IN THE UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2018] UKUT 395 (LC)
UTLC Case Number: LP/42/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – proposed conversion of two barns into a single dwellinghouse – whether practical benefits of substantial value or advantage – whether likely to create a precedent – whether restriction impedes a reasonable user given existence of separate limitation on right of way to use access road to that of a single dwellinghouse – application allowed under section 84(1)(aa) of Law of Property Act 1925 – compensation assessed at £60,000

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

BY

(1) MICHAEL ANTHONY O'BYRNE
(2) ERLA RAFNS-O'BRYNE

Re Land at Tubney Manor Farm,
Appleton,
Oxfordshire,
OX13 5PP

Before: His Honour John Behrens and A J Trott FRICS
Sitting at: The Royal Courts of Justice, Strand, London WC2A 2LL
on
6 – 7 November 2018

Martin Hutchings QC, instructed by IBB Law, for the Applicants
Adam Rosenthal, instructed by Loxley Solicitors Ltd, for the Objectors

The following cases are referred to in this decision:

Re Fisher & Gimson (1992) 65 P & C R 312
Re Snaith and Dolding's Application (1996) 71 P&CR 104
McMorris v Brown [1999] 1 AC 142
Shephard v Turner [2006] EWCA Civ 8
Re Hextall's Application (2000) 79 P&CR 382
Hotchkin v McDonald [2004] EWCA Civ 219
Re Martins' Application (1988) 57 P&CR 119
Re Bass Limited's Application (1973) 26 P&CR 156

DECISION

Introduction

1. This is an application under grounds (aa) and (c) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act") by Mr and Mrs O'Byrne in respect of land known as Tubney Manor Farm ("TMF"), Appleton near Abingdon, Oxfordshire. In summary they seek modification of a covenant so as to permit the land to be used for two private dwellinghouses.

2. Mr and Mrs O'Byrne purchased TMF in 2001 for £600,000 from Magdalen College, Oxford[1] ("the College"). They live in the Grade II listed farmhouse which forms part of TMF. They have a planning permission which permits them to convert, and link, two adjacent outbuildings, referred to as the 'Modern Barn' and the 'Old Barn' and thus to create a single residential dwelling, separate from the farmhouse. They would like to carry out the conversion in accordance with the planning permission, move from the farmhouse to the converted dwellinghouse and sell the farmhouse.

3. However, TMF is subject to a restrictive covenant in favour of the College which prevents Mr and Mrs O'Byrne from using it (so far as relevant) other than as a single private dwellinghouse. It is not in dispute that the development would infringe the covenant.

4. Mr and Mrs O'Byrne accordingly apply to the Tribunal for the modification of the covenant on the grounds mentioned above. The College objects to the modification. It points out that Mr and Mrs O'Byrne are the original covenantors. It contends that it will be injured by the relaxation of the covenant and that the benefits secured by it are substantial. Furthermore, it contends that modification of the covenant will not assist Mr and Mrs O'Byrne. This is because of the legal rights of access to TMF. Access is gained from the public highway over an access road owned by the College. Mr and Mrs O'Byrne have a right of way over the road. However, the use of that right of way is limited to "the Permitted Uses" of TMF – i.e. insofar as concerns this application use as a single private dwellinghouse. The proposed development would create a second dwellinghouse and the user would be excessive. Thus, even if the covenant were modified it would not be possible for the development to go ahead.

5. In addition to the main issues between the parties there was a side issue as to whether some of the inter solicitor correspondence was inadmissible as having been written on a "without prejudice" basis. On 11 October 2018 His Honour Judge Huskinson directed that the side issue be determined at the hearing. In the event the main application was conducted in such a way as to make it unnecessary for us to rule whether it was inadmissible and we do not do so.

6. The application has been bitterly fought both before and at the trial. Mr Hutchings QC appeared for the applicants and pursuant to the directions of His Honour Judge Huskinson he produced two skeleton arguments – one on the main issues and the other on the side issue. He called one witness of fact, Mr Michael O'Byrne, and two experts: Mr Mark Charter MRICS, a partner in Carter Jonas LLP, whose evidence answered a series of questions from the instructing

[1] The President and Scholars of the College of St Mary Magdalen in the University of Oxford

solicitor about the effect on the amenity and value of the College's benefitted land were the covenant to be modified, and Mr Huw Mellor BA (Hons), MRTPI, also a partner in Carter Jonas LLP, whose evidence answered a different series of questions from the instructing solicitor about planning matters.

7. Mr Adam Rosenthal appeared for the College and he also produced two skeleton arguments. He called one witness of fact, Mr Douglas Mackellar MRICS, a director of Savills (UK) Ltd who act for the College, and two expert witnesses: Mr Charles Huntington-Whiteley FRICS, a director of Strutt & Parker, in relation to the effect of the proposed modification of the covenant on the amenity and value of the College's benefitted land and Mr Mike Robinson BA (Hons), Dip TP, MRTPI, a senior associate director of Strutt & Parker, in relation to planning matters.

8. We made an accompanied site inspection on 8 November 2018.

The 2001 transfers

9. TMF and some adjoining farmland formerly comprised Manor and Barn Farms, Appleton which, until 2001, had been owned by the College for a significant period of time and which had been subject to a tenancy protected by the Agricultural Holdings Act 1986. The tenancy was surrendered in 2001 whereupon the College decided to sell TMF to Mr and Mrs O'Byrne, and other small parcels of land to neighbouring occupiers. The main block of agricultural land was retained by the College and let to a tenant pursuant to a farm business tenancy agreement. The access road was retained by the College and is subject to rights of way in favour of the tenant, the owners of the adjoining properties and TMF.

The Transfer of TMF ("The 2001 Transfer")

10. On 27 June 2001 TMF was transferred to Mr and Mrs O'Byrne for £600,000. It comprised a farmhouse, some farm buildings and some agricultural land totalling in all some 6 acres. The 2001 Transfer contains two restrictive covenants in clause 5 of relevance to the application:

> "The Transferee hereby covenants with the Transferor... so as to bind so far as may be the Property into whosoever hands the same may come and so that this covenant shall be for the benefit and protection of the Retained Land or any part or parts thereof:-
>
> 5.1 not to use the Property for any purpose other than for the Permitted Uses save that nothing herein contained shall prohibit the conversion of any of the barns forming part of the Property for uses ancillary to the Permitted Uses…
>
> 5.4 not to make or cause to be made any objections claims or comments of any description on any application for planning permission for sand and gravel extraction in respect of that part of the Retained Land shown edged in orange on Plan B or on any appeal or public enquiry arising from such application".

11. Permitted Use is defined in clause 1.3 as "use [as] a single private dwellinghouse and for agricultural or forestry purposes". The Retained Land is defined by reference to a plan. Clause 2 of the 2001 Transfer grants a right of way from the public highway over the access road in the following terms:

> "2.1 a right of way for the Transferee and his successors in title in common with all others for the time being having the like right at all times and for all purposes in connection with the use and enjoyment of the Property for the Permitted Uses to pass and repass with or without vehicles over and along the roadway shown coloured brown on Plan A the Transferee and his successors in title and all others benefiting therefrom paying a fair and reasonable proportion (having regard to the nature and extent of user) of the cost of maintaining repairing and keeping the same in good repair and condition …"

Transfers to neighbouring properties

12. There are three relevant neighbouring properties – Spinney View, Keepers House and Crawleigh. Spinney View is immediately to the south west of TMF and depends on the access road for access. Keepers House is to the south west of Spinney View and is on the junction of Oaksmere (a public highway) and the access road. It has the right to use the access road but takes vehicular access from Oaksmere. Crawleigh is to the west of Keepers House and has an access independent of the access road.

13. By three transfers each dated 4 May 2001 the College transferred to each of the owners of the neighbouring properties small rectangular pieces of land between the south-western boundary of TMF and the public highway for prices between £10,000 and £20,000. Each of the transfers contained restrictive covenants for the benefit of the Retained Land which prevented the building on the land sold of any building except a well-constructed stable, garage, garden shed, summerhouse or an extension to their adjoining dwellinghouse of not more than 30% of the enlarged floor area[2].

Geography

14. As an annex to this decision we have included two aerial plans helpfully provided by IBB Law. The first plan shows the Retained Land. Two areas of retained land are shown as tenanted farmland, the third area is shown as Quarry. The Quarry was earmarked for mineral extraction by the College. Mineral extraction took place pursuant to a lease dated 15 February 2005. The extraction took place in phases. It was carried out by Hills Minerals and Waste Ltd ("Hills"). The last phase was completed in 2012. Hills have restored the land to agricultural use but are subject to restoration and aftercare obligations under their agreement which could potentially last until 2038. Hills have sublet to a farm tenant. Mr Mackellar thought it was possible that at some time in the future if mining techniques change there was the potential for further extraction from the area.

15. The second plan shows the extent of TMF, the position of the existing farmhouse and the two barns. It also shows the access road and the three neighbouring properties. The access road is

[2] This means an extension could be approximately 43% of the area of the original dwellinghouse.

constructed from compacted hardcore with a grass verge on either side. Ignoring the verge, it is between 2.9m and 3.9m wide though most of the road is over 3m wide. With the verges it is generally between 4 and 5.5m wide but increases to over 7m at the northern end. A series of photographs show that it is just possible for two medium sized cars to pass although one of the cars has to make use of the verge.

16. It is approximately 260m from Oaksmere to the entrance of TMF. There are three points (marked on the plan) where vehicles can leave the access road and gain access to the Retained Land. As can be seen, one is near the junction with Oaksmere, the second is halfway up the access road and the third is near the entrance to TMF. There is a gate on the left hand side approximately 80 m from the entrance providing pedestrian access to Keepers House. There is a further access on the left hand side 108 metres from the entrance giving vehicular access to Spinney View. At the view we were told that there had at one time been a further vehicular access on the left hand side leading to Keepers House.

Mr O'Byrne's evidence

17. When Mr and Mrs O'Byrne bought TMF in 2001 the farmhouse was in very poor condition and in need of renovation. They spent three years renovating the property at a further cost of about £500,000. That renovation included the residential conversion of the pigsty to enable it to be used by family and guests. In the course of his evidence Mr O'Byrne accepted that he was aware of the covenants when he purchased TMF. He discussed them with Ms Jo Dare (of Savills) at the time. She told him that the covenants (including one not to object to any planning application made by the College for sand and gravel extraction on the quarry site) were needed because there was a planning application to extract minerals from the Quarry and the College was anxious to minimise the possibility of objections from adjoining residents.

18. In 2007, at a time when Mr O'Byrne's business ran into difficulties they applied for planning permission to convert The Old Barn into a separate dwelling. At the time they intended to move into the Old Barn and sell the farmhouse. Planning permission was granted on 8 May 2007.

19. A further application to extend the Old Barn which was made in 2008 was refused by both the local planning authority and on appeal. It was refused because, in the view of the inspector, the extension to the Old Barn would be inappropriate development in the Green Belt. Fortunately, the difficulties with Mr O'Byrne's business resolved and the plan to move into the Old Barn was not pursued.

20. In late 2015 Mr O'Byrne was considering retirement. After extensive discussions with Savills Mr and Mrs O'Byrne made an application for permission to convert the Modern Barn immediately adjacent to the Old Barn and to link it with the Old Barn to create one large dwelling. Permission was granted in May 2017. Mr and Mrs O'Byrne would like to implement the planning permission. They would like to divide TMF, relocate to the single dwellinghouse to be formed from the conversion and amalgamation of the two barns and sell the farmhouse.

21. Following the grant of the 2017 planning permission Mr O'Byrne approached the College and asked to purchase a small triangular plot of land to the north of the Modern Barn. This approach led to a reply by Ms Poppy Martin (a graduate surveyor employed by Savills) dated 8 June 2017. In his evidence Mr Mackellar confirmed that the letter had been seen and approved by him. Although the letter is headed "without prejudice" it has been ruled by the Tribunal not to have been protected by privilege. It includes the following passage:

> "Elsewhere in situations such as this, the planned intensification of use creates value and consideration is usually agreed for the lifting of covenants/access restrictions reflecting the uplift in value.
>
> We have discussed the principle of this with the College who have indicated that they are prepared to consider the position, subject to agreeing terms with you. However before doing so they require an undertaking from you in respect of their legal and surveyors fees which will be incurred"

22. In cross-examination Mr Mackellar accepted that this letter would be taken by a reasonable reader to mean that the College was prepared to sell the land and release the covenant and access restrictions if suitable terms could be agreed. However, he was at pains to emphasise that the College's preference was not to sell and thereby impinge the flexibility of its ownership. This case was, he said, different because Mr and Mrs O'Byrne had already obtained planning permission.

The College's concerns

23. The College has a number of concerns about the relaxation of the restrictive covenant to allow the implementation of the 2017 planning permission. Mr Mackellar points out that farm land is part of the College's endowment as it still owns nearly 4,000 acres across Oxfordshire, Warwickshire and Lincolnshire. The income from its endowment is fundamental to enable it to meet its charitable objectives. In 2016/2017 it transferred some £6.3m from its endowment. This was approximately 45% of the College income. Capital growth within the endowment is important to the College which takes a long term view of its investment decisions. It therefore manages its existing portfolio with the long term in mind and to preserve opportunities for the future.

24. According to Mr Mackellar the rationale for the covenants was to maintain restrictions on housing density and to protect the College, its tenants and the neighbouring properties from increased movement on the access road. By maintaining control it enables the College to ensure that it has maximum flexibility over its future plans for the Retained Land.

25. Mr Mackellar pointed out that TMF is only about five miles from the outskirts of Oxford. In the long term the Retained Land has potential for a number of uses which may not be anticipated today. Some of these might be affected by an intensification of the residential density of neighbouring land. He said that the proposed development was very close to the Retained Land so that any new owner would have a greater chance of a successful objection if, for example, the College sought to apply for permission for renewed mineral extraction at the Quarry. This could effectively sterilise the use of the Retained Land.

26. Mr Mackellar was concerned that the relaxation of the covenant would set a precedent making it more difficult for the College to refuse any further applications to relax this and similar covenants in future. In his view there was potential for applications in the distant future from the owners of the three neighbouring properties and from the College. He was concerned that there might be an application to increase the number of dwellinghouses at TMF to four. In particular he was concerned that there might be an application to convert the old pigsty into a separate dwellinghouse and/or to remove the link between the Old Barn and the Modern Barn thereby creating two separate dwellinghouses.

27. The potential intensification of residential use could, in Mr Mackellar's view, affect the College in several ways. First, there could be problems over the use of the access road. There could be conflicts between the domestic occupiers and the agricultural tenant or tenants of the Retained Land. There could be conflicts as between the domestic occupiers themselves. Second, the intensification could affect either the agricultural use of the Retained Land or its development potential. If, for example, the agricultural tenant changed his farming methods this could give rise to disputes between the domestic occupiers and the tenant. An example given was the spreading of pig slurry. Mr Mackellar felt that the College would be likely to be dragged into any such dispute. Third, the intensification increased the potential number of objectors to the future development plans of the College. He pointed out that the two barns are very close to the boundary between TMF and the Retained Land. Thus the occupier was more likely to be affected than the occupier of the farmhouse. He accepted that covenant 5.4 of the 2001 transfer meant it would not be possible for the owner of any part of TMF to object to a proposal to extract further minerals from the quarry. However his concerns related to all other potential developments.

Existing use of access road and conflicts.

28. It is important to record that there was no evidence before the Tribunal of any existing problems either in respect of the use of the access road as between the domestic occupiers and the agricultural tenant or in respect of the farming methods employed by the current agricultural tenant.

29. There are four other access points in Oaksmere from which the tenant can gain access to the Retained Land. However, there is some force in the comment made in evidence that use of the access road is probably the safest option, especially if it is necessary to open a gate. It must also be borne in mind that if the agricultural tenant uses the first access point he hardly has to go onto the access road at all.

30. There was remarkably little evidence of the actual existing use of the access road by the agricultural tenant. Neither Mr Farrant (the College's tenant) nor Mr Morgan (Hill's subtenant and the College's former tenant) were called to give evidence. Mr O'Byrne said that he hardly ever saw Mr Morgan. However in cross-examination he readily accepted that he spent most of his working hours either in the office or working at home. He also readily accepted that whilst so working he would not have seen what was happening on the access road. Mr Mackellar acknowledged that he only visited the site between three and six times a year and thus could not give direct evidence of the usage.

31. There were strands of hearsay evidence which painted a slightly fuller picture:

(i) In a letter dated 2 July 2004 from Mr Mackellar to Mrs O'Byrne, Mr Mackellar stated that Mr Morgan (the College's then tenant) said he rarely used the access road preferring "to take access up the field", i.e. from another entrance further along Oaksmere.

(ii) Mr Mackellar said that the first access point was created after the occupier of Spinney complained of mud on the road from the agricultural tenant.

(iii) Mr Mackellar said Mr Farrant used the access road and the second access point quite frequently in "the dry season" to get to the cattle handling unit adjacent to it.

(iv) There was also some vague hearsay evidence that Mr Farrant had expressed some concern at the possible intensification of the number of houses using the access road. However, it is not clear what he was told, when he expressed that concern or whether he knew the extent of the possible intensification. In those circumstances it is difficult to attach any weight to it.

(v) It was common ground between all four experts that if TMF is occupied as two dwellinghouses rather than one the vehicular movements over the access road would increase by about 10 a day: two between 8 am and 9 am, two between 5pm and 6 pm and the remainder throughout the day.

32. In the light of this evidence we have no hesitation in finding that the increased usage of the access road caused by the relaxation of the covenant would at the present time have a very small effect on any benefit enjoyed by the College as owner of the access road. We think the suggestion that the agricultural tenant might be able to negotiate a slightly lower rent because of the increased use of the access road is unrealistic.

The expert evidence

33. Although the Tribunal had the benefit of reports from all four experts it was not provided (despite requests) with any further reports stating the areas where they agreed and disagreed. The time allowed for this application was relatively short and in those circumstances we did not press the parties for an explanation. We would however repeat our comment made during the hearing that it was unacceptable. This is especially so as it was apparent when the experts gave evidence that there was in fact a large amount of common ground between them. Reports setting out areas of agreement and disagreement are invaluable in the Tribunal's pre-reading of the application. They are of great assistance in helping to identify the real issues between the experts. They also often help the experts to clarify their thinking.

34. It was common ground that TMF and all the surrounding land including the Retained Land and the three neighbouring residential properties are within the Oxford Green Belt. The Vale of White Horse Local Plan 2031 Part 1 ("LP31") is the most recent plan and was adopted in December 2016. It sets out local planning policies until 2031. It confirms that all the above property will remain in the Green Belt until 2031. Mr Robinson pointed out that there is an obligation to review the plan every five years and thus a possibility that it will be removed from the Green Belt in such a review. He did not, however, suggest that there was a proposal to remove it from the Green Belt.

35. The experts agreed that the policy for development within the Green Belt had not materially changed since 2001. It is currently contained in paragraphs 143 to 146 of the NPPF which state:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.
>
> 145. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:
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> a) buildings for agriculture and forestry;
>
> b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;
>
> c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
>
> d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
>
> e) limited infilling in villages;
>
> f) limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites); and
>
> g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:
>
> – not have a greater impact on the openness of the Green Belt than the existing development; or
>
> – not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.
>
> 146. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:
>
> a) mineral extraction;
>
> b) …"

36. The experts considered a number of possible developments in the light of this guidance.

Development of the three neighbouring properties

37. None of these properties have any buildings on the strips of land sold to them in May 2001. Accordingly, construction of a new building does not fall within any of the exceptions in paragraph 145. Neither Mr Mellor nor Mr Robinson could envisage that there could be any circumstances sufficient to amount to the "very special circumstances" to outweigh the inappropriate development in the Green Belt. Accordingly, they could not see any realistic prospect of any of the three neighbouring properties obtaining planning permission for new dwellinghouses before 2031 (unless LP31 was reviewed). Mr Mellor was not prepared to speculate what might happen after 2031. Mr Robinson referred to the possibility that planning policies might change in the future which might fundamentally affect the chance of these three sites obtaining permission.

Development at TMF: Hope value of further development in 2001

38. There were a number of existing buildings at TMF when Mr and Mrs O'Byrne purchased in 2001. In addition to the farmhouse there were, amongst others the Modern Barn, the Old Barn and the pigsty. Conversion of existing buildings falls within exception (c) of para 145 of the NPPF. There was an equivalent exception in 2001. Both Mr Mellor and Mr Robinson considered there was "hope value" in 2001 that permission would be granted for conversion of one or other of these buildings. With the benefit of hindsight this view is confirmed by the fact that permission to convert the Old Barn was granted in 2007. Both Mr Charter and Mr Huntington-Whiteley were asked in evidence to value this hope value. Neither had considered the position in their reports and were in effect being asked to perform a valuation exercise "on the hoof". We examine their evidence when considering the question of compensation at paragraph 80 below.

Development at TMF: Present prospect of further development

39. Mr and Mrs O'Byrne have, of course, obtained permission for the conversion of the Old Barn and the Modern Barn to one single dwelling. Two possible further developments were considered by Mr Mellor and Mr Robinson. The first was the conversion of the Old Barn and the Modern Barn into two separate dwellings. It was apparent at the view that the two structures are large enough for this to be possible. Mr Mellor accepted that it was feasible but in his view a planning application would not be straightforward. Ultimately, he did not think it was likely. Mr Robinson disagreed. He made the point that it was simply a question of removing the tie between the two buildings. Indeed, he thought it might be possible to carry out the conversion within the existing permissions. In any event he thought planning permission was likely to be granted if applied for.

40. The second possible development is the conversion of the pigsty to separate, rather than ancillary, residential use. Mr Mellor thought this would be more difficult due to the proximity of the pigsty to the Farmhouse. Mr Robinson did not agree and felt it was a real possibility.

41. The Tribunal agrees with Mr Robinson that there is a real prospect that permission would be granted to divide the Old Barn and the New Barn into two separate dwellings and with Mr Mellor

that the proximity of the pigsty to the Farmhouse is likely to present considerable problems to an application in relation to the pigsty.

42. The modification sought by Mr and Mrs O'Byrne would limit the number of dwellinghouses to two. Thus neither of the possible developments can be carried out without a further relaxation of the covenants. Furthermore, neither of the possibilities arise for decision in this application. If there were a future application in respect of either of them it would be considered on its merits at the time.

Development on the Retained Land

43. The present use of the Retained Land is agricultural. The mineral extraction on the Quarry finished in 2012. The restoration agreement between Hills and the local planning authority is ongoing and will, at least in respect of a small strip of land laid down for the management of rare agricultural weeds, last until 2038. The agreement is not, of course, set in stone and it would be open to the parties to vary it.

44. There are no buildings on the retained land. Mr Huntington-Whiteley accepted that the Retained Land was likely to be used for agricultural purposes for the foreseeable future. He considered possible uses in the light of the exceptions to the Green Belt policy. These included clay-pigeon shooting, playing fields, local clubs, equine use, a cross country course and further mineral extraction. As we understood his evidence, he did not think that the conversion of the Old Barn and the New Barn would have any significant effect on any of these activities though he thought that the proximity of the Modern Barn to the boundary might marginally affect some of them.

45. In considering possible future development three specific proposals were considered.

(a) Besselsleigh School

46. This is a 9.5 acre site in the Green Belt immediately to the east of and adjacent to the Quarry. On 31 October 2018 planning permission was granted for the conversion of the Manor House into flats, the erection of 36 new dwellings within an extension to the Manor House and 27 houses within the grounds. Mr Robinson put this forward to show that in certain circumstances residential development that would normally be considered inappropriate can be allowed in the Green Belt. Mr Mellor suggested that there were material differences between that application and any possible application in respect of the Retained Land. He pointed out that it involved – at least in large part – the conversion of existing buildings. He also referred to the Officer's report which concluded (in para 6) that there were very special circumstances justifying the decision to grant planning permission in the Green Belt. He used the expression "chalk and cheese" to compare that application with any similar application on the Retained Land.

(b) Park and Ride

47. In a strategy paper dated May 2016 the Quarry was included as one of six possible sites for a future Park and Ride scheme. It is plain from the report that it is not the preferred site but in agreement with Mr Robinson we do not think it possible to rank the order of preference any further. Mr Robinson made the point that there might be an objection from the new owner at TMF on the ground of noise or lighting. However, he also agreed that any scheme could accommodate any likely objection and that any such objection was unlikely to make any material difference to the outcome of any planning application.

(c) Oxford and Cambridge Corridor

48. On 12 September 2018 the government announced the preferred corridor for the new Oxford – Cambridge Expressway. This is supposed to unlock new opportunities for growth including the development of up to a million homes. At this stage the road corridor covers a relatively broad area. The map shows that it will pass either to the west or the east of Oxford. If it passes to the west it would appear to include the Retained Land. Thus, there might be development opportunities for the Retained Land. In cross-examination Mr Robinson however accepted that the addition of one additional objector was unlikely to make any practical difference to the sort of possible development involved.

The Law

49. A number of points of law have arisen in the course of the argument. It is convenient to deal with them in this section of the judgment. We start by setting out the relevant parts of section 84 of the 1925 Act. So far as relevant it provides:

> (1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction… on being satisfied —
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes …. or, as the case may be, would unless modified so impede such user; or
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

50. Under section 84(1B) the Upper Tribunal is required to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

Effect of the second impediment

51. This was a major part of Mr Rosenthal's submission. He recognised, of course, that the restrictive covenant prevented the proposed development. However, he submitted that there was a second impediment in the terms of the right of way. There is a question of construction in relation to this which we shall address below. For the purpose of this argument it is necessary to assume that the terms of the right of way will prevent the use of the right of way even if the restrictive covenant is modified. Mr Rosenthal submits that the presence of the second impediment is fatal to the application. He submits that it cannot then be said that the restrictive covenant impedes the reasonable user of the land. Thus, he submits, there is no jurisdiction under section 84(1)(aa) to modify the covenant. In effect he submits that the restrictive covenant has to be the sole impediment to the reasonable user proposed by the person applying for its modification.

52. Mr Rosenthal accepted that there was no authority on the point though he submitted it is supported by the textbooks. In his skeleton argument he referred to *Restrictive Covenants and Freehold Land* (4th Edition, Francis), at paragraph 16.166 and *Scamell and Gastowicz on Land Covenants* (2nd Edition), at para. 20.12.

53. We do not accept Mr Rosenthal's argument. There is nothing in the section which states that the covenant has to be the sole impediment to the reasonable user, or even the main impediment to such user. There is no reason to imply such a provision. It simply has to be an impediment. We accept that a second impediment may be relevant to the question of the discretion to accede to the application. We do not however accept that it is a matter going to jurisdiction under subsection (1)(aa). Nor do we accept that the submission is supported by the text books cited. In paragraph 20.12 of *Scamell and Gastowicz* the authors cite *Re Fisher & Gimson* (1992) 65 P & C R 312 where an order was made under subsection (1)(aa) despite the presence of a second covenant which might or might not have impeded the user. The point was

not raised in that case. The authors comment that in such a case the Tribunal *might* (our emphasis) not be satisfied. In our view this is a point going to discretion and not jurisdiction.

Precedent/thin edge of the wedge

54. It is quite often alleged in applications such as this that to grant the application would be the thin end of the wedge and would create a precedent. The argument is set out clearly in the decision of the President, Judge Marder QC, in *Re Snaith and Dolding's Application* (1996) 71 P&CR 104 LT at 118:

> "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see *Re Ghey & Galton* [1957] 2 Q.B. 650; 9 P&CR 1 and *Re Farmiloe* (1983) 48 P&CR 317. It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example *Re Henman* (1972) 23 P&CR 102; *Re Saviker (No. 2)* (1973) 26 P&CR 441; and *Re Sheehy* (1992) 63 P&CR 95.
>
> Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

55. This passage was cited with approval by Lord Cooke in *McMorris v Brown* [1999] 1 AC 142 at 151 and Carnwath LJ in *Shephard v Turner* [2006] EWCA Civ 8 who emphasised that the issues were issues of fact not law. In *Re Hextall's Application* (2000) 79 P&CR 382 the Tribunal was faced with an argument that the "thin edge of the wedge" argument was confined to cases where the covenants were enforceable by virtue of a scheme of development. The argument was rejected by the President (George Bartlett QC) but who made the point at 392 "although no doubt it is in such cases that it is most likely to have application".

Substantial practical benefits

56. There is some discussion in the authorities as to whether the practical benefits secured by the covenant are of "substantial value or advantage" to those entitled to the benefit. In *Shephard v Turner* Carnwath LJ considered that a safer guide was whether the benefit was "considerable, solid, big". He preferred not to seek a substitute for the expression used by Parliament but encouraged the Tribunal to promote uniformity of decision by applying the section in a common sense way.

Ability to modify easements

57. This was a very late addition to Mr Hutchings QC's submissions in that it appeared for the first time in his closing submissions. Unsurprisingly Mr Rosenthal objected to it being considered. Mr Hutchings QC referred us to paras 16.19 – 16.23 of *Scamell and Gastowicz* in support of a submission that the Tribunal has power to modify easements as well as restrictive covenants. This is obviously a point of law of some importance. Furthermore, in para 16.23 the authors consider it unlikely that restrictions within an easement would be held to be within section 84 of the 1925 Act. This is a view expressed by Mummery LJ in paragraph 5 of *Hotchkin v McDonald* [2004] EWCA Civ 219. We agree with Mr Rosenthal that it is not appropriate to seek to raise the point in this way. If Mr Hutchings QC had wanted to argue that the Tribunal has power to modify the easement, proper notice should have been given so that it could have been dealt with. Accordingly, we accept Mr Rosenthal's submission that we should not consider it further.

Whether money would be adequate compensation

58. There can be cases where the payment of money would not be adequate compensation for the relaxation of a covenant. For example, a local authority might argue they are enforcing a restrictive covenant as "custodians of the public interest" and that a money payment would not remove the adverse effect of the proposed development on that interest; see for instance *Re Martins' Application* (1988) 57 P&CR 119 at 126. This is not such a case. The College is not in occupation of any of the Retained Land and in the letter of 8 June 2017 made it clear that it was prepared to consider the position subject to agreeing terms. Mr Mackellar accepted that was a reference to the payment of money. In our view money would be an adequate compensation on the facts of this case.

Construction of the Transfer

59. This was merely a late addition to Mr Hutchings QC's submissions in that it appeared for the first time in his opening submissions. It was not referred to in the pleadings or even in his skeleton argument. However, it raises a point of law highly relevant to some of the issues in the case. Furthermore, Mr Rosenthal did not object and was able to make detailed submissions in relation to it in his closing submissions. In those circumstances it is plainly right for the Tribunal to deal with the submission.

60. In summary Mr Hutchings QC submits that if the Tribunal modifies the restrictive covenant so as to allow TMF to be used for two private dwellinghouses it will, as a matter of construction, also permit the right of way to be used for two private dwellinghouses. In support of that submission he relies on the judgment of Mummery LJ in the unanimous Court of Appeal decision in *Hotchkin*. Mr Rosenthal, on the other hand submits that this case is distinguishable from *Hotchkin.* He points to differences between the wording of the grants in the two cases and submits that those differences should lead to a different result. He invites the Tribunal to concentrate on the words actually used by the parties and reminds the Tribunal that it is no part of its function to rewrite the contract they have made.

61. On any view there are many similarities between this case and *Hotchkin.* In *Hotchkin* the court was concerned with the construction of a right of way in a conveyance. The grant of the right of way was in these terms:

> " ..... a right of way over the roadway coloured Blue on the said plan for all purposes in connection with the use of property hereby conveyed authorised by Clause D in the Schedule hereto subject to the Purchaser paying a proportion according to use of the cost of repairing and maintaining the same ..... "

62. The schedule sets out stipulations and restrictions referred to in the purchaser's covenant in clause 2 of the 1965 conveyance. Clause D of the schedule was in these terms:

> "Not to use the property hereby conveyed for any purposes other than Offices and purposes ancillary thereto …"

63. An application was made to the Lands Tribunal to modify the restrictive covenant so as to permit the use of the property as holiday lettings on a commercial basis and as a commercial health and fitness centre. The question arose as to whether they would still be able to use the right of way for the altered purpose. The proceedings before the Lands Tribunal were stayed pending an application to the High Court. Judge Rich QC declared that the owners would be able to use the right of way for the modified purpose and his decision was upheld in the Court of Appeal. The only reasoned judgment was given by Mummery LJ. Several parts of his judgment are worthy of citation:

> "10. …(1) This is a case of an express grant of a right of way. Its effect depends on the meaning of the language in which the grant is expressed, read in the context of the conveyance as a whole and in the circumstances surrounding the conveyance. The grant is of a right of way over a servient tenement, that is the roadway over Mr Hotchkin's land, and it is for the benefit of, and is in connection with, the lawful use of the dominant tenement, the Manor House...
>
> 12. (3) The critical point is that the roadway is available as a right of way to and from the Manor House in connection with the lawful use of the Manor House. There is no dispute that the language of the grant must be construed in the light of the circumstances existing at the date when it was executed…
>
> 13. On that approach it is possible, in my view, to arrive at a construction of the grant which makes practical sense. The starting point is that the language of the grant of the right of way makes an express link between the use of the right of way in connection with the Manor House and the lawful use of the Manor House. Mr Hotchkin's construction, however, rests not just on linking the use of the right of way to the use of the Manor House but to the use of the Manor House as fixed or frozen forever at one particular time - that is as specified in the 1965 conveyance, the date when the restrictive covenant was imposed - regardless of whether the covenant is later validly modified or discharged by order of the Lands Tribunal to permit a different lawful use of the Manor House.
>
> 14 … At the date of the grant of the right of way in connection with the use of the Manor House the restriction on user - although valid and effective as regards the property and the right of way - was subject always to possibility of judicial modification under the statutory authority of s.84 of the Law of Property Act 1925. Modifications can be obtained under s.84, if they are justified, in the judgment of the Lands Tribunal, by

changes in the character of the property or by other material circumstances and the continued existence of the restriction would impede the reasonable use of the property without securing practical benefits to other persons.

15. The statutory jurisdiction under s.84 was not and, indeed, could not have been ousted by any agreement between the parties. The possibility of a non-consensual variation regarding the lawful use of the Manor House was, in my view, one of the relevant circumstances existing at the date of the 1965 conveyance, whether or not that was appreciated by the parties at the time.

16. If the user of the Manor House and the roadway giving access to it are so linked, as they are in the terms of this grant, it is unrealistic, to say the least, to suppose that the parties intended to create a situation in which the user of the Manor House could be lawfully changed without having a corresponding impact on the right of the way enjoyed in connection with it.

17. (4) In my judgment the grant here is of a right of way over a roadway to and from the Manor House, but subject to a user covenant for the time being lawfully binding on the owners of the Manor House. The user covenant is capable of being modified from time to time or even discharged altogether on the application of the owner of the Manor House and against the wishes of the owner of the servient tenement. The lawful use of the right is linked to the lawful user of the Manor House. If the user of the latter is lawfully modified then the only sensible consequence that could have been contemplated by the parties to the 1965 conveyance is that the roadway could be lawfully used in connection with the purposes of the modified use of the Manor House. What sense would there be in producing a situation in which the lawful use of the Manor House could be changed without the agreement of those entitled to enforce the restriction on use, but the lawful use of the right of way could not be changed without the agreement of the servient owner who, in this case, was one of those entitled to the benefit of the covenant?"

64. It will be recalled that there are three relevant clauses in the 2001 Transfer of TMF. Under clause 1.3 Permitted Uses are defined as "use [as] a single private dwellinghouse and for agricultural or forestry purposes". Under clause 5.1 the Transferee is prohibited from "using the Property for any purpose other than for the Permitted Uses …". Finally, under clause 2.1 the Transferee is granted a right of way over the access road "for all purposes in connection with the use and enjoyment of the Property for the Permitted Uses".

65. Mr Rosenthal submitted that the essential difference between the 2001 Transfer and *Hotchkin* is that in *Hotchkin* the permitted purpose of the right of way was the use authorised by Clause D. Thus, if the authorised use changed so did the permitted purpose. The structure of the three clauses in the 2001 Transfer was different and, he submitted that led to a different result. If the Tribunal modified the restrictive covenant it would not be modifying the definition of the Permitted Use. Accordingly, it would not be modifying the uses permitted over the access road. He submitted that the starting point in construing the 2001 Transfer was to consider the words chosen by the parties and stressed that it was not for the Tribunal to rewrite the bargain made by the parties.

66. Mr Hutchings QC acknowledged that *Hotchkin* was not an authority in the strict sense in that the court was there construing a different bargain in the light of different surrounding

circumstances. However, he invited the Tribunal to follow Mummery LJ's reasoning and approach. He submitted that there was here a close link between the use of the access road and the lawful user of TMF. Thus he submitted that it is unrealistic, to say the least, to suppose that the parties intended to create a situation in which the user of TMF could be lawfully changed without having a corresponding impact on the right of the way enjoyed in connection with it. If the user of the former is lawfully modified then the only sensible consequence that could have been contemplated by the parties to the 2001 Transfer is that the roadway could be lawfully used in connection with the purposes of the modified use of the Manor House. What sense would there be in producing a situation in which the lawful use of TMF could be changed without the agreement of the College, but the lawful use of the right of way could not be changed without its agreement? He acknowledged that the structure of the 2001 Transfer was not identical to the clauses in *Hotchkin.* In substance, however, it was the same. There should not be a different result simply because the parties had chosen to place the definition of the permitted use in a separate definition section rather than set it out in the restrictive covenant as in *Hotchkin*.

67. In our view the purposive construction submitted by Mr Hutchings QC is to be preferred to that of Mr Rosenthal. In our view the reasoning of Mummery LJ is directly applicable to the 2001 Transfer and we do not repeat it. We agree with Mr Hutchings QC that it makes no difference that the parties have chosen to define the Permitted Uses in a definition section and then incorporated that definition into the two other clauses. If we were to distinguish the two cases on that basis it would not, in our view do any credit to the law.

68. Accordingly, we conclude that if we modify the restrictive covenant it will be lawful for Mr and Mrs O'Byrne to use the access road for the modified use.

Modification

69. We propose to follow the conventionally asked questions based on those suggested by leading counsel for the applicants in *Re Bass Limited's Application* (1973) 26 P&CR 156.

Is the proposed development reasonable?

70. This is common ground between the parties. The development has been granted planning permission. We agree that it is reasonable.

Do the covenants impede that user?

71. It is plain that the covenant prevents the use of TMF for two dwellinghouses. In the light of our view on the construction issue the right of way does not provide a second impediment. If, contrary to our view, the right of way did provide an impediment we would still have held for the reasons set out above that the restrictive covenant impeded the use.

Does impeding the proposed user secure practical benefits to the objector?

72. We accept that there is a subjective element to the answer to this question. Accordingly, we accept Mr Rosenthal's submission that Mr and Mrs O'Byrne have to take the College as they find it. We accept that the College takes a long term view of its investments and wishes to maintain maximum flexibility. We also accept that the presence of a new dwellinghouse close to the boundary of TMF might have a marginal effect on the College's future development plans.

73. In those circumstances we are satisfied that there are practical benefits to the College secured by the restriction. In passing, we would add that, in our view, the practical benefits are just enough to amount to injury within s84(1)(c) of the 1925 Act so that the claim under s84(1)(c) fails. In fairness to Mr Hutchings QC he did not pursue the claim under s 84(1)(c) with any vigour.

Are any practical benefits of substantial value or advantage to the Objector?

74. We are quite satisfied that the benefits are not substantial either individually or cumulatively. Any increase in the use of the access road will be very limited and will not, in our view, create any significant conflict between the agricultural and domestic use of that road. The suggestion that the agricultural tenant might be able to negotiate a reduced rent is unrealistic having regard to the other accesses to the Retained Land and the complete lack of any evidence of current problems. The precedent value of relaxation of the covenant is, to our minds, small. The position of the three neighbouring properties is very different to that of TMF. Their covenants are different. There are no buildings on the plots that were purchased in 2001. The likelihood of a grant of planning permission for development is small. We accept that there may well be further applications in respect of the buildings at TMF. However, these would be considered on their merits at the time and the Tribunal would take into account the fact that there were already two dwellinghouses on the plot.

75. We accept that it is possible that the dwellinghouse next to the boundary might have a small effect on any future development by the College. However, any such effect could be accommodated at the planning stage. Furthermore we note that the covenant as presently worded contains a proviso which would allow Mr and Mrs O'Byrne to use the Modern Barn for purposes ancillary to the residential use of the farmhouse in any event.

76. We consider it unlikely that any potential development by the College will be significantly affected by an additional objection from the additional owner of part of TMF. In any event this objection was met in Mr Hutchings QC's closing speech when he offered on behalf of Mr and Mrs O'Byrne to include a covenant restraining any owner of TMF from objecting to any proposed development to the Retained Land.

Discretion

77. Two principal arguments were addressed to us in relation to discretion. The main argument related to the right of way. Mr Rosenthal submitted that the impediment created by the right of

way was such that we should not as a matter of discretion modify the covenant. Mr Hutchings QC submitted (on the assumption that he was wrong on the construction issue) that the right of way was not such an impediment as Mr Rosenthal suggested. He pointed out that any court enforcing it might not grant an injunction. It might make an award of damages. Equally it might be arguable that there was an alternative claim to a right of way under s62 of the 1925 Act. This Tribunal has no jurisdiction to rule on whether any of these arguments would succeed.

78. None of these matters arise because we have agreed with Mr Hutchings QC's argument on construction. However, it is possible that a higher court may take a different view on the construction issue. In those circumstances it seems to us that there are, at least, triable issues on the question of whether a court would grant an injunction or not. Thus it is not certain that the right of way would have imposed an impediment. Thus, if we had held that the right of way was not modified we would not have refused to modify the restrictive covenant on that ground. Rather we would have modified it and left the parties to take such action as they thought appropriate in respect of the right of way.

79. Mr Rosenthal's second argument was that this application was being made by the original covenantor and that the covenant was given relatively recently. We acknowledge that he is correct and there are examples in the reports where these factors have influenced the Tribunal against modifying the covenant. However we do not think that this is such a case. We think that, subject to the question of compensation, the further restrictions referred to in an email dated 20 April 2018 from IBB Law to Loxley and the further restriction offered by Mr Hutchings QC in his closing submissions, the factors in favour of modifying the covenant substantially outweigh those against. Accordingly, we propose to modify the covenant to allow Mr and Mrs O'Byrne to develop the Old and Modern Barns in accordance with the permission granted in May 2017.

Compensation

80. Both parties agree that compensation is to be assessed under the second head:

> a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

81. If we had not acceded to Mr Hutchings QC's submission on construction we would have assessed the compensation under this head at nil. This is because there were two impediments to further development – the covenant and the right of way. The covenant alone would have made no difference to the consideration paid for TMF in 2001.

82. However, as we have found that the covenant and the right of way are interlinked we do think that the restriction had the effect of reducing the consideration paid for TMF in 2001.

83. One of the questions that Mr Charter was asked to address by his instructing solicitor was question 9:

"(i) If on 21st June 2001, Tubney Manor Farm had been sold to the Applicants with a (modified) restriction which permitted its use for two private dwellings, what price would the Applicants have had to have paid for it?

(ii) Would that price have been different if the express right of way benefitting Tubney Manor Farm permitted the Access Road to be used by two private dwellings at the property?"

84. In answering this question Mr Charter relied on Mr Mellor's expert planning report and concluded that a purchaser of TBM in 2001 "would have assessed the prospects of being able to obtain planning permission to build a second dwelling at any time in the foreseeable future as very low." He said that even without the limitations imposed by the right of way a purchaser would have considered those prospects "so low he would have discounted to nil any hope value". He therefore thought that a purchaser in 2001 would not have been willing to pay more than was paid, i.e. £600,000.

85. Mr Charter did not answer the second part of question 9 in terms. Instead he said that even if a purchaser did attach some hope value to the "far-off" prospect of a future planning permission for a second dwelling he would not have paid more for TMF because the right of way over the access road would have constrained such further development.

86. In answer to questions from the Tribunal, Mr Charter reconsidered his position on hope value given (i) there had been no material change in Green Belt policy since 2001; and (ii) planning permission was granted in May 2007 for the conversion of the Old Barn into a separate dwelling (not ancillary to the use of the farmhouse). He said in these circumstances, and assuming the absence of the restrictive covenant and no constraint on the right of way, a prospective purchaser might have assessed hope value for further residential development in the range of 5-10% when TMF was purchased in 2001, i.e. £30,000 to £60,000 based on the purchase price of £600,000.

87. In his expert report Mr Huntington-Whiteley identified three practical benefits secured by the restriction which collectively he considered to be of substantial advantage to the College. It followed that he did not think ground (aa) was satisfied. He went on to say, somewhat cryptically, that if he was wrong about the substantiality of the practical benefits: "Because of the uncertainty regarding future use of the Objectors land I do not consider money to be adequate compensation."

88. Mr Huntington-Whiteley acknowledged in cross-examination that he had not addressed the alternative head of compensation under section 84(1)(ii) in his report, but he said no hope value would have been paid when TMF was purchased in 2001 if there had been no restrictive covenant because further development was prevented by the right of way over the access road in any event. If it was assumed that both the restrictive covenant and the limitations on the right of way were absent, Mr Huntington-Whiteley said there would have been hope value but only in respect of the conversion of the Old Barn into a separate residential unit. He thought the plot was large enough to be effectively divided but considered that the creation of another house next door to the existing farmhouse would injuriously affect the value of the latter. He thought the value of the Old Barn with the benefit of planning permission for conversion into a separate dwelling would have been £150,000 to £200,000 in 2001 and that there would have been a 50% chance of getting

planning permission. He therefore took hope value at £75,000 to £100,000. The hope value would be offset to some degree by the reduced value of the farmhouse. Mr Huntington-Whiteley said that Mr Charter's allowance of 5% for hope value was "far too little".

89. We are satisfied that the restrictive covenant reduced the consideration received by the College in 2001. We accept that hope value for future residential development was likely to have been limited at that time to the possible conversion of the Old Barn into a separate dwelling. We agree that the presence of another dwelling in the curtilage of TMF is likely to have affected the value of the existing farmhouse, although we doubt this would have been a significant reduction given the size of the plot, the partial masking effect of the pigsty and the opportunity to minimise the effect of the conversion by sensitive design, layout and landscaping. In our opinion the purchase price would have been 10% higher had the restriction on more than one dwelling not been imposed upon the sale. We therefore assess compensation under section 84(1)(ii) at £60,000.

Determination

90. We are satisfied that ground (aa) has been established and that it is appropriate to exercise our discretion and allow the application. Under section 84 (1C) of the 1925 Act the power conferred on the Tribunal to modify a restriction includes power to add such further provisions restricting the user or the building on the land affected as appear to us to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicants; and the Tribunal may refuse to modify a restriction without some such addition. The applicants have offered to give an assurance that the owners from time to time of TMF and every part of it will pay a fair and reasonable proportion (having regard to the nature and extent of user) of the cost of maintaining, repairing and keeping the access road in good repair and condition and to enter an appropriately worded restriction to such effect against their registered title. We agree with this proposal and invite the parties to consider how effect can most conveniently be given to it. If the parties cannot agree on the appropriate way to secure this assurance, further submissions should be filed by the parties with the Tribunal for its determination of the issue, such submissions to be filed no later than two months from the date of this decision. The applicants have also agreed to modify and extend the restriction contained in clause 5.4 of the 2001 transfer as shown below. The following order shall therefore be made:

The restrictions in clauses 5.1 and 5.4 of the transfer dated 27 June 2001 are modified under section 84(1)(aa) of the Law of property Act 1925 as follows:

> "5.1 not to use the Property for any purpose other than for the Permitted Uses save that nothing herein contained shall prohibit (i) the conversion of any of the barns forming part of the Property for uses ancillary to the Permitted Uses; or (ii) the development permitted under planning permission reference P17/V0656/FUL granted by Vale of White Horse District Council on 12 May 2017 in accordance with the terms, details and approved plans referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and other matters approved in satisfaction of the conditions attached to such permission.
>
> 5.4 not to make or cause to be made any objections claims or comments of any description on any application for planning permission in respect of the Retained Land or on any appeal or public enquiry arising from any such application."

91. An order modifying the restriction shall be made by the Tribunal provided, within three months of the date of this decision, the applicants shall have:

(i) Signified their acceptance of the proposed modification to the restrictions in clause 5.1 and 5.4 of the transfer dated 27 June 2001;

(ii) Paid the sum of £60,000 to the objector under section 84(1)(ii) of the Law of Property Act 1925; and

(iii) Given to the College the assurance referred to in paragraph 90 above and described in detail in the applicants' solicitor's email to the College's solicitor dated 20 April 2018 at 11:30.

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

Dated: 10 December 2018

His Honour John Behrens

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)

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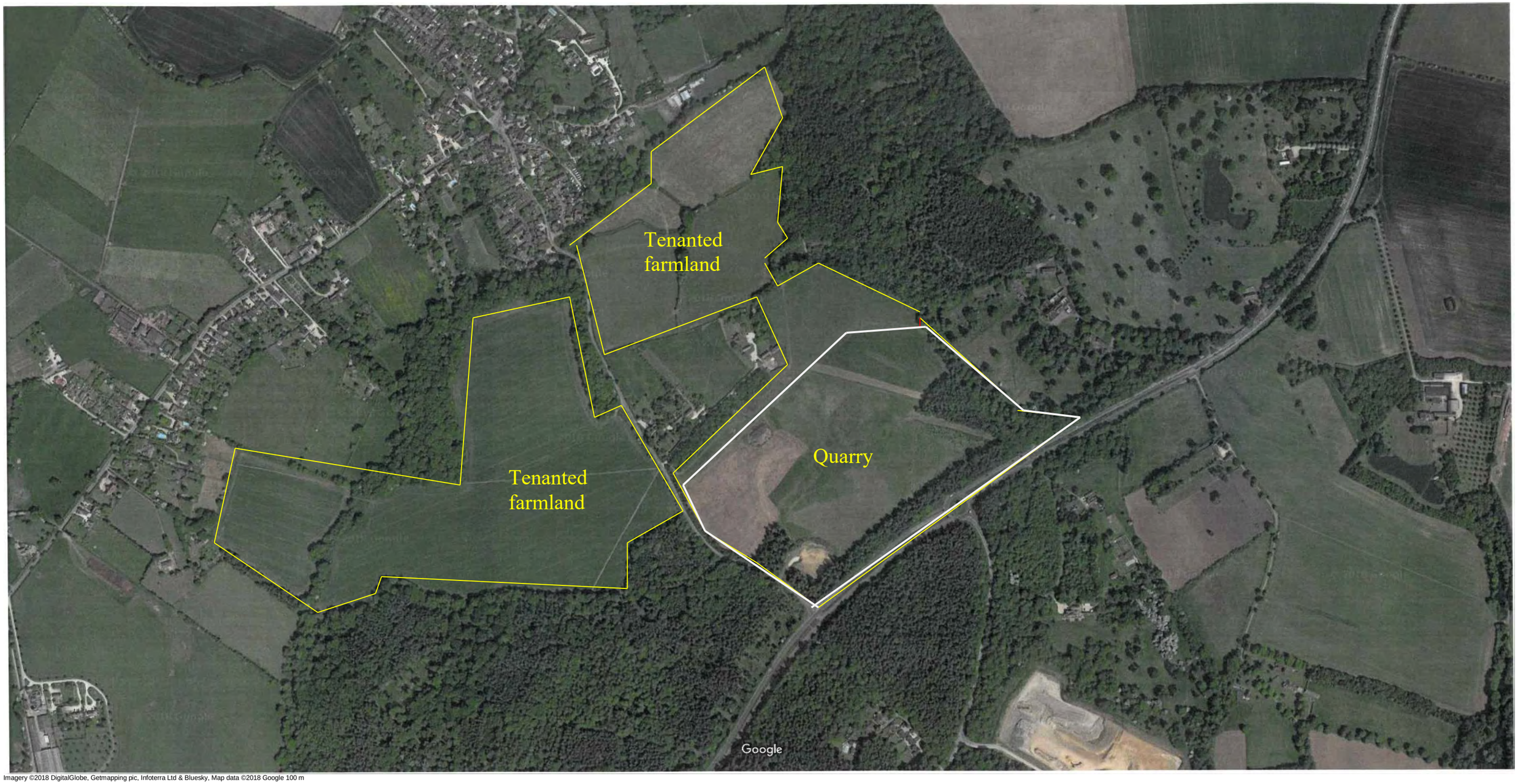

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