from all sides of the community irrespective of religion." But Mr Shareef thought that the use of the centre would increase "if there are amenities and facilities that could attract users of the religious building." He concluded that once the mosque was "fully established" there would be a greater use of the community centre which would increase its value by up to 5%. Mr Shareef accepted that this was an arbitrary figure for which there was no evidence.

33. Mr Shareef next considered the effect of the mosque on 711 Yardley Wood Road, the adjoining property to the north. Based on Mr Jones's report Mr Shareef said that traffic, parking and noise issues were "within acceptable limits". He concluded that Muslims would pay a premium to live in close proximity to the mosque and that consequently the value of No. 711 was likely to increase by at least 10%.

34. Mr Shareef reviewed the criteria that needed to be satisfied in order for a building to be used as a mosque and said that there were no suitable alternative sites available for purchase in the vicinity of the application land.

35. Mr Jones gave evidence about the traffic and parking implications of the use of the property as a mosque and madrasah. He did so by comparing the traffic generation of the previous use as a doctor's surgery with that of a mosque. He established the traffic movements for the doctor's surgery upon the assumption that four doctors had previously worked there and by making comparisons with four other similar sites that he had identified from the Trip Rate Information Computer System. Mr Jones concluded that the highest hourly traffic flow movements for the doctor's surgery (10am to 11am) would have been 29 with the total over the whole day (7am to 7pm) being 178. He rounded these figures to 30 and 180 respectively.

36. Mr Jones obtained direct evidence of traffic movements at the mosque by undertaking two surveys, one on Friday, 8 June 2012 and the other on Monday, 11 June 2012. He supplemented those results with data that the applicants had collected in a survey conducted during October 2011 and which Mr Dawood exhibited as part of his evidence.

37. Mr Jones's first survey was conducted during the Zuhr prayer session on a Friday between 1.15pm and 2.15pm. This was the busiest prayer session of the week. The survey took place during the school half-term holiday which meant there was a particularly large attendance of 154 people (99 adults and 55 children). 65 adults (66%) were interviewed, 54% of whom said they had come by car, although no distinction was made between drivers and passengers. 45% of adults walked. The equivalent figures for the applicants' own survey, which was taken for all services over a five day period from Friday, 14 October to Tuesday, 18 October 2011, were 54% and 42% respectively.

38. 21 adults said they had come by a car that was parked on-site. Grossing this figure up to allow for the fact that only two thirds of the adult attendees were interviewed meant that 32 adults had arrived by a car that was parked on-site. A maximum of 23 cars had parked on-site during the prayer session so the occupancy rate of each car was 1.4 adults. 14 adults said they had arrived by car that was parked off-site which meant that a total of 15 cars had parked off-site during the prayer session. The most popular location to park was on the service road to the south where four cars were parked. Mr Jones inspected both service roads during the service and said that he had observed on-street parking but all of it on the other side of the street to the private access ways. He said that there was considerable capacity for additional parking in both locations.

39. The second survey was conducted on a Monday afternoon during the madrasah class held between 4.30pm and 5.30pm. 26 children attended the class and were accompanied by seven adults, five of whom came in cars. Four of the adults dropped their children off on-site; the fifth driver dropped the children off on Yardley Wood Road. The madrasah class therefore gave rise to no demand for parking.

40. Mr Jones concluded that the Zuhr prayer session on the Friday generated 76 traffic movements and the Monday madrasah generated 20 traffic movements. He did not have any survey data for the other four prayer sessions on the Friday but he assumed that in total they were equivalent to the main Friday Zuhr prayers. This gave an overall total of 172 traffic movements per day based on the busiest day of the week. This traffic generation was of the same order of magnitude as the estimate of 180 daily vehicle trips generated by the former doctor's surgery.

41. Mr Jones accepted that the pattern of traffic generated by the doctor's surgery would have been different to that of the mosque. The former did not generate traffic before 7am or after 7pm. It had less peak flows and was more evenly distributed over the day. Car parking and traffic movement at the mosque was shorter but more intensive. Nevertheless Mr Jones thought it was still a valid exercise to compare the traffic generated by the two types of use.

42. The total daily volume of traffic using Yardley Wood Road was approximately 14,000 vehicles and so the use of the madrasah on the busiest day of the week only represented some 1% of the overall flow. Mr Jones said that this change in traffic flows would be imperceptible.

43. Mr Jones's surveys also provided information about the distribution of those attending the mosque. They showed that attendees were almost exclusively local. Those who walked all came from within 1 km of the site, while, apart from two outliers, all those who came by car travelled no more than 2.5 km (straight line distance).

Evidence for the objector

44. Mr Stackhouse is employed as a valuer in the council's Property Services Division of the Resources Directorate. He gave evidence about the history of the use of the application land, the present extent of the council's landholdings in the locality, the various approaches to the council to

vary the restrictive covenant and the background to the council's action in the High Court to enforce the restrictive covenant.

45. The council owned 78 properties on Yardley Wood Road including seven that were within the area that the Tribunal had identified as requiring notification of the application. These included the two properties adjoining the application land. The council also owned Billesley Common and the grass verges in front of the property. He said that the properties which required protection under the covenant were generally all of those within the council's ownership. Mr Stackhouse said that he had not received complaints about the use of the application land personally from any party.

46. Mr Stackhouse was challenged on his statement that "off-site parking is limited and any off-site parking is likely to disturb adjoining residential occupiers, who have access by way of a service road". He accepted that there were areas in the locality where one could park on the street but he did not consider these to be ample or sufficient to cope with the traffic generated by the mosque. He said he would be surprised if attendees of the mosque would be prepared to walk far to the property from their parked cars. He accepted that he was not a traffic expert and that the council had called no expert traffic evidence. The statement at the end of his witness statement that the council opposed the variation of the covenant to protect those with the benefit of the covenant "from the significant increase in traffic which is likely to arise and has already arisen from the use of the property as a mosque and madrasah" was, he acknowledged, an assertion that was not supported by evidence.

47. Councillor Susan Barnett has been a councillor for the Billesley Ward, Birmingham since May 2011 and previously from 2002 to 2007. She said that she had lived and worked in the area for most of her life. She described Yardley Wood Road and the area around the application land. Road improvements had been undertaken after an accident involving a child and following a petition sent to the ward committee in January 2012. Councillor Barnett had been told by local residents that there had been an increase in traffic around the application land which the residents attributed to the use of the property as a mosque. There were problems with on-street parking on the service roads near the property with people's driveways being blocked and cars being parked on the grass verges. Bondfield Road, on the opposite side of Yardley Wood Road from the application land, had also experienced an increase in the number of parked cars. Councillor Barnett had also received complaints about noise coming from the property late at night and early in the morning.

48. The concerns of residents were put to Councillor Barnett at ward meetings, in person and by letter, email and telephone. Councillor Barnett described the level of local concern about the mosque as "very high" and estimated that she spent about 5% of her constituency time on this issue.

49. In her witness statement Councillor Barnett stated that the council's opposition to the variation of the covenant was "to protect Council properties with the benefit of the covenant from an increase in traffic to and from the property, which is likely to arise if the covenant is varied and has already arisen from the use of the property as a mosque and madrassah." During cross-

examination Councillor Barnett said, twice, that this was the only reason that the council opposed the current application.

50. Councillor Alexander Buchanan was elected as a councillor for Billesley Ward in 2010. He knew the local area very well having lived in the ward for most of his life. He said that local residents were concerned about the impact on traffic and parking of the use of the property as a mosque and madrasah. He had had eight or nine meetings with local residents about the issue and the subject was always raised at ward meetings. Residents complained about double parking, damage to trip rails, parking on grass verges and an increase in traffic. There had also been complaints about noise late at night coming from people leaving the mosque. The residents had direct experience of these problems. Councillor Buchanan exhibited a number of diary sheets that had been kept by some of the complainants and which provided written and pictorial evidence of the various problems.

51. Councillor Buchanan described the level of concern about the use of the property and the problems it caused as being "high" and estimated that it took up some 10% to 15% of his constituency time. He stated that the council opposed the application to vary the covenant "to protect council properties with the benefit of the covenant from the increase in traffic and problems of parking which is likely to arise if the covenant is varied and has already arisen from the use of the property as a mosque and madrassah".

52. Mr Stephen McCabe was elected as the Member of Parliament for the Birmingham constituency of Selly Oak, which includes the Billesley Ward, in 2010. Previously he was the Member of Parliament for Hall Green constituency, which also included Billesley Ward, from 1997-2010. In total he had represented the area for 15 years. Between 1990 and 1998 he had been a councillor in the neighbouring ward of Brandwood. He knew the Yardley Wood Road area very well.

53. Mr McCabe said that local residents (over 20 in total) had raised concerns about the mosque at council meetings, report back sessions, calls to his office and by returns to a postal survey that he had conducted and which produced a 12% response rate. In his experience this was a very high figure for such a survey and demonstrated the strength of local feeling.

54. The exhibit to Mr McCabe's witness statement contained the survey results. There was an undated covering letter to the survey which comprised five questions. The first three questions were:

> "Q1: Do you agree that the rules governing the use of the property should be upheld and enforced?
>
> Q2: Have you experienced any problems with this building in the last 3 years? Please give details.
>
> Q3: What do you feel is an acceptable use [of] this building?"

Two sets of results were given, the first of which showed a 12% response rate (301 survey questionnaires returned out of 2,514 households contacted). The second set of results, marked "results from closer analysis", showed a 7.3% response rate (169 survey questionnaires returned out of 2,328 individuals contacted). There were also separate analyses of the responses from residents in Yardley Wood Road (12% response) and Chinn Brook Road (3.2% response).

55. The initial set of results showed that 22% of respondents had experienced problems with the property in the last three years, a figure which increased to 29% in the "closer analysis" results.

56. Mr McCabe said that local residents had expressed concerns about the breach of the covenant, noise, increased traffic, parking and obstruction and the use of the property for a purpose that did not have planning permission. They were concerned that these problems would get worse if the covenant was varied to allow the long term use of the property as a mosque.

57. Mr McCabe said that he and Councillor Buchanan had met with the "elders" of the mosque. The elders had acknowledged the concerns of the local community and admitted that the property was not ideal for their purposes. Mr McCabe had asked the council to assist in the identification of a suitable alternative building but no such building had yet been identified.

Submissions

Submissions for the applicants

58. Mr Hansen said that the applicants' primary case was made under ground (aa). They relied upon both limbs of section 84(1A). Mr Hansen invited the Tribunal to consider ground (aa) by reference to the approach adopted in *Re Bass Limited's Application* [1973] 26 P&CR 156.

59. Mr Hansen firstly considered whether the proposed user was reasonable. The property had planning permission for use as a mosque and madrasah. Its previous use as a doctor's surgery fell within Class D1(a) of the Town and Country Planning (Use Classes Order) 1987, as amended. Its current use fell within Class D1(h): "for, or in connection with, public worship or religious instruction". As both uses fell within the same use class no planning permission was required to change from one use to the other. The council, as local planning authority, had confirmed this in writing.

60. Mr Hansen also referred to the Birmingham Unitary Development Plan 2005 which provided guidelines for the conversion of existing buildings to provide places of worship serving the needs of more than just the immediate population (paragraph 8.33). Those guidelines accepted in principle that (i) such uses could be appropriately sited in residential areas, and (ii) the use of detached dwelling houses or pairs of semi-detached houses would be acceptable.

61. Mr Hansen submitted that the reasonableness of the proposed user was also supported by (i) the lack of suitable alternative properties in the area (neither the applicants nor the objector had

been able to identify any viable or available sites); (ii) the fact that the application land was not part of a building scheme; and (iii) the location of the mosque at the property was in keeping with the character of the local area which was primarily residential with nearby places of worship. Mr Hansen concluded that the proposed use fulfilled an important local need and was a reasonable user which was self-evidently impeded by the covenant.

62. Mr Hansen then considered whether by impeding the proposed user the covenant secured practical benefits of substantial value or advantage to the objector.

63. The council claimed to be the custodian of the public interest and sought to rely on *Re Martins' Application* [1988] 57 P&CR 119. Mr Hansen said that the purpose of the restriction was not to protect the public interest but was "for the benefit of the adjoining and adjacent land of the Corporation." The purpose of the covenant was clear from the wording of the instrument and it could not be properly interpreted as having been imposed by the council as the custodian of the public interest. Mr Hansen said that in the council's earlier litigation which preceded the current application the council's position was that it was 711 and 725 Yardley Wood Road, which were contiguous with the property, which had the benefit of the covenant as "adjoining and adjacent land".

64. Mr Hansen submitted that the objector's reliance upon *Re Martin's Application* was misplaced. That was a case about a covenant made pursuant to section 37 of the Town and Country Planning Act 1962 which restricted the use of an area of land to public open space and prohibited any building upon it. The Court of Appeal upheld the Tribunal's decision on ground (aa) that it was a practical benefit of substantial advantage to the objector, Hastings Borough Council, to prevent detriment to the visual amenity of this part of its area for which money would not be an adequate compensation. The circumstances in the present application were different: the covenant had been imposed for the specific purpose of protecting the council's adjoining and adjacent property and did not engage any role the council might have as the custodian of the public interest.

65. Mr Hansen distinguished the facts of the present application from those in *Re Thames Valley Holdings Limited's Application* [2010] UKUT 325(LC) and *Re Vertical Properties Limited's Application* [2010] UKUT 51 (LC) which involved covenants in favour of the National Trust and the New Hampstead Garden Suburb Trust Ltd respectively and in which the objectors' role as the custodian of the public interest was clear. In *Re Thames Valley Holdings Ltd* the Tribunal, George Bartlett QC, President, said (at paragraph 36):

> "The point is an obvious one, and is simply stated: if the purpose of the restriction is to protect the public interest, and if the benefit of the restriction to the covenantee body lies solely in its ability to enforce the restriction, the mere payment of money to the covenantee will do nothing to alleviate the loss of the benefit. The public interest, the sole concern of the covenantee, would have suffered, and the mere payment of money to the covenantee will not make up for this."

The essential question was whether the purpose of the covenant was to protect the public interest. It was clear on the facts that this was not the case in respect of the subject covenant. The

restriction protected the council with respect to the two adjoining properties that it owned. It was a straightforward and ordinary covenant and bore no resemblance to the type of case involving custodianship of the public interest.

66. Mr Hansen submitted that even if I was against him on this point the council's argument would fail because, on the facts, there was no loss or disadvantage to the public interest caused by the proposed modification to the covenant. He referred to *Re Willis's Application* [1998] 76 P&CR 97 where the Tribunal, Mr P F Clarke FRICS, said (at page 114):

> "Where an objector holds the benefit of a restriction as custodian of the public interest and will suffer some insubstantial loss or disadvantage from the discharge or modification, then the application will fail because money *per se* cannot be an adequate compensation. But where the objector is custodian and will not suffer any loss or disadvantage from the discharge or modification, then the question of compensation does not arise at all and the absence of compensation will not be fatal to the application."

In *Re Wards Construction (Medway) Limited's Application* [1994] 67 P&CR 379 the Tribunal, His Honour Judge Bernard Marder QC, President, held that by impeding the proposed redevelopment the restriction did not secure to those whom the Sevenoaks District Council sought to represent any practical benefit of substantial value or advantage so that it was not open to the council to claim to act as guardian of the public interest in maintaining the restriction, and as the council would suffer no loss from the proposed modification, the question as to whether money would be an adequate compensation did not arise. Neither the council nor the public interest would be injured by the proposed modification.

67. Mr Hansen said that the custodian point was a distraction. Even if it applied there would be no loss. Mr Shareef's valuation evidence, which was the only expert evidence on the point, indicated that the presence of a mosque would increase rather than decrease house values in the locality of the application land.

68. The restriction did not secure any practical benefits for the council in its capacity as freehold owner of adjoining and adjacent land. The council owned the freehold interest in 725 Yardley Wood Road which was immediately south of the application land. It had been let on a long lease to the Malachi Community Trust and there was no evidence that the use of the property as a mosque and madrasah had adversely affected the use of the community centre or the value of the council's reversionary interest. The council also owned 711 Yardley Wood Road immediately to the north of the application land. This was subject to a council tenancy. The occupier had not raised any objections to the current use of the application land and there was no adverse effect on the value of the council's freehold interest.

69. In considering the substantiality of any practical benefit secured by the covenant it was necessary to examine what other use could be made of the property without breaching the covenant. In *Shephard v Turner* [2006] 2 P&CR 28 Carnwath LJ (as he then was) said (at paragraph 37):

> "However, in considering the practicality and substantiality of the benefits to the objectors of being able to prevent that use, there must be an element of comparison with what would

happen if the modifications are not allowed. If an equally damaging development could be carried out without breaching the restrictions, and there is evidence that it is likely to happen, then the apparent benefits of impeding the proposed development may be illusory."

Mr Hansen acknowledged that one should not push this argument too far by comparing the proposal with an unlikely, but permissible, development. In this application a reasonable comparator was a doctor's surgery, a use that was both rational and possible. It had been used as such in the past and the comparison was not an illusory exercise. Mr Jones's evidence had shown similarities in the traffic generated by the former use as a doctor's surgery and the property's current use as a mosque. The restriction did not secure any substantial practical benefit. It did not preserve the character of the area or the amenities of local residents.

70. Mr Hansen made what he described as an overriding submission about the nature of the objector's evidence. He argued that there had been no proper evidence to substantiate the objection and queried whether elected representatives were best placed to offer evidence. He made two general points:

(i) Evidence in the form contained in the witness statements of Councillors Barnett and Buchanan and Mr Stephen McCabe MP could not be satisfactorily tested by cross-examination. It was hearsay evidence. It was fundamental to natural justice and to a fair hearing that the applicants should have the opportunity to test the evidence rigorously. But the objector's evidence lacked specificity and was entirely based upon generalities. Mr Hansen said that under these circumstances the Tribunal should place little weight on such evidence.

(ii) The objection of Mr Denis Darlington of 709 Yardley Wood Road was struck out by order of the Tribunal dated 13 April 2012. But that objection had crept in at the back door by being included as incident diary sheets in the exhibits of Councillor Buchanan. Mr Darlington did not have the benefit of the covenant and no weight should be given to such untested evidence. In this connection Mr Hansen relied upon *Re Felton Homes Ltd's Application* [2004] Lands Tribunal LP/3/2003 (unreported).

71. The evidence of the two councillors should be given no weight. It comprised anecdotal stories about one or two incidents which proved nothing. The traffic objection was supported by no direct evidence from a single local resident. No such resident was called to give evidence nor were any emails, letters or petitions produced to corroborate the evidence of the councillors. There was a glaring evidential lacuna that could not be filled by one or two anecdotal examples.

72. Mr Hansen submitted that the objector had produced no expert traffic evidence to support its assertions that (i) the use of the property as a mosque and madrasah had resulted in "an intolerable level of traffic which is entirely unsuitable for a residential area", and (ii) that residents had been unable to park and/or get in and out of their driveways owing to the volume of traffic which the council said was a problem which continued throughout the day. Mr Jones's evidence on the other hand was compelling and persuasive and should be accepted. He had demonstrated that there was adequate on-site parking that was sufficient for all but the busiest times on Friday afternoon prayers and special religious occasions. There was more than adequate off-site parking for peak time use. The increase in traffic, ignoring the traffic that would be generated by other uses of the property,

was in the order of 1% when set against the 14,000 daily vehicle movements along Yardley Wood Road. It was a negligible amount that would not be noticed.

73. Nor was there any direct evidence about obstructions caused by parked cars or damage to the grass verges. These were assertions by the councillor witnesses that could not be attributed to the attendees of the mosque. Mr Stackhouse had said that he had received no complaints. He had accepted that Mr Jones had fairly summarised the position in his expert report when he said:

> "From my inspection of these [two service] roads I consider that there is adequate capacity to accommodate this amount of off-site parking and that there is no need for any vehicles to be parked across private driveways."

74. Mr Stackhouse's concluding comment in his witness statement that the enforcement of the covenant would protect those with the benefit of it from "the significant increase in traffic which is likely to arise and has already arisen from the use of the property as a mosque and madrassah" was another assertion unsupported by evidence. While Mr Stackhouse did not accept that there was ample off-street parking he did accept that it was available in a variety of locations.

75. Mr. Hansen submitted that Mr Jones was a highly impressive and reliable witness. His evidence supported the conclusion that, by impeding the proposed user, the covenant secured no practical traffic or parking benefits to the objector, either measured against a comparative use that did not breach the covenant, or otherwise.

76. Mr Hansen argued in the alternative that by impeding the user of the property as a mosque the restriction was contrary to the public interest under section 84(1A)(b) of the 1925 Act. The evidence of Mr Shareef, Mr Dawood and, for the objector, Mr McCabe had shown a lack of any suitable alternative site for a mosque and a madrasah in the locality. There was a substantial, and growing, Muslim population in the area and the Unitary Development Plan recognised the multi-cultural nature of the local demographic and emphasised the need to provide a cultural environment that reflected this diversity. There was a compelling local need for a mosque and a madrasah which amounted to a strong public interest in its provision.

77. The question of whether money would be an adequate compensation for any loss or disadvantage which the objector would suffer from the modification of the covenant if either section 84(1A)(a) or (b) was established did not arise because the applicants' evidence had shown that no such loss or disadvantage had occurred. Indeed the evidence of Mr Shareef and Mr Jones, the only expert evidence before the Tribunal, indicated that the objector had not been injured and that ground (c) of section 84(1) had also been satisfied.

78. Mr Hansen submitted that if the Tribunal was satisfied on the merits of the application then it would be wholly disproportionate to refuse relief by exercising its discretion to express disapproval of the applicants' conduct in using the property in breach of the restriction. The facts of the present application could be distinguished from those in *Re George Wimpey Bristol Limited's Application* [2011] UKUT 91 (LC) and *Re Lee's Application* [2012] UKUT 125 (LC) upon which the objector relied. The applicants accepted that they knew about the restriction when they bought the

property. They made their own application to vary the covenant but this had been refused by the council. They had continued to use the property in breach of the covenant but they had not been advised of the possibility of making an application to this Tribunal until the council had commenced injunction proceedings against them. They had wrongly, but in good faith, thought that the council's acceptance of the fact that they had planning permission for their proposed use meant that they were in a position to negotiate a modification of the covenant. This was not an example of a profit-motivated company presenting the Tribunal with a fait accompli comprising a new building constructed in a flagrant breach of a restriction and in the teeth of strenuous objection. The applicants in this case were charitable trustees who had not been professionally advised on this point. A breach of covenant by the applicants was not a trump card that the objector could play having failed to sustain a valid objection. For the Tribunal to treat it as such and to exercise its discretion by withholding relief would be unduly harsh.

Submissions for the objector

79. Mr Bates submitted that the general purpose of ground (aa) was, as stated by Carnwath LJ in *Shephard v Turner* (at page 629): "… to facilitate the development and use of land in the public interest." The objector had been criticised for its lack of detailed and specific evidence. But the local population had been complaining collectively and their elected representatives and the local authority, as the democratically accountable body, were in the best position to report the seriousness of the impact of the use of the property upon the local community and to gauge its effect upon the public interest in the area. It was not, as the applicants suggested, a question of weighing one expert report against another. It was entirely appropriate to start from the position that the councillors and the local Member of Parliament were best placed to give evidence on behalf of the community since they had personal experience of the extent and the nature of the complaints caused by the use of property as a mosque and madrasah.

80. The applicants said that the objector did not have a role as the custodian of the public interest and that its interest was limited to that of an adjoining and adjacent landowner. Mr Bates submitted that the present application was similar to *Re Martin's Application* where, notwithstanding the grant of planning permission, the Tribunal held that the council, as objector, would be injured by the proposed development in its capacity as custodian of the public interest.

81. The reasonableness of the proposed user had to be considered in the context of the objector's role as such a custodian of the public interest. The use of the property as a mosque and madrasah was not objectionable per se. But this was not the right building for such a use. The restriction secured substantial practical benefits to the objector by preventing on-street parking, access difficulties and late night noise. There was no reason to disbelieve the evidence of the councillors. They had seen the problems for themselves. This was not a complaint from an individual tenant of the council; it was about the interests of all the people in the local area. Hence the type of evidence presented by the council. The applicants relied upon *Felton Homes* but no local authority was involved in that case and there was no custodian of the public interest. In *Felton Homes* there were a large number of people seeking to be heard who were not so entitled. That was not the situation in the present application. It was self-evident that once the council was involved then wider issues had to be addressed. That was how the public interest was to be identified.

82. Mr Bates submitted that Mr Jones's evidence was not as helpful as the applicants suggested. It was not possible to make a meaningful comparison between the use of the property as a doctor's surgery and that of a mosque. The doctor's surgery generated a peak movement of 10 vehicles per hour over limited opening hours. 154 people attended the mosque on the Friday afternoon when Mr Jones undertook his survey. That number might be untypically small bearing in mind Mr Dawood's evidence of 193 signatures to a petition in support of the use of the property as a mosque and his acceptance that the trustees were actively encouraging more Muslims to attend. The intensity of use as a mosque was much greater than that of a doctor's surgery and the hours of use were quite different. The comparison between the previous and proposed uses was a red herring. Mr Jones's evidence showed that at least 15 cars were parked off-site during Friday afternoon prayers. Those cars parked on the service roads and caused problems to local residents. The ability to control and prevent peaks of use was of substantial value to the council.

83. Impeding the proposed use was not contrary to the public interest. 70 to 90% of local Muslims already worshipped elsewhere and the applicants had not established that there was an unmet need. Even if this locality did need a mosque it did not mean that it should be located on the application land. The covenant was not old – only 13 years in its current form – and resulted from arm's length negotiations. In refusing previous applications to modify the covenant the council had tried to balance all the interests of the local community and nothing had changed in that respect. The council were in the best position to judge the public interest and the Tribunal should be slow to second guess the council's decision. The applicants had to show that their proposed use was so important as to be almost an exceptional case (see *Re SJC Construction Company Limited's Application* [1974] 28 P&CR 200). They had not done so. The existence of planning permission for the proposed use was only one factor to take into account (see *Re Martins' Application*).

84. Mr Bates concluded on ground (aa) that the primary benefit to the council was its ability to retain influence and control over the use of the application land. Taking into account the needs of all of the members of the local community, it was not in the public interest to modify the covenant. Since the covenant secured practical benefits of substantial advantage to the council in its capacity as guardian of the public interest money would not be an adequate compensation for any loss or disadvantage suffered (see *Re Martins' Application* and *Re Thames Valley Holdings Limited's Application*).

85. Mr Bates said that neither party placed great weight upon the applicants' reliance on ground (c). That ground was relied upon in cases where an objection was frivolous or vexatious: per Russell LJ in *Ridley v Taylor* [1965] 1 WLR 611 at 622F. The council's objection was neither frivolous nor vexatious. They were entitled to pursue an objection in the light of a considerable number of complaints made by local residents. Ground (c) was not relevant in this application. Mr Bates submitted that neither ground (aa) or (c) had been made out and that the application should therefore be refused.

86. Mr Bates said that if, contrary to his submission, the Tribunal was satisfied that either ground (aa) or (c) were made out the Tribunal could still properly decline to grant the modification sought, having regard, inter alia, to the conduct of the applicant. In *Re George Wimpey Bristol Limited's Application* the Tribunal, Mr Norman Rose FRICS, said (at paragraph 35):

> "Since the applicants have not succeeded in establishing the ground relied upon, I have no power to modify the restriction, and the application is refused. I would add that, if ground (aa) had been made out, it is unlikely that I would have exercised the discretion that I have to modify the covenant. This is because I find on the evidence that the extensive works which Wimpey Homes have carried out on the application land were not an inadvertent action resulting from the discovery of a covenant at a late stage in the development programme. Rather, they were the result of a deliberate strategy of forcing through the development on the restricted land in the face of many objections from those entitled to the benefit of the restriction, to the point where they have so changed the appearance and character of the application land that the Tribunal would be persuaded to allow them to continue with the development. It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flaunt their legal obligations in this way."

87. In *Re Lee's Application* the Tribunal, Mr George Bartlett QC, President, found force in the objector's submission that, even if ground (aa) had been made out, it would have been appropriate to refuse the discharge or modification as a matter of discretion because of the conduct of the applicant.

88. In the present appeal both Mr Ramzan and Mr Dawood said that they knew of the existence of the restrictive covenant before the property was purchased. Furthermore they knew that the council had refused the request of the previous owners to convert the property to a mosque and madrasah. The council had then refused the applicants' own request to vary the covenant. The applicants said that they thought the covenant could be sorted out later following the clarification of the planning position but there was no suggestion that they did not know that what they were doing at the property was prohibited by the covenant. In reality the applicants had simply and knowingly gone ahead and broken the covenant. They had chanced their arm and committed a wilful breach. The applicants had continued to do so until the council initiated injunction proceedings. Under these circumstances, and in the light of *Re George Wimpey Homes Ltd's Application* and *Re Lee's Application*, the Tribunal should express its disapproval of the applicants' flagrant and calculated disregard of the covenant by refusing the application.

89. The applicants relied upon *Re Vertical Properties Limited's Application* to support their argument that the Tribunal should not exercise its discretion and refuse the application. That case was concerned with the "thin edge of the wedge argument" which did not apply to the present application. The applicants knew exactly what they were doing and the Tribunal should not endorse their behaviour.

90. Mr Bates submitted that if the Tribunal decided to grant the application it should do so in the alternative form proposed by the applicants, namely for the use of the application land as a place of worship including associated or ancillary religious education. Mr Bates said that to grant a general rather than a specific religious use would be fair in all the circumstances.

Conclusions

91. I deal firstly with the question of whether the council's status as an objector is founded both on its own account (in respect of adjoining and adjacent land that it still owns) and as the custodian of the public interest (for the benefit of its tenants and the owners and occupiers of other properties in the neighbourhood).

92. The council support their argument that they have a role as the custodian of the public interest by reference to *Re Martin* and *Re Houdret and Co Ltd's Application* (1989) 58 P&CR 310. Those cases can be distinguished from the present application inasmuch as they involved covenants that were imposed under planning agreements. In *Re Martin* the restrictive covenant was contained in an agreement entered into under section 37 of the Town and Country Planning Act 1962, while in *Re Houdret* the restriction was imposed under a deed entered into under section 52 of the Town and Country Planning Act 1971. In both cases the council's role as custodian of the public interest was based on a statutory right to enforce the covenant as if the council owned unspecified adjacent land with the benefit of the covenant.

93. A similar situation arises in respect of the enforcement of covenants by a local housing authority under section 609 of the Housing Act 1985. Thus in *Re Willis's Application* the purchasers covenanted in terms similar to those contained in the deed of variation in the present application. The facts are set out by the member, Mr P F Clarke FRICS (at page 99):

> "… under the right to buy provisions of the Housing Act 1980, the purchasers covenanted with the vendor "for the benefit and protection of so much of the adjoining or adjacent lands of the council [as] are capable of being benefitted thereby" to observe and perform the covenants referred to in the Fourth Schedule to the conveyance.
>
> …
>
> Similar restrictions were imposed on all houses on the estate sold by the council."

The member concluded (at page 113):

> "I am satisfied that by virtue of its retained ownership of houses and its continuing powers and duties under section 609 of the Housing Act 1985 the council still has the role of custodian of the public interest."

The public interest that was sought to be protected "is the amenity of the estate and the preservation of a scheme of covenants for the benefit of that estate."

94. A similar conclusion was reached by the Tribunal, His Honour Judge O'Donoghue, in *Re Loves' Application* (1994) 67 P&CR 101 (at page 107):

> "I am satisfied that the council is by virtue of its retained ownership of substantial parts of this estate and also in accordance with its powers and duties under the provisions of section 609 of the Housing Act 1985 a custodian of the public interest in this matter."

95. In *Re Willis* and *Re Love* the local authority objectors owned retained land but their role as the custodian of the public interest was derived (at least in part) from the exercise of their statutory

powers under the 1985 Act. The ability of an objector to act as a custodian of the public interest is not necessarily limited to planning agreements or for the purposes of the 1985 Act, and nor is it necessarily limited to public bodies. In *Zenios v Hampstead Garden Suburb Trust Limited* [2011] EWCA Civ 1645 the Court of Appeal held that the respondent's interest as an objector was that of the public interest even though it was not a public body.

96. In *Re Willis* there was a scheme of covenants designed to benefit an identifiable estate, a substantial part of which was retained by the local authority. The covenant in the present application was imposed under a deed of variation that was intended to regularise the anomaly between the user permitted under the 1937 lease, which allowed use as a doctor's surgery, and the restrictive covenant as to user imposed under the 1967 conveyance of the freehold reversion of the property, which prevented use as a doctor's surgery. There is no evidence that the covenant was imposed (i) under a scheme of similar covenants that were consistently imposed upon the sale of properties by the council in order to protect the amenities of a defined estate; (ii) under a building scheme; or (iii) under or in connection with any statutory powers, for instance those relating to planning agreements or the role of the council as a local housing authority.

97. It is possible for local authorities to have the benefit of a restrictive covenant solely as the owners of the land to which it is annexed, see for instance *Stockport Metropolitan Borough Council v Alwiyah Developments* (1986) 52 P&CR 278.

98. Mr Stackhouse described the purpose of the variation to the 1967 freehold covenant at paragraph 15 of his witness statement:

> "At the time of the variation [May 2000], the Council agreed to the variation to reflect the fact that the 1937 lease had allowed for use of the property as a doctor's surgery and the property had been used as such ever since. However, the Council also wanted to ensure that the adjoining Council properties, with the benefit of the covenant, would not be inconvenienced or experience undue nuisance by the variation of the covenant. It was considered that this variation achieved the appropriate balance."

It was not until the then owners of the property applied to the council to amend the covenant in 2008 that the council referred to broader considerations of the public interest. In a letter written to the owners on 11 December 2008 the council said:

> "The Council as a result of arm's length negotiations agreed the existing user covenant with your clients in 2000. The Council was conscious at the time that it must not try to be too restrictive whilst still ensuring that adjoining residential occupiers were not likely to be inconvenienced or to potentially experience any undue nuisance.
>
> The Council believes that in its current form the covenant continues to achieve that aim. Following consultation with local ward Councillors we believe that there is considerable local unease about the proposed use as it will involve a significant extension of the hours and intensity of the building's use."

When Olton applied to the council to vary the covenant in 2009 the council replied on 27 August 2009 that:

> "The Council has significant concerns about the proposed use [which] the Council considers …is likely to cause significant inconvenience or nuisance to residents close by."

99. In my opinion the covenant was varied in May 2000 for the benefit of the council's adjoining and adjacent land and not for reasons associated with the general or local public interest. The mere fact that the council retained extensive ownership of property in the vicinity of the application land is not sufficient to endow their objection with the status of having been made in the capacity of a custodian of the public interest. The covenant was imposed by the council as a landowner and, in my opinion, the council's objection should be considered in terms of the land which is specified in the deed of variation as having the benefit of the covenant, namely "the adjoining and adjacent land of the Council".

100. The covenant is not expressed to be for the benefit of an area of land that is defined on a plan attached to the deed of variation and nor is the benefit defined by reference to a named and identifiable estate. It is for the benefit of the council's adjoining and adjacent land. The meaning of these words was considered in *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430. Luxmoore J said at 440:

> "When used in conjunction with the word "land", the word "adjoining" in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin. Of necessity it connotes contiguity. …The word "adjacent" when used in contradistinction to the word "adjoining" means I think that which lies near but is not in actual contact with land. The degree of proximity must depend on the circumstances of each case. As Sir Arthur Wilson said in the case of *Mayor of Wellington v Mayor of Lower Hutt* [[1904] AC 773,775]: "'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances." "

I interpret the words "adjoining" and "adjacent" accordingly.

101. The council owns four properties that adjoin the application land in the sense of being physically contiguous with (touching) it. To the west is Billesley Common; to the east is the grass verge that lies between the two service roads; to the north is the terraced house at 711 Yardley Wood Road; and to the south is the community centre at 725 Yardley Wood Road (albeit separated from the property by the path that leads to Billesley Common).

102. Details of the council's total land ownership in the wider area were shown on a plan attached as an exhibit to Mr Stackhouse's witness statement at page 390A. Mr Stackhouse said that the council owns 78 properties along Yardley Wood Road as well as a substantial number of houses on the residential estate to the east.

103. In my opinion the "adjacent land" of the council cannot reasonably be taken to include all of the properties identified in the plan exhibited to Mr Stackhouse's witness statement. The expression "adjacent" in this context requires a degree of proximity that is limited to those properties that are capable of benefiting from the covenant. In my opinion that does not include

properties in the locality or neighbourhood generally. From the evidence it is clear that the council's main concern about this application is the extent of on-street parking that occurs when the car park on the application land is full. There are three roads in particular where such on-street parking has been identified: the two service roads on either side of the property and Bondfield Road opposite. In my opinion the adjacent land of the council on the western side of Yardley Wood Road should be taken to include those properties that it owns between Bromwall Road to the south and Trittiford Road to the north. There are eight such properties (excluding the two adjoining properties).

104. From the evidence and my second site inspection I do not consider that the eastern side of Yardley Wood Road is affected by on-street car parking arising from the use of the application land and I think it is reasonable to limit the extent of the council's adjacent land to that shown on the service plan for the application, namely 704 to 738 (even) Yardley Wood Road. The council own seven properties along this frontage. There is evidence, supported by my own observations during my second site inspection, that users of the mosque park in Bondfield Road. In my opinion the council owned properties in Bondfield Road between Yardley Wood Road and the junction with Capcroft Road and Colemeadow Road should be considered as adjacent land. There are 10 such properties. There is therefore a total of 25 council owned properties which, in the context of this application, may be considered to be adjacent to the application land.

105. Having determined which of the council's properties have the benefit of the covenant I now turn to whether the applicants have established either of the grounds (aa) and (c) upon which they rely.

Ground (aa)

106. In considering ground (aa) I adopt the well known sequence of questions that was first set out in *Re Bass Ltd's Application.*

107. *Is the proposed user reasonable?* The applicants have planning permission for their proposed use which is also in accordance with the policies of the Birmingham Unitary Development Plan 2005. The objector argues that it is not a reasonable user because of "considerable local opposition". That is not an argument which I consider goes to the reasonableness of the user. An unpopular proposed use (if such it is) may still be a reasonable one. It is also an argument based upon a public interest perspective which I have determined is not appropriate in this application. In my opinion the proposed user is reasonable.

108. *Does the covenant impede that user?* It is self-evident that the covenant does impede the proposed user and this is not disputed by the council.

109. *Does impeding that user secure practical benefits to the objector?* This question falls to be answered by reference to the effect of the proposed use upon the adjoining and adjacent land of the council (as determined above) and not by considerations of public interest. In my opinion the covenant does secure practical benefits to the objector in respect of at least some of its adjoining

and adjacent properties. It prevents the lawful parking of additional cars on-street during the periods when the property is in use as a mosque and madrasah. This is of particular relevance to the council's properties on the west side of Yardley Wood Road and to the properties in Bondfield Road. It also avoids the intensification of traffic movements associated with daily prayers and prevents any noise being made by people leaving the mosque.

110. *Are those practical benefits of substantial value or advantage?* The council did not adduce any expert valuation or traffic evidence. The only expert traffic evidence was given by Mr Jones for the applicants. He said that the total traffic generated by the proposed user and the previous use as a doctor's surgery was broadly similar. But the pattern of traffic flow was undoubtedly different between the two uses with that generated by the doctor's surgery being more evenly distributed throughout the day. The traffic generated by the mosque and madrasah is more concentrated around the times of prayers and lessons. Mr Jones's analysis of the volume of traffic generated by the proposed use was based upon direct survey results and, although complicated in parts, I found it to be robust and logical. I consider Mr Jones's conclusions about the volume of traffic and the extent and times of on-street parking to be realistic.

111. I accept Mr Jones's evidence that the additional traffic flow on Yardley Wood Road is de minimis compared with the existing volume of vehicular movements. There is no evidence to support the statement made by the council in its grounds of objection that:

> "The use of the [application] land as a Mosque and Madrasah has resulted in an intolerable level of traffic which is entirely unsuitable for a residential area…"

Mr Stackhouse acknowledged under cross-examination that there was no evidence to support his assertion that the proposed use of the application land would lead to a significant increase in traffic. I am satisfied that the covenant does not secure a substantial practical benefit to the council in terms of preventing a deleterious increase in traffic.

112. Mr Jones's evidence showed that at the busiest period there were 15 or so cars parked on-street during prayers. This conclusion was broadly in line with the observations that I made on my second, unaccompanied, site visit. That level of on-street parking is only likely to occur early on Friday afternoons or at times of religious festivals. At other times the car park at the property should have sufficient capacity to accommodate the vehicles generated by the proposed use.

113. None of the occupiers of the adjoining or adjacent land of the council (as defined) were called to give evidence. None of them appear to have made any written complaints about the use of the property as a mosque and madrasah. Mr Stackhouse said that no resident had complained to him about the proposed use. The evidence of Councillors Barnett and Buchanan and of Mr McCabe did not give details, other than the incident diaries and photographs adduced as exhibits to Councillor Buchanan's evidence, of particular complaints. Those incident diaries and photographs were, apparently, produced by the residents of two houses in Yardley Wood Road close to the application land: Mr and Mrs Darlington (whose own objection to the application was struck out by order of the Registrar) and Mr J R Griffiths. Neither property is adjoining or adjacent land of the council. The councillors and Mr McCabe summarised vicariously the views of constituents as

they were reported to them. The occupiers of the two properties adjoining the application land, which are most affected by the proposal, have not been identified as complainants.

114. I am satisfied that the proposed use as a mosque does, at peak times, generate significant on-street parking in the locality of the application land, particularly along the two service roads that run parallel with Yardley Wood Road. On the two times that I visited the site, including once during the busy Friday early afternoon prayers, there were no problems caused by on-street parking and nobody's drive was blocked. There appears to be sufficient on-street car parking to accommodate the current peak time traffic generated by the mosque if the on-site car park is full. There is also additional off-street car parking a short distance from the application land. The number of persons attending the mosque at any one time is limited by the physical capacity of the building on the application land and it seems unlikely that this number could exceed 200 persons given the property's present configuration. But while I am satisfied that there is sufficient car parking available both off-street and on-street at and in the vicinity of the application land, that does not mean that people attending the mosque necessarily park thoughtfully. There is hearsay evidence that there have been problems of obstruction along the two service roads, albeit not identified in terms as being in respect of properties that have the benefit of the covenant. But, as Mr Hansen argued, such evidence could not be tested by cross-examination and there is no proof that any of the vehicles causing a problem were associated with attendance at the mosque. For instance one of the photographs adduced by Councillor Buchanan shows a van parked on the verge outside the application land, but this is advertising the services of the car wash on the opposite side of Yardley Wood Road. Another photograph shows a lorry delivering concrete to the application land which is likely to have been a discrete, rather than a regular, occurrence.

115. I am satisfied on the evidence that by impeding the proposed user the covenant does not secure to the council a practical benefit of substantial advantage regarding the prevention of on-street parking. Lest I be wrong in my conclusion that the council are not acting in the capacity of a custodian of the public interest, I would add that I would have reached the same conclusion even if the effect of on-street parking had been considered more widely.

116. Noise is not an issue that was identified in the council's grounds of objection. But it is referred to in the witness statements of Councillors Barnett and Buchanan and that of Mr McCabe. The only evidence on the point from an identified person is to be found in the incident diaries appended to Councillor Buchanan's statement. Mr and Mrs Darlington refer to several incidents of noise from the property, although Mr Griffiths makes no complaint about noise. Such noise is generally associated with people leaving the property after late night prayers during the summer months. As I have already stated Mr Darlington's objection was struck out by order of the Registrar and I agree with Mr Hansen that to allow them to submit unexamined evidence vicariously through the council's witnesses would be to admit such evidence via "the back door". Consequently I do not attach weight to such evidence which, in any event, would only be relevant if the council were acting in the capacity of custodian of the public interest. There was no specific evidence that any of the occupiers of the adjoining or adjacent properties of the council, which have the benefit of the covenant, have complained about noise. I recognise that late night noise, unlike on-street parking, is likely to be relevant on every evening during the summer (rather than being associated with just one prayer session on one day a week), but I do not consider that the evidence shows that the covenant secures to the council any practical benefit of substantial advantage. Again

I would have reached the same conclusion even if the effect of noise had been considered more widely.

117. Mr Shareef's expert valuation evidence for the applicants was that the proposed user would have a beneficial rather than a detrimental effect upon residential values. He also said that the value of the community centre would be increased as a result of the presence of the mosque next door. I do not accept Mr Shareef's analysis of the impact of the mosque upon the value of the community centre which was based upon what he acknowledged was an arbitrary assumption that there would be a greater use of the centre once the mosque was "fully established". But I can see no reason why the mosque would have a detrimental effect upon the value of the community centre and there was no evidence that any such detriment had occurred. None of the council's witnesses said that there had been any complaints from the community centre. Mr Shareef's opinion that residential values in the area would increase by up to 10% was based upon his experience elsewhere of Muslim communities paying a premium to live in close proximity to a mosque. While I do not accept Mr Shareef's figure of 10% which was not supported by specific examples or by any comparable sales in the vicinity of the application land, I have received no evidence that the effect (if any) of increased noise, traffic and on-street parking would outweigh any premium that Muslims would pay to live close to the mosque at the property. The evidence of the council's four witnesses did not refer in terms to any complaints made by residents about the impact of the proposed use upon the value of their properties. I am satisfied that by impeding the proposed user the covenant does not secure to the council any practical benefits of substantial (or indeed any) value.

118. Finally I address briefly an issue that was identified in the council's grounds of objection as follows:

> "In this latter regard, the use of the subject land as a Mosque and Madrasah has led to increased community tensions, including to unruly protests, offensive graffiti and threats of violence. This poses a clear risk of serious harm to the neighbouring properties entitled to the benefit of the covenant; preventing such tensions is clearly a practical benefit to the objector."

The council's witnesses acknowledged the existence of tensions in the community as a result of the proposed use of the property but they emphasised that those tensions should not overshadow what Councillor Buchanan described as "the genuine concerns and objections that have been raised about the current use of the property." Mr Bates did not pursue this ground of objection at the hearing and did not challenge Mr Hansen's closing submission that the objector had effectively abandoned this ground of objection. I therefore give it no weight.

119. I conclude that the covenant does not secure to the council any practical benefits of substantial value or advantage.

120. *Is impeding the proposed user contrary to the public interest?* This question is derived from section 84(1A)(b) of the 1925 Act and was argued in the affirmative by the applicants as an alternative to their case in respect of subsection (1A)(a). Since I have found in the previous paragraph that the applicants have succeeded in their arguments under that subsection it is not necessary for me to consider this question.

121. *Would money be an adequate compensation for the loss or disadvantage (if any) that the council will suffer from the proposed modification?* I have concluded that the proposed modification will not adversely affect the value of any of the council's adjoining or adjacent property. Furthermore I do not consider that the proposal will cause any disadvantage to the council, either as landowner or (if relevant) as a custodian of the public interest. It follows that this question is nugatory since there has been no loss or disadvantage which could give rise to monetary compensation.

122. It is also necessary, when considering whether a case falls within subsection 84(1A) of the 1925 Act "and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified", to take into account the matters set out in section 84(1B). In reaching my answers to the foregoing questions I have had regard to the planning matters referred to in that subsection and also to the period at which and context in which the restriction was created.

123. I conclude that the applicants have satisfied ground (aa).

Ground (c)

124. Having determined that the applicants have succeeded under ground (aa) it is not necessary for me to consider the parties' arguments under ground (c).

Discretion

125. While I have found that the applicants have succeeded in establishing jurisdiction under ground (aa), that does not mean that they are entitled as of right to an order modifying the covenant in the terms that they seek. The Tribunal has a discretion in the matter which it must exercise judicially.

126. Under section 84(1B) of the 1925 Act I am required to take into account "any other material circumstances" when determining whether the restriction ought to be modified. I am invited by the council to exercise my discretion against the applicants due to their conduct in committing a wilful and sustained breach of the covenant. The applicants consider that to refuse them relief having established the Tribunal's jurisdiction would be wholly disproportionate and unduly harsh.

127. The applicants acknowledge their continuing breach of the covenant. They explained that they thought, in the apparent absence of legal advice to the contrary, that the clarification by the council that their use already had planning permission meant that they could expect the council to modify the covenant to allow the proposed use. The applicants admit that they were aware that the council had twice refused to do so, the second time in response to a request from Olton in June 2009. The latest that the applicants must have known of the requirement to apply to this Tribunal in order to modify the covenant, given the council's consistent refusal to do so, was the 26 September 2011, the date of the High Court hearing of the council's application for an injunction against the applicants. But knowing they were in breach of the covenant and knowing that the

injunction application against them was stayed pending an application to the Tribunal to modify the covenant, the applicants still pursued a planning application (registered on 5 October 2011) to erect a single storey side extension to the mosque to provide an area for ablutions. Planning permission for the extension was granted on 28 November 2011 which was then implemented despite the applicants (by then) having made the present application. I consider that the applicants exacerbated the breach of the covenant by constructing the extension before the present application has been determined. I find it difficult to reconcile this history with Mr Hansen's description of the applicants as acting wrongly but in good faith.

128. In my opinion the applicants' conduct justifies Mr Bates's description of it as that of someone "chancing their arm" and constitutes a sustained and wilful breach of the covenant. Such conduct is to be deprecated. Mr Bates referred me to *Re George Wimpey Bristol Limited's Application* and *Re Lee's Application* in which the Tribunal said that had ground (aa) had been made out it was "unlikely" that discretion to modify the covenant would have been exercised (*Wimpey*) and that the objector "would have been likely to argue quite strongly against an order in [the applicant's] favour in the event that [the applicant] had made out a case" (*Lee*). In both cases the Tribunal based its comments upon the conduct of the applicant. But in both cases these comments were *obiter* since the Tribunal found that there was no jurisdiction for it to modify or discharge the covenants in any event. In the present application I have found that I do have such jurisdiction.

129. Under these circumstances a refusal of the application as a matter of discretion invites the description of a sanction; a "trump card", as Mr Hansen described it, to overcome the council's failure to sustain a valid objection. The purpose of section 84 of the 1925 Act is to enable applicants to obtain modification or discharge of restrictive covenants in circumstances where they can demonstrate statutory jurisdiction. Having satisfied me on the facts, and on the law as applied to those facts, that the Tribunal has such jurisdiction in this case, I am loath to exercise my discretion so as to deny the applicants the relief that they seek. Where jurisdiction has been established I consider that the discretion of the Tribunal to refuse the application should only be cautiously exercised. It should not be exercised arbitrarily and, in my opinion, should not be exercised as, effectively, a punishment for the applicants' conduct unless such conduct, in all the circumstances of the case, is shown to be egregious and unconscionable. On balance I do not consider that the applicants' conduct was so brazen as to justify my refusal of their application.

130. In reaching this conclusion about the exercise of my discretion I have taken two factors in particular into consideration as mitigating the applicants' conduct. Firstly, the applicants are charitable trustees and are using the property for a religious purpose for which, on the evidence, there is a significant demand and no alternative venue in the locality. They did not breach the covenant in order to make a profit from the proposed use; rather they did so in order to satisfy what they saw as an urgent requirement for a place of religious worship. Secondly, the applicants, in the apparent absence of legal advice to the contrary, made the mistake, which is commonly encountered by the Tribunal, of assuming that the existence of planning permission for the proposed use would eventually be determinative of the outcome of a request to modify the restrictive covenant. This mistake was compounded in the present case by the fact that the planning authority and the beneficiary under the covenant were the same person, namely the council.

Determination

131. I am satisfied that ground (aa) has been established and that I should not exercise my discretion to refuse the application. I do not consider that the council will suffer any loss or disadvantage from the proposed modification and therefore the question of compensation does not arise.

132. In my opinion it is appropriate to modify the covenant so as to allow the specific use of the property as a mosque and madrasah rather than the more general religious use which the applicants suggested as an alternative.

133. The power conferred under section 84 of the 1925 Act to modify a restriction includes power, under subsection 84(1C), to add such further provisions restricting the user of or the building on the land affected as appear to the Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicants. The Tribunal may refuse to modify the covenant without some such addition.

134. In my opinion there are two provisions that need to be added restricting the use of the property and without which I would refuse the application. Firstly, the application land shall not be used for a call to prayer (the Adhan) which is audible outside of the building located on the application land. Secondly, those parts of the application land that are presently used for car parking (to be defined on a plan to be prepared by the applicants, approved by the Tribunal and appended to the order) shall not be used for any other purpose.

135. The following order will accordingly be made:

> Clause 3 of the deed of variation dated 2 May 2000 is modified on ground (aa) by insertion of the following words at the end of the clause:
>
> "or as a mosque and madrasah, provided that (i) the Said Land shall not be used for a call to prayer (the Adhan) which is audible outside of the building located on the Said Land, and (ii) those parts of the Said Land which are shown coloured pink on the plan attached to this order shall not be used for any purpose other than for private car parking."

136. An order modifying the restriction in clause 3 of the deed of variation in accordance with the above shall be made by the Tribunal provided, within two months of the date upon which this decision shall take effect, the applicants shall have signified their acceptance of the proposed modification in writing to the Tribunal.

137. A letter on costs accompanies this decision which will take effect when, but not until, the question of costs is decided.

Dated 6 August 2013

A J Trott FRICS

Addendum on Costs

138. I have now received submissions on costs from both parties.

139. The applicants submit that the objector should pay 50% of their costs or alternatively that the Tribunal should make no order as to costs. They argue that they have succeeded in their application and that no compensation has been ordered. The applicants submit that the objector behaved unreasonably for several reasons:

(i) It founded its objection on traffic grounds but called no expert evidence to support those grounds;

(ii) No occupier of the adjoining or adjacent land of the objector was called to give evidence;

(iii) No local residents complained about the impact of the proposed use on the value of their properties;

(iv) The alternative ground of objection based on "increased community tensions" was abandoned;

(v) The objector had wrongly claimed to be the custodian of the public interest;

(vi) The objector had denied that the proposed user was reasonable; and

(vii) The objector had failed to identify any suitable alternative building.

140. The objector submits that the applicants should pay its costs for the following reasons:

(i) The objection was partially successful. The covenant was not discharged but only modified with additional conditions being imposed by the Tribunal;

(ii) There was no basis for saying the objector had acted unreasonably and the decision contained no criticism of its conduct; and

(iii) The Tribunal had been severely critical of the applicants' conduct and unless the Tribunal made an order for costs against the applicants then there would be no consequences at all for them as a result of their conduct which the Tribunal had said was "to be deprecated".

141. Costs are in the discretion of the Tribunal which is usually exercised in accordance with the principles applied in the High Court and county courts. The Tribunal therefore has regard to all the circumstances, including the conduct of the parties and whether a party has succeeded in part, if not the whole, of their case. Consideration of conduct includes the conduct both during and before the proceedings, whether a party has acted reasonably in pursuing or contesting an issue and the manner in which a party has conducted their case.

142. Given that the applicant is seeking to remove or diminish the objector's particular property rights, an unsuccessful objector to an application made under Section 84 of the Law of Property Act 1925 will not normally be ordered to pay any of the applicant's costs unless the objector has acted unreasonably.

143. I am not persuaded by the applicants' submissions that the council acted unreasonably in this case. The objector's failure to appoint an expert transport witness went to the effectiveness of its case but it did not constitute unreasonable behaviour. Mr Bates explained why the objector relied upon the evidence of two councillors and the local Member of Parliament (see paragraph 79 of the decision). It did not act unreasonably in doing so. The remaining criticisms of the objector on this point do not, in my opinion, either individually or collectively, amount to unreasonable behaviour.

144. I deprecated the applicants' conduct as being a sustained and wilful breach of the covenant (paragraph 128 above). In my opinion that conduct was unreasonable. While I acknowledged at paragraph 130 two factors which I consider mitigated the applicants' conduct, I nevertheless consider that such conduct should be reflected in the award of costs against the applicants. Taking account of the mitigating factors to which I have referred I order that the applicants shall pay 50% of the objector's costs, such costs to be assessed by the Registrar on the standard basis unless agreed.

Dated 17 September 2013

A J Trott FRICS