LP/7/2001

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – restriction requiring paddock to remain undeveloped – application to discharge or modify this restriction so as to permit development with five houses – whether use of restriction as a bargaining tool relevant to para (a) – whether practical benefits of substantial value or advantage secured by restriction – application for modification but not discharge granted – nil compensation payable – Law of Property Act 1925, s.84(1)(a), (aa)(1A) and (c)

IN THE MATTER of an APPLICATION under SECTION 84 of the LAW OF PROPERTY ACT 1925

B Y

JOHN PETER BROOMHEAD
JOHN MICHAEL KIDD
and
BARBARA ANN KIDD

Re: "Withinlee"
Withinlee Road
Prestbury
Macclesfield SK10 4AT

Before: N J Rose FRICS

Sitting in public at Manchester Combined Tax Tribunal on 30-31 October and 1 November 2002, at Oldham County Court on 16-18 December 2002 and at Wigan County Court on 21-22 January 2003

The following cases are referred to in this decision:

Stockport Metropolitan Borough Council v Alwiyah Developments (1986) 52 P & CR 278
Re Bennett's and Tamarlin Ltd's Applications (1987) 54 P & CR 378
Re Truman, Hanbury, Buxton and Co Ltd's Application [1955] 3 All ER 559
Fisher v Winch [1939] 1KB 666
Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 All ER 98

Stilwell v New Windsor Corporation [1932] 2 Ch 155

The following cases were also cited:

Re Marcello Developments' Application LP/18/1999, unreported
Re Luton Trade Unionist Club and Institute Ltd's Application (1969) 20 P & CR 1131
Re Bradley Clare Estates Ltd's Application (1987) 55 P & CR 126
Re Jilla's Application [2000] 2 EGLR 99
Cresswell v Proctor 1968 1 WLR 906
Re Beech's Application (1990) 59 P & CR 502
Ridley v Taylor 1965 1 WLR 611
Re Bass Ltd's Application (1973) 26 P & CR 156
Re Lloyds Bank Ltd's Application (1976) P & CR 128
Re North's Application (1997) 75 P & CR 117

Wayne Clark, instructed by Mace and Jones, Solicitors of Manchester for the applicants
Charles Machin, instructed by Pricketts, Solicitors of Buxton for the objector.

DECISION

Introduction

1. This is an application by Mr John Peter Broomhead, Mr John Michael Kidd and Mrs Barbara Ann Kidd ("the applicants") under section 84 of the Law of Property Act 1925 ("the 1925 Act"), seeking the discharge or modification of a restrictive covenant. The covenant affects freehold land with an area of 1.04 hectare (2.6 acres), currently used for grazing purposes and forming part of the curtilage of a house known as "Withinlee", Withinlee Road, Prestbury, Macclesfield, SK10 4AT. I shall in future refer to that land as "the paddock".

2. The restriction in question was imposed by a conveyance dated 24 April 1967 by Mrs Olive Anita Rodman to Mr Broomhead and Mr Kidd. In addition to the paddock, the conveyance included the house and garden of Withinlee, which lies immediately to the north. The conveyance contained, among others, the following covenant by the purchasers:

> "Not at any time to erect or build or cause or permit to be erected or built upon so much of the said land hereby conveyed as is hatched red on the said plan any buildings or other structures without the consent in writing of the vendor or her successors in title and to leave the same at all times hereafter open and unbuilt upon."

3. The reference to the land "hatched red" was to the paddock. The covenant was expressed to be for the benefit of the adjoining property of the vendor and her successors in title.

4. In June 1999 the applicants submitted a planning application, seeking outline permission for residential development of five houses on the paddock. This application was approved, subject to certain conditions, on 28 July 1999. The applicants now seek the discharge of the relevant restriction, or alternatively its modification so as to permit a maximum of five houses to be erected on the paddock.

5. A number of objections have been submitted by parties who it is agreed are entitled to the benefit of the restriction. With the exception of the one made by Upton Hunter Estates Limited ("Upton"), the owner of a strip of land adjoining the eastern boundary of the paddock, all objections have subsequently been withdrawn subject to the condition that access to and egress from any development of the paddock must not be via Tudor Drive, a cul-de-sac to the north-east of Withinlee leading south off Withinlee Road.

6. At the hearing Mr Wayne Clark of counsel appeared on behalf of the applicants. He called the applicants and Mr T R Simpson as witnesses of fact and, as expert witness, Mr P R Higham, FRICS, senior partner of Higham & Co of Manchester. He also submitted a witness statement of Mr C D Taylor, which was not challenged. Counsel for Upton, Mr Charles Machin, called as factual witnesses, Mr G A Yeo, Mrs A C Weatherby and Mr K R Dixon

and two expert witnesses, Mr P A Sheehan, FRICS, an associate of Garner & Sons of Stockport and Mr D B Shelmerdine, FRICS, with Meller Braggins of Wilmslow. Mr Machin also relied, with leave of the Tribunal, on statutory declarations sworn by Mr Anthony Scott Rodman, son of the late Mrs Olive Rodman. Finally, he submitted a witness statement of Mr D J McGuinness, which was not challenged. On the morning of the second day of the hearing I inspected the paddock and the surrounding area, accompanied by representatives of the parties.

Facts

7. Unfortunately, the parties did not prepare an agreed statement of facts. From the evidence, however, I find the following facts. The paddock was acquired jointly by Mr Broomhead and Mr Kidd in 1967 as part of the purchase of "Withinlee". A strip of land belonging to the vendor and abutting the eastern boundary ("the brown land") was excluded from the sale. That strip of land was purchased by Upton in April 2001. Immediately following the acquisition in 1967 the house and land were divided down the middle, resulting in Mr Broomfield owning the western half and Mr Kidd (subsequently together with Mrs Kidd) owning the eastern half of the house, driveway, garden and paddock. The purchasers' covenants included, among others, a covenant:

> "When called upon by the vendor or her successors in title to erect a suitable hedge or fence to the satisfaction of the vendor or her successors in title along the north easterly side of the plot of land hereby conveyed dividing it from the strip of land shown hatched blue on the said plan and for ever thereafter to maintain such hedge or fence in good repair order and condition."

The land described in the conveyance as being hatched blue is that referred to in this decision as "the brown land". In fact, the applicants used the brown land as part of their garden and paddock until it was fenced off in 1997, Mrs Rodman having died in June 1995.

8. Prestbury is one of the high value residential areas of north-east Cheshire and a commuter area for the Manchester conurbation. It comprises an attractive village centre surrounded by high quality housing, mainly large detached houses built over the last century, many individually designed but interspersed with areas and pockets of new residential development. Withinlee is located three quarters of a mile due west of the village centre.

9. Withinlee Road contains low density development and Withinlee itself was one of the largest homes in Prestbury before it was split. Withinlee Road also contains some modern housing in small in-fill developments (such as Tudor Drive and Holmlee Way) and various large individual houses of more recent origin.

10. To the south of Withinlee Road and behind its frontage development are some large houses, all standing in large grounds and accessed by driveways from the road. They include Withinlee itself. The land to the south of Withinlee falls away and the character of the area then changes to that of a residential estate served by Castleford Drive, which was built from the 1970s onwards. More recent, and generally larger and more attractively laid out housing,

was built in the 1980s and early 1990s to the east of the paddock and is known as Magnolia Rise and Elm Rise. As a result, the paddock is now surrounded to the north, south and east by residential development.

11. The paddock has been used for grazing purposes since at least 1967. Although it is within two legal ownerships, in practice it forms one open undivided field. It is broadly rectangular in shape, with a curved northern boundary where it is contiguous with the rear garden of Withinlee. There is a timber loose box at the north-west corner. The land is undulating and falls to the south and south-west. At the northern end the fall is quite steep. There are three groups of trees on the land adjacent to the north-western and southern boundaries, all of which are in a tree preservation order. The southern and lower boundary of the land abuts a residential estate and the cul-de-sac end of Castleford Drive. The western boundary abuts a field, adjacent to and owned together with Withinlee Hollow, a large house set in its own grounds. The eastern boundary adjoins the brown land. On the eastern side of the brown land is a pronounced fall in levels down to Magnolia Rise, a residential cul-de-sac leading north off Castleford Drive.

12. The physical boundaries of the paddock are delineated as follows:

Northern – iron railing

Eastern – timber post and rail fence

Southern – hawthorn hedge

Western – timber post and wire fence.

13. The brown land has the following areas:

Adjacent to the paddock (i.e. the southerly portion)	0.116 ha (0.29 acre)
Adjacent to the garden of Withinlee (i.e. the northerly portion)	0.160 ha (0.40 acre)
Total area	0.276 ha (0.69 acre)

14. Prior to the sale of Withinlee, the brown land formed an integral part of the grounds of that property. It has a length of 198m and is 12m (40 ft) wide, apart from at its northern end, where there is a short dog leg of about 39m, with a depth varying from 10m to 14m. This dogleg immediately abuts the southern end of Tudor Drive.

15. The brown land runs along the eastern boundary of Withinlee. It is level at the northern end and then gradually falls away towards the south. The middle part of the strip is on the top edge of an escarpment which falls away steeply to the houses of Magnolia Rise to the east. It is wooded at the northern end, although there has been some recent clearance of trees and shrubs adjacent to Tudor Drive. The southern part contains some large pine trees, some of which have recently been cleared. Two tree preservation orders affect the land and the only access is a farm gate from Tudor Drive. The southerly part of the brown land has until recently been used in conjunction with the paddock for sheep grazing. Where the strip is

adjacent to the garden of Withinlee, the western boundary drops down along a slope which borders a former quarry in the garden.

16. In 1996 Mr Rodman requested that a fence be provided along the length of the western boundary of the brown land in accordance with the conveyance covenant. Since the fence was provided in 1997, that land has remained unused. It is now overgrown and in a generally neglected state.

17. Two other areas of land were owned together with Withinlee at the time of the 1967 conveyance. The first ("the orange land") contains two semi-detached cottages built prior to 1967, and four detached houses built in the early 1970s. All six houses today comprise the Tudor Drive cul-de-sac. The second area ("the yellow land") lies to the north of the section of Withinlee now owned by Mr Broomhead. It was, in fact, subsequently purchased by Mr Broomhead. He sold the plot directly fronting on to Withinlee Road, which now contains a detached house known as "Rosewood". He retained the rear part, which remains undeveloped.

Paragraph (a)

18. The application is made under paragraphs (a), (aa) and (c) of sub-section 84(1) of the 1925 Act and I shall consider each of these grounds in turn. Under paragraph (a) the issue is whether

> "by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete."

19. Mr Rodman said that his mother had retained the brown land in 1967, in the expectation that it would be utilised to provide an access road to the paddock as and when the latter was developed. The restrictive covenant had been imposed on the advice of the selling agent, a Mr Bridgford, who had discussed the matter with an officer of the local planning authority. As a result of that discussion, Mr Bridgford was satisfied that the covenant would prevent the paddock being developed to the exclusion of the brown land. This would enable Mrs Rodman either to sell the brown land, or release the restrictive covenant, at a price which included a fair proportion of the development value of the paddock.

20. Mr Clark accepted that the original purpose of the covenant was to enable Mrs Rodman or her successors in title to obtain in due course a price for the release or modification of the restriction. He argued, however, that such a purpose was not derived from the observance of the covenant and was therefore not relevant to paragraph (a). In support of this submission, he relied on *Stockport Metropolitan Borough Council v Alwiyah Developments* (1986) 52 P & CR 278, an appeal which concerned the application of paragraph (aa). In the course of his judgment, Eveleigh LJ said:

> "The benefit envisaged must be a practical one as opposed to a pecuniary one, that is the practical benefit which is afforded by the observation of the covenant. Thus the

> subsection exempts from discharge or modification those covenants whose preservation will secure a practical benefit. Bargaining power is only a benefit when it results in the receipt of the price upon the covenant being discharged. Such a benefit cannot be of the kind contemplated by the subsection for it results from the discharge and not the continuance of the covenant."

21. Mr Clark also pointed to the decision of this Tribunal (V G Wellings QC) in *Re Bennett's and Tamarlin Ltd's Applications* (1987) 54 P & CR 378, in which the objector's ability to extract a payment in return for agreeing to the modification of a restriction was held not to be a relevant loss or disadvantage to be taken into account under grounds (aa) and (c).

22. Finally, Mr Clark referred to the following observations of Romer LJ in *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1955] 3 All ER 559:

> "I cannot see how, on any view, the covenant can be described as obsolete, because the object of the covenant is still capable of fulfilment, and the covenant still affords a real protection to those who are entitled to enforce it."

23. He submitted that the matter should be tested by asking what Upton would have received by enforcing the covenant. The answer, he said, was that they would not receive a payment by enforcing it; such a payment would be made only if they agreed to discharge the restriction. Since the enforcement of the covenant afforded no protection, argued Mr Clark, it was obsolete.

24. Mr Machin submitted that the proper test – per *Truman* – was simply whether the object of the covenant was still capable of fulfilment. One of its objects was to obtain a payment in the future. That was clearly still capable of fulfilment, various offers having been made by the applicants to purchase the paddock in recent years in an attempt to secure the effective release of the covenant.

25. Mr Machin pointed out that neither *Stockport* or *Bennett's* related to an application on ground (a) and submitted that different considerations applied to the latter paragraph. Moreover, he suggested that the character of both the brown land and the paddock remained substantially as they had been in 1967 and, despite the residential development that had taken place in the neighbourhood, it was still generally rural or semi-rural. In particular, the land to the west of the paddock was still as rural and open as it had been when the covenant was imposed. Accordingly, he submitted that there had been no changes in the character of the paddock or the neighbourhood, or other material circumstances, such that the restriction should be deemed obsolete.

26. The only witness with direct knowledge of the late Mrs Rodman's motivation in imposing the restriction was Mr Anthony Rodman. He said that his mother had consulted his late brother and him about the proposal before she entered into the contract to sell the paddock. According to Mr Rodman, his mother wished to ensure that she or her estate would receive some financial benefit if and when the paddock was developed. I accept that

evidence. Mr Rodman did not suggest that his mother had had any other objective in imposing the covenant and I find that there was none.

27. I should add that, in his initial report, Mr Higham expressed the view that there had been substantial changes in the neighbourhood since 1967, such that the covenant was now obsolete. Mr Clark, however, did not rely on that opinion in support of the applicants' case on paragraph (a) during the course of his closing submissions. Bearing in mind the evidence relating to the object of the covenant, I consider that Mr Clark was right to adopt that approach.

28. In view of the financial offers made for the brown land by the applicants before application was made to this Tribunal, Mrs Rodman's objective is clearly still capable of fulfilment. Mr Clark says that such an objective cannot be taken into account in considering whether the covenant is obsolete, although he accepts that there is no direct authority on the point where paragraph (a) is in issue. The covenant in this case having been made only to secure a bargaining power, if Mr Clark's submission is right, the restriction was obsolete as soon as it was made. This seems to me to be a contradiction in terms. The original objective of the covenant is still capable of fulfilment and in my judgment that objective may properly be taken into account for the purposes of considering whether the covenant is now obsolete.

29. It is true that the other test mentioned by Romer LJ in *Truman* – namely, whether enforcement of the covenant would afford a real protection to the applicants – would not be passed in this case. There is, however, nothing to suggest that Romer LJ considered it essential for both tests to be passed for obsoleteness to be established. The application under paragraph (a) therefore fails.

Paragraph (aa)

30. The applicants also rely on paragraph (aa). Here the issue is whether the Tribunal is satisfied

> "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 …
>
> (1A) Sub-section (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 Lands 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.

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

31. It is agreed that the proposed residential development of the paddock would constitute a reasonable use of that land for a private purpose. The issue between the parties is whether the continued existence of the restriction secures to Upton any practical benefits of substantial value or advantage to it.

32. Mr Higham pointed out that the brown land was an isolated ownership comprising bare land without buildings. He considered that, because of its size and configuration, it was incapable of any reasonable use by itself. Accordingly, the restrictive covenant did not secure any benefit to the brown land, let alone one of substantial value or advantage. The brown land had only ever been used for grazing on part and was now disused. Thus its ongoing use would not be affected or impaired by the discharge of the covenant. Even if planning permission were granted for a single house on the brown land, Mr Higham did not consider that a well developed low density scheme on the paddock would adversely affect the brown land. There had been no objection by the Rodman estate to the planning application on the paddock, nor to any of the planning applications made in respect of the neighbouring residential estate at Magnolia Rise or the extensions at Heron House, both of which were as close, or closer to the brown land than the proposed houses on the paddock. Thus, the owners of the brown land had not previously held the view that surrounding developments would impact on the reasonable use of their property.

33. Mr Yeo is the managing director and principal shareholder of Upton. In his witness statement he said that, when deciding to purchase the brown land, he had formed the view that, assuming planning permission could be obtained to construct a substantial house upon it, its value would be adversely affected by any development on the paddock. He was optimistic, however, that a successful application by the original covenantors to discharge the restrictive covenant would be difficult to achieve. If they failed to obtain such a discharge, the only way in which the paddock could be developed would be if his company consented to it; and such consent would only be forthcoming on payment of an appropriate consideration. In the course of cross-examination, Mr Yeo said that he had no objection to the form of development of the paddock now proposed by the applicants.

34. Mr Sheehan prepared a total of five statements or reports which were submitted prior to the commencement of the hearing. The second of these was a supplementary report dated 10 October 2001. It dealt with the effect of the proposed development of the paddock upon the brown land. He said:

> "The restrictive covenant as drawn has clearly served a useful purpose in preserving the development land purely as land for agricultural use which has enhanced the rural aspects of the area and given a locality of peace and quiet. If it remains it will endow upon the Upton Hunter land a number of qualities not easily found in

development land. Prestbury is an exclusive and in planning terms jealously guarded area. Withinlee Road is a superior location much sought after; sites of this size and disposition are rare and command a premium. The proposed development of the (paddock) would deny to the (brown land) and its subsequent development many considerable advantages, namely:

a) An area of peace and quiet.

b) The preservation of its privacy and a sense of space.

c) Would destroy the ethos of the site as intended to be developed by Upton Hunter.

d) Damage irrevocably the high visual amenity and views over the countryside.

e) Materially alter the character of the proposed Upton Hunter development.

f) A garden that could not be overlooked …

To quantify the reduction in value arising from the loss of the items mentioned above I have assumed that the proposed residence would be built to high standard of the type prevalent in this area. Nationally known builders of repute [Jones Homes and Messrs Crosby] would calculate such a residence to cost in the region of £200/£225 per square foot developed giving a price in excess of £700,000 given that the interior finish could add to this figure.

The proposed development of the (paddock) would have a severe impact on this residence and would reduce its desirability and thus its value. This serious difference in value is reflected in the sum of £150,000 …

The value of the Upton Hunter land in its present state without planning consent but zoned for residential use can be expressed in the sum of £180,000 but if the proposed development of the five houses on the (paddock) goes ahead this sum would be reduced to £100,000."

35. In the course of cross-examination, Mr Sheehan said, with commendable frankness, that he had reconsidered the position. He now felt that the development of the paddock would not have the detrimental effects listed as items (a) to (f) in the previous paragraph and that it would not adversely affect the value of the brown land or the house that was proposed to be built upon it.

36. Mr Shelmerdine considered that it was extremely rare to have the opportunity of developing a building plot such as the brown land, which enjoyed an exceptional view over essentially rural land. The construction of five houses on the paddock would destroy the exceptional degree of privacy and tranquillity that would otherwise be enjoyed by the proposed house on the brown land and would change its character from one of exclusivity to an estate house.

37. In a report dated 11 October 2001, Mr Shelmerdine referred to Upton's then proposal to construct a house with a gross internal floor area of approximately 2,690 square feet on the

brown land. He considered that the value of that land, with the prospect – but not the fact – of planning permission being granted, was £240,000. If the restrictive covenant on the paddock were released, he considered that this value would fall to £210,000. At the hearing Mr Shelmerdine produced revised valuations of the brown land, to reflect the fact that the gross internal area of the proposed house had been reduced to 2,110 square feet. He now felt that the appropriate values were £180,000 with the covenant in place and £140,000 assuming the covenant were released.

38. Since 1999 the brown land has been the subject of five applications for planning permission to erect a single dwelling house upon it. The first three applications were all withdrawn. The fourth was refused on 17 October 2001. One of the reasons for refusal was that the proposed development would be unneighbourly to adjoining property. In an attempt to overcome that objection, Upton submitted a further application on 17 May 2002 to erect a smaller house, approximately 20 metres to the north of the previous location. The effect of this amendment was that, whereas windows of the house which had previously been proposed would have enjoyed views in a westerly direction across the paddock and the countryside beyond, the view west from the house now proposed would be into the rear garden of Withinlee. The fifth planning application was refused and is the subject of an outstanding appeal. Assuming that appeal is successful, the occupiers of the new house will enjoy views over the paddock, but only from their rear garden and not from the house itself. In those circumstances, I find it surprising that Mr Shelmerdine considers the development of the paddock currently proposed would reduce the site value of the brown land by 22.2%, whereas the corresponding effect on the site value of the house that was proposed when he prepared his report in October 2001 – and which enjoyed more significant views across the paddock – would have been only 12.5%.

39. In my view, not only are Mr Shelmerdine's percentage reductions mutually inconsistent, but they both significantly overestimate the likely impact of the release of the covenant upon the development value of the brown land. Mr Higham pointed out that, if the current planning appeal were successful, a purchaser of the proposed house on the brown land would know that his home would abut the boundaries of two houses to the east and one to the west. Against that background, Mr Higham considered that a purchaser who was willing to buy a house on such a long, narrow site would not be concerned whether the paddock, which fell away steeply from the brown land and would abut only the rear part of its rear garden, was to be developed or not. This indifference would be reinforced by the fact that each of the five houses proposed would stand on a site which was much larger than the brown land and would tend to enhance residential values in the area. Moreover, it was at least possible that the proposed development of the paddock would increase the overall value of the brown land, because it might produce one or two special purchasers, interested in purchasing part of it as a garden extension, at not insignificant prices. In the light of all the evidence and my site inspection, I agree with that assessment of the position, which is consistent with Mr Yeo's lack of objection to the development now proposed on the paddock. I therefore find that, assuming the outstanding planning appeal is successful, Upton's right to prevent the proposed development of the paddock does not provide it with any material benefits of substantial value or advantage.

40. It is also necessary to consider the effects on the brown land of the release of the restrictive covenant, assuming the outstanding planning appeal is dismissed. As I have said, Mr Higham's view was that the use of the brown land for grazing purposes would not be affected if the covenant were discharged. Neither Mr Sheehan nor Mr Shelmerdine gave consideration in any of their reports to what would be the effect of such discharge if there were no prospect of residential development on the brown land. In answer to questions from me, however, Mr Shelmerdine expressed the view that, in those circumstances, release of the covenant would probably improve the value of the brown land. This was because it would increase the number of owners of adjoining houses who might be expected to be interested in acquiring parts of the brown land as extensions to their existing gardens. I accept that view of the position.

41. For completeness I should add that Mr Shelmerdine suggested at one stage that a house that was more acceptable to the planning authority could be designed if the current appeal were to be dismissed. He conceded, however, that, unlike the surveyors who were acting for Upton on the appeal, who did not give evidence before me, he was not a planning expert. I place no weight on this suggestion by Mr Shelmerdine. I therefore find that, whether or not the outstanding planning appeal on the brown land is successful the restriction, in impeding the proposed residential development of the paddock, does not secure to Upton any practical benefits of substantial value or advantage.

'Ransom strip'

42. That finding is subject to one qualification. The qualification concerns Upton's allegation that it is not the restriction that is impeding the proposed development of the paddock, but the applicants' lack of control of the proposed means of access to that development. In order to understand this allegation it is necessary to set out the relevant history in some detail. On 5 June 1973 planning permission was granted by Cheshire County Council for residential development comprising 27 dwellings and garages at Castleford Park, Prestbury for P E Jones (Contractors) Limited ("Jones"). That consent related to land which has a common boundary with the paddock and lies to the south of it. It was subject to a number of conditions, including the following:

> "Road number 1 on the attached revised plan A shall be continued and made up to the extremity of the northern boundary of the site as shown amended in red."

The accompanying plan showed that the road continuation in question was the cul-de-sac end of Castleford Drive referred to in paragraph 11 above.

43. The reason for this condition was:

> "In the interests of well planned development as the site is part of a larger area of land shown as suitable for future residential development on the Prestbury village plan."

44. A previous planning application relating to the same site had been refused, because it did not provide for a direct road link to the land to the north.

45. On 26 September 1973 the County Surveyor wrote to Jones as follows:

> "Highways Act 1959 – section 40. Collar Park, Castle Hill, Prestbury
>
> With reference to your request for an agreement under the above Act, the following particulars are suggested and I shall be glad to know if they are acceptable to you:-
>
> 1. Amount of bond - £12,500
> 2. Time required to complete the development - 2 years
>
> There are two amendments to the plan:-
>
> a) a correction at the easterly end of Road 1 in order to tie in accurately with the plan attached to the agreement dated 22/10/71.
> b) an addition to the length of Road 1 to be covered by the agreement (between plots 126 and 129 to the site boundary) in order to comply with the conditions of planning consent to this development.
>
> As soon as I hear from you, I will ask the Clerk of the County Council to prepare the draft agreement for your perusal."

46. Jones replied on 27 September 1973. They said:-

> "We thank you for your letter dated 26 September and accept the bond figure and completion time as described and we should be obliged if you could proceed with the draft agreement at your early convenience.
>
> The two points raised regarding the plan to be attached to the agreement have been brought to the attention of our architects and we will supply you with amended drawings when requested."

47. On 28 September 1973 a telephone conversation took place between Jones's architect, Mr Allsop of A Lancaster Britch and Associates and a representative of the County Surveyor, Mr Connolly. Mr Allsop pointed out that there was a considerable difference in levels between the end of the proposed road and the adjoining paddock. As a result it was agreed that the road should be constructed only as far as possible towards the site boundary.

48. Mr Allsop wrote to Mr Connolly on 12 October 1973, as follows:

"Further to my recent telephone conversation with Mr Connolly please find enclosed one paper copy of our drawing No.337/13 duly amended as suggested and coloured to indicate the extent of the estate roads to be adopted.

Perhaps you could let us know whether or not the drawing now meets with your approval."

49. The adoption agreement between Cheshire County Council ("the council") and Jones ("the developer") was completed on 27 March 1974. It read:

"WHEREAS the developer is developing a building estate at Collar Park, Castle Hill, Prestbury within the district of the council and is making roads for the public use on the said building estate in the positions indicated on the plan annexed hereto and thereon coloured brown and desires that the said roads shall on completion become highways maintainable at the public expense

AND WHEREAS the council subject to the construction and maintenance of the said roads in a proper manner upon the terms and conditions hereinafter appearing has consented to take over and adopt the said roads as highways maintainable at the public expense …

NOW in pursuance and by the authority of Section 40(2) of the Highways Act 1959 and of all other powers enabling the parties hereto respectively

IT IS HEREBY AGREED AND DECLARED as follows:-

1. The developer shall at his own expense and to the reasonable satisfaction of the County Surveyor (herein referred to as "the surveyor") execute or cause to be executed the following work (hereinafter referred to as "the works"):-

   (a) Construct and otherwise make good the said roads;

   (b) Provide a suitable outfall for the surface water drainage therefrom;

   (c) Provide means of street lighting therein

   in accordance with the specifications supplied by the surveyor.

2. (a) The developer shall notwithstanding anything hereinafter contained within a period of 3 years from the date of this agreement carry out and complete the works to the reasonable satisfaction of the surveyor. Each of the said roads shall be completed within six months of the same becoming built-up by the erection and completion of dwelling houses on both sides thereof and in such manner as to ensure a direct connection to an existing highway maintainable at the public expense from any road or roads so completed in accordance with this agreement.

   IN the interpretation and application of this clause a road shall be deemed to be built-up if the aggregate length of the frontages of the buildings on both sides of the road constitutes at least one half of the aggregate length of all the frontages on both sides of that road.

(b) If the developer shall default in completing the works or any part thereof in accordance with the terms of this agreement whether such default shall relate to one or to more than one of the said roads the council shall (after notice in writing by the surveyor to the developer of its intention to do so) have the right to complete or arrange to complete such works or any part thereof and recover the expenses thereof from the developer…

5. (a) AS soon as all or any of the said road shall have been completed and provided with suitable outfalls for surface water drainage in accordance with the provisions herein contained to the reasonable satisfaction of the surveyor the developer on application in writing to the surveyor, accompanied by evidence in writing that any drains or sewers (not forming part of the works) laid in such road or roads have been constructed to the satisfaction of the local authority that will eventually adopt them and that the means of street lighting therein have been completed to the satisfaction of the lighting authority, shall be entitled to a certificate of the surveyor fixing the date of commencement of the maintenance period in respect of the said road or roads.

(b) The developer shall make good to the reasonable satisfaction of the surveyor any defect or damage arising or becoming manifest in the said road or roads during the period of six calendar months from the commencement of the maintenance period and the maintenance period shall end at the expiration of the said six months or on completion of all works of making good as aforesaid whichever is later.

(c) At the end of the maintenance period in respect of any road or roads the said road or roads (as the case may be) shall become maintainable at the public expense …"

50. The plan accompanying the agreement indicated that the roadway coloured brown continued right up to the boundary of the paddock. The following words were added to the plan in manuscript, within the boundary of the paddock:

> "Verbally agreed 28/9/73 that the length of road A-B would be constructed only as far as was reasonable bearing in mind the difference in levels."

51. The road A-B was the most northerly section of Castleford Drive, B being located on the site boundary. Directly beneath the manuscript words was the following, which formed part of the printed drawing:

> "Allowance on drainage for additional 12 units."

52. Mr Simpson is the principal engineer of development control of the Borough of Macclesfield joint highways team of Cheshire County Council. He has worked for the highway authority since 1969. On 14 November 2002 he replied to a letter from Mr Higham, asking whether the adopted portion of Castleford Drive extended up to the boundary of the paddock. He said:

"The scale of your original plan provided to me, necessarily limited the detail of the limits of adoption indicated on that plan when returned with my letter dated 14 July 2002. However, for the avoidance of doubt, I would advise you that the limits of adoption are indeed to the site boundary. This was a condition of the planning approval for the site and this was recognised in the preparation of the Section 40 agreement for the adoption of that road, and indeed was reflected in the final adoption of the road upon completion of the maintenance period.

Further, with respect to your second paragraph, there is a note on the Section 40 drawing which states that the length of road A-B (B being the site boundary) would be constructed only as far as was reasonable bearing in mind the difference in levels between each side of this boundary. The emphasis being on the word "constructed", i.e. the metalled section of road, whereby the construction would cease at an appropriate point but that the limits of adoption would still continue up to the boundary, the balance of land being a highway verge. The site boundary being the centre of the hedge. That, therefore, is my understanding of the limits of adoption of Castleford Drive. There is no ransom strip between the adopted highway and the site boundary. Indeed, there is a letter on my file to Pembroke Homes Limited that tells them quite categorically that Castleford Drive is an adopted highway up to the site boundary at the end of the cul-de-sac.

I would confirm that the works subject to adoption were carried out to the satisfaction of the highway authority; otherwise adoption would not have taken place. If I can be of further assistance please do not hesitate to contact me."

53. Before me, Mr Simpson explained that the Council agreed that surfacing of the road would stop short of the boundary in order to avoid the necessity of constructing a retaining structure.

54. Nine days before the commencement of the hearing of this application, Upton ("the seller") entered into a conditional contract for the sale of the brown land to Jones ("the buyer"). The relevant terms of the contract – which referred to the brown land as "the property" and the alleged ransom strip between Castleford Drive and the paddock as the "land coloured red" – were as follows:

"14. The buyer represents that it is the owner of the piece of land adjoining Castleford Drive, Prestbury shown coloured red on the plan annexed.

15. This contract is conditional upon:-

(i) the seller successfully resisting proceedings in the Lands Tribunal under case no. LP/7/2001 brought by John Peter Broomhead, John Michael Kidd and Barbara Ann Kidd as owners of the land edged blue on the plan annexed ("the blue land") for the release/variation of a covenant preventing development on the blue land ("the proceedings").

(ii) the buyer completing the purchase of the blue land.

(iii) the buyer obtaining a local search reasonably satisfactory to it containing no onerous or unusual entries or any information which would prevent the development of the property and the blue land for residential

purposes in accordance with the planning permission (as defined below) or materially increase the cost of such development.

(iv) the grant of a planning permission for the residential development of the property and the blue land in terms satisfactory to the purchaser ("the planning permission").

16. The buyer shall be entitled to rescind this contract if the conditions set out in special condition 15 shall not have been fulfilled by 21 April 2004.

17. The consideration shall be 30% of the open market value (as defined in special condition 18) of the property and the blue land in the plan annexed …

19. Notwithstanding the provisions of special conditions 17 and 18, the consideration shall not be less than the sum of £265,000 in the event of the seller obtaining a planning consent for the construction of a private residence on the property, which does not require the acquisition of any other rights or consents to implement.

20. The transaction shall be completed on or before the expiry of one month from the date on which the conditions comprised in special condition 15 are fulfilled or the consideration is determined pursuant to special conditions numbered 17-19 inclusive which ever shall be the later.

21. The buyer will use reasonable endeavours to assist the seller to defend the proceedings

22. The buyer may on giving written notice to the seller at any time prior to the date in Clause 16 waive any one or more of the conditions in Clause 15."

55. Mrs Weatherby is employed by Emerson Developments (Holdings) Limited, which owns the entire issued share capital of Jones. She commenced employment as a solicitor with the holding company in December 1984 and since 1985 she has been the head of the Emerson Group legal department. She explained the conveyancing history of the land comprised in the Castleford Drive development undertaken by the company in the 1970s. She said that retention of ownership at the end of a road was her company's normal practice wherever the end of a road could abut undeveloped land, since it provided the company with a negotiating advantage should the owner of such adjoining land decide to make it available for development. She produced copies of the 1976 conveyances of 24 Castleford Drive and 21 Larch Rise. Those properties lie immediately south of the southern boundary of the paddock and in both cases land in the vicinity of the road was retained by her company. In cross-examination Mrs Weatherby agreed that her company had voluntarily registered its title to a ransom strip in Hawthorn Rise, a cul-de-sac off Castleford Drive, but it had taken no steps to register the two strips of land retained out of the conveyances of 24 Castleford Drive and 21 Larch Rise.

56. The boundary between the paddock and the Castleford Drive estate to the south is straddled by a hedge. Mr Machin submitted that the applicants did not own the hedge. A Mr Morris originally owned all the land comprising the paddock and the land to the south. (I

shall refer to the latter as "the Castleford land"). On 1 March 1916 Morris conveyed OS field no.141 – the Castleford land – to a Mr Moseley and he conveyed the southerly part of the paddock on 14 April 1920 to a Mr Frank. Mr Machin submitted that the ruling conveyance as regards the boundary between the paddock and the Castleford land was that dated 1 March 1916, since it preceded the 1920 indenture. He pointed out that the 1916 conveyance conveyed field no.141 plainly by reference to its OS number. He cited *Fisher v Winch* [1939] 1KB 666 as authority for the proposition that a conveyance of land by reference to its OS number conveys that land up to the centre line of its physical boundary as shown on the OS plan. Finally, he said that the oral evidence showed that, over the past 30 years, the hedge separating the paddock from the Castleford land had been maintained by the respective owners or occupiers on either side as if it were a party hedge. The proper conclusion, Mr Machin submitted, was that the hedge at the end of Castleford Drive belonged to the applicants and Jones up to the centre-line on each side respectively; it was a party hedge.

57. Mr Machin referred extensively to commentaries on the law of highways in Sauvain On Highway Law, 2nd edition and Halsbury's Laws of England, 4th edition (1995 reissue) Vol.21. He made the following submissions. In the case of the dedication of a highway at common law, the presumption was that a strip of land between the highway and the enclosed land adjoining it would belong to the adjoining owner. Although this presumption may be rebutted by acts of ownership there were no such acts by the highway authority in the present case. The vesting of a highway in a highway authority did not transfer ownership of the sub-surface soil or of roadside waste to the highway authority unless (in the case of roadside waste) it was part of the highway. Where there was a fence on the side of a highway, the public right of passage was presumed to extend to the space between the highway proper and the fence; but the presumption did not arise if the existence of the fence was not in some way referable to the existence of the highway (for example if the fence existed before the highway). In such instance there must be proof of actual user sufficient to justify an inference of dedication. In the present case there could be no presumption that the highway at Castleford Drive extended to the space between the end of the made-up road and the hedge. The hedge existed long before Castleford Drive was adopted as a public road. Even if the space between the end of the highway and the hedge could be said to be part of the highway, the space between did not include the hedge itself (or any part of it). The hedge (and the narrow strip of land on which it stood) remained vested in the landowners in whom it had been vested prior to the adoption, either as a hedge belonging exclusively to one particular landowner, or as a party hedge belonging half each to the contiguous landowners. As regards the creation of a highway by adoption, authority supported the proposition that adoption under statutory powers did not vest pre-adoption trees (or hedges) in the highway authority. In relation to "highway trees" the highway authority had limited powers of control over such trees – basically for their maintenance and protection, not for their destruction.

58. Mr Machin pointed out that Halsbury (para 123) stated:

> "At common law an owner of land adjoining a highway is entitled to access to that highway at any point at which his land actually touches it, even though the soil of the highway is vested in another; but he has no such right if a strip of land, however narrow, belonging to another and not subject to the right of passage, intervenes".

59. Mr Machin suggested that there would have to be a clear expression of intent in the adoption agreement to the effect that the hedge at the end of Castleford Drive was to be included in the adopted road. Not only was there no such expression of intent, but the indications from the wording of the adoption agreement were that the hedge was not to be included in the adoption or in the highway thereby created. Even if it was, that would not entitle either the highway authority or the applicants to remove the hedge – the ownership of the hedge (and the soil it stood on) would remain in those who by law would have owned it if there had been no adoption.

60. Mr Machin further submitted that the adoption agreement did not make the hedge part of the highway for four reasons. Firstly, the tarmacadam surfacing of Castleford Drive fell just short of the boles of the hedge on the south side, as confirmed by the manuscript endorsement on the adoption agreement plan. Secondly, the wording of the adoption agreement (and especially the recitals and clauses 1 and 5(a)) was against it being construed as including the hedge in the adoption process; there was no mention of a hedge or any obligation to maintain a hedge, and adoption of the hedge (unless it were only of the southerly half of only the part coterminous with the end of the road) would have needed the agreement of the applicants as owners of the northerly half; there was no evidence that such agreement had been sought. Thirdly, the construction of the adoption agreement should not be influenced by the subjective intentions of the highway authority, the local council, or indeed Jones. Finally, as a matter of highways law, adoption of a road did not include the abutting hedges, verges or trees unless expressly provided in the adoption agreement.

61. Mr Clark pointed out that there was no title document showing that there was a strip of land between the highway and the hedge or the mid-point of the hedge, or that half of the hedge was vested in Jones. He submitted that the documentary evidence was inconclusive as to whether Jones had any interest in the hedge at all.

62. At best Jones had half the hedge. Even if they did, this would not prevent access, for two reasons. Firstly, it was clear from the evidence of Mr Simpson that the local highway authority was insisting that Jones agreed to adoption up to the mid-point of the hedge. Thus the clear evidence before the Tribunal was that, if the highway authority had anything to do with it, they considered that access was not a problem and that there existed a highway up to the mid-point of the hedge.

63. Secondly, in construing the option agreement the Tribunal was entitled to hear extrinsic evidence to explain the genesis of that agreement and the reason for the brown colouring on the attached plan. This involved knowing that the local authority wanted a comprehensive scheme without any ransoming position and that the adoption agreement was part of that scheme. Alternatively, there was either a collateral agreement that the obligation as to the extent of the road to be made up was varied, but no variation of the extent of the land coloured brown was made; or Jones would be estopped from contending that the adoption was anything other than up to the mid-point of the hedge.

64. Mr Dixon is the joint owner, with his wife, of 24 Castleford Drive. He, Mr Broomhead and Mrs Kidd gave evidence relating to the history of the maintenance of the hedge. This

evidence was conflicting and did not, in my view, establish that such maintenance has always been undertaken by the owners or occupiers of the paddock. Even if it had done so, this would not on its own necessarily be sufficient to prove that the applicants owned the entire hedge. Moreover, the sale of field no.141 in 1916 by reference to its ordnance survey number points to the centre line of the hedge being the physical boundary of the Jones land. As Mr Clark pointed out, this is not a formal boundary dispute, but on the available evidence in this application I find that the hedge is a party hedge.

65. In my judgment, the overriding factor determining whether a ransom strip exists between the paddock and Castleford Drive is the proper construction of the adoption agreement itself. The factors to be taken into account in the construction process were referred to by Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All ER 98, as follows:

> "My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386 and *Reardon Smith Line Limited v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principle by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in a situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret occurrences in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of

words is a matter of dictionaries and grammar; the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

66. Thus, the adoption agreement is to be construed taking into account the entire factual background available to the parties, which would have affected the way in which the document would have been understood by a reasonable person. The previous negotiations of the parties and their subjective intentions are to be excluded from that background. In my judgment, the relevant factual background to the agreement is as follows. The local planning authority wanted a comprehensive development scheme including the land to the north of the Castleford Drive extension and had previously rejected one that was not comprehensive. The road to be adopted was shown on the plan with brown colour, extending right up to the site boundary and incorporating drainage for a further 12 units on the land to the north. The clear intention of the parties was that the new road would in time serve the 12 houses to be erected on that land. The fact that the agreement contains no specific reference to the hedge is immaterial. The only matter which might conceivably suggest that the adoption would exclude part of the area coloured brown is the manuscript addition to the plan, indicating that the parties had verbally agreed that it was not necessary to make up the entire road. That agreement, however, was merely a practical recognition by the parties of the problems resulting from the differences in levels. It cannot, in my view, be reasonably interpreted as reserving a ransom strip to Jones. Moreover, even if Mr Machin is right in suggesting that the hedge itself is not vested in the highway authority, paragraph 3-49 of Sauvain's summary of the law on the ownership of trees does not support his suggestion that the highway authority is unable to remove it. Sub-paragraph (c) reads as follows:

> "The vesting provisions of the Highways Act 1980 and its predecessors did not vest in the highway authority pre-adoption trees but the highway authority will have rights and powers, in relation to the tree analogous to ownership." (see *Stillwell v New Windsor Corporation* [1932] 2 Ch 155).

67. There is therefore no impediment to the proposed development of the paddock, apart from the restrictive covenant itself. In view of my earlier findings, it follows that the application succeeds under ground (aa).

Ground (c)

68. Finally, the applicants rely on paragraph (c), namely

> "that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction".

In view of my decision on (aa), it is not necessary for me to make a finding on this ground.

The Tribunal's discretion

69. I have found that the applicants have succeeded in satisfying the requirements of paragraph (aa). I now consider whether it is appropriate for me to exercise my discretion to discharge or modify the restriction. I bear in mind that the application is by the original covenantors, albeit many years have passed since the restriction was imposed. I also bear in mind that Upton purchased the brown land in April 2001, knowing that outline planning consent had been granted for the proposed development of the paddock and because, as Mr Yeo said, they had

> "formed the view that there was the potential to make a decent profit on the transaction."

Mr Yeo's company purchased the brown land for £100,000. In Mr Shelmerdine's view, which I accept, the land will be worth that sum even if planning consent for the erection of a house upon it is refused on appeal and the covenant is released. I have taken into account those factors and the various other matters referred to in section 84(1B) of the 1925 Act and I consider that it is appropriate for me to exercise my discretion under that Act. The application is for both the discharge and modification of the restriction. The remaining objections to this application have been withdrawn subject to a condition prohibiting access to and egress from the development via Tudor Drive and I agree that such condition is a reasonable one. In the course of his closing submissions Mr Clark accepted that the Tribunal did not have power to impose such a condition if the restriction is discharged. Accordingly, I determine that the restrictive covenant shall be modified so as to permit the applicants to erect a maximum of five houses on the paddock, subject to the condition that access to and egress from any such development must not be via Tudor Drive.

Compensation

70. On the assumption that the restriction would be discharged or modified, Upton claimed compensation under section 84(1) of the 1925 Act, which provides as follows:

> "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 a sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following headings, 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 the restriction was imposed, in reducing the consideration then received for the land affected by it."

71. The consequence of the modification of the restriction in the present case will be to remove Upton's power to obtain a financial benefit before houses can be erected on the paddock. That loss, however, is not compensatable. As Dillon LJ (with whom Griffiths LJ agreed) put it in *Stockport*:

> "The loss of the right to bargain is not in itself a subject for compensation, although the development value may be a relevant factor for consideration in some circumstances in valuing a loss of amenity."

I have found that the modification of the covenant would not adversely affect the value of the brown land. Accordingly, there is in my view no justification for an award of compensation under paragraph (i).

72. Mr Higham did not consider that any compensation should be paid under paragraph (ii). He pointed out that at the time of the purchase in 1967, neither the paddock nor any surrounding land was allocated for development. The original sale particulars and advertisement both referred to a paddock and did not mention any development potential. The applicants originally agreed to pay £14,050 for Withinlee without the paddock. This was subsequently increased by £1,000 to include the paddock. As Mrs Kidd explained, the first the purchasers knew about the restriction was when they received the draft contract. The restriction was, however, of no consequence to them as, at that time, they only intended to use the paddock for grazing.

73. Mr Sheehan considered that the market value of the paddock in April 1967, on the assumption that no restriction on use was in place, was £12,250. This was based on a value of £30,439 assuming planning permission for residential development, discounted by 60% to reflect the absence of planning permission. In his initial report, Mr Sheehan said that, in 1967, the paddock

> "was land with serious development potential and its designation shows that it was not a question of whether it was developable – but when".

74. This opinion was based on comments contained in the Prestbury village plan, a non-statutory document prepared by Cheshire County Council in February 1970, and on two internal documents prepared by the local planning authority in connection with planning

applications for residential development on sites which Mr Sheehan described as being "very close to the affected land".

75. In cross-examination, Mr Sheehan agreed that the paddock was not "designated" for development at the relevant date. He should have said that, in view of "what was happening around the land", he thought it would be developed one day. He also agreed that it was not accurate to describe the two internal documents as relating to land "very close to" the paddock. Finally, he accepted that, although planning consent was granted for residential development on both sites, those consents post-dated the sale of the paddock to the applicants.

76. Mr Shelmerdine valued the paddock in April 1967, assuming it was free of the restrictive covenant, at £8,500. This value, he said, was prepared on the assumption that the land was

> "zoned as suitable for future residential development and reflecting 'hope value'".

He considered that the hope value was

> "8.5 times the agricultural value, reflecting the fact that this land was not in the green belt in 1967 and it was deemed suitable for future residential development."

In cross-examination, Mr Shelmerdine accepted that the land was not zoned for residential development at the relevant time.

77. The multiplier of 8.5 time agricultural value was based on the sale of Bolshaw Farm, Heald Green, some 22 years after the valuation date. Mr Shelmerdine said that Bolshaw Farm, which was in the green belt, was sold for £15,000 per acre, equivalent to approximately five times agricultural value.

78. Before deciding which, if any, of the valuation evidence is to be preferred, it will be helpful to outline the events leading to the sale of the paddock in 1967. Mr Rodman said that his mother inherited the Withinlee estate following the death of her husband in May 1964. She instructed a firm of estate agents, J R Bridgford and Son ("Bridgfords"), to dispose of the entire estate in 1964 or early 1965. This strategy was pursued unsuccessfully for several months before she reluctantly decided to sell the estate in lots. In the late summer of 1965 the house was offered with a limited garden area of approximately 1.5 acres. The property was advertised on this basis for approximately 8 months, but without success. The sales package was then varied to include the paddock and the property was first advertised in that way in August 1966. Shortly afterwards Mr Kidd agreed to buy the house and garden alone for £14,055. His friends, who were intending to share in the purchase, were forced to drop out because they were unable to sell their own house. Mr Broomhead then joined in the negotiations and indicated a wish to buy the paddock as well. It was in these circumstances that agreement was reached to increase the purchase price by £1,000.

79. Mr Sheehan considers that, if the paddock had had the benefit of planning permission for residential development at the time of the sale, it would have been worth £30,000; Mr Shelmerdine's equivalent figure is £32,000. Mr Sheehan assesses hope value at 40% of this development value and Mr Shelmerdine at 26.5%. Unlike Mr Higham, neither professes to be a planning expert and neither considered it appropriate to seek the advice of such an expert on the planning prospects for the paddock at the relevant date.

80. Throughout the entire period of marketing Mrs Rodman was advised by Bridgfords, who, according to Mr Sheehan, were probably the leading estate agents in the area. They had recently marketed a large neighbouring site with residential planning consent. It is, in my view, simply inconceivable that Bridgfords would have advised Mrs Rodman to sell the paddock for £1,000, if there had been a real prospect that planning consent would be granted in the foreseeable future, resulting in a 30-fold increase in value. The fact that Bridgfords marketed the property over a lengthy period, without mentioning in their sales particulars or to the eventual purchasers that the paddock possessed any development value, clearly indicates that the approaches of Mr Sheehan and Mr Shelmerdine towards hope value are fanciful. I reject their valuation evidence on this aspect in its entirety and I accept Mr Higham's opinion that the restriction had no effect on the price paid for the paddock in 1967. Accordingly, no compensation is payable to Upton.

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

Dated: 11 February 2003

(Signed) N J Rose

Addendum

82. I have received written submissions from the parties on costs.

83. The applicants say that they were successful and that costs should follow the event. They applied for either a discharge of the restriction or its modification, in order to permit the carrying out of the proposed development. The issue was whether or not that development could be carried out and the applicants have obtained a modification sufficient to enable them to undertake the development that Upton was resisting. Although the application under paragraph (a) failed, it was only necessary for the Tribunal to find for the applicants on one of the grounds sought. The majority of the evidence related to paragraph (aa) and the right to compensation thereunder; the applicants were successful in respect of both.

84. The applicants also say that, in contrast to Upton, they acted in a way that was reasonable and proportionate in seeking to avoid the necessity of proceeding to a hearing. They wished to avoid proceedings if at all possible and put forward two offers to purchase the brown land from Upton's predecessor in title before application was made to the Tribunal. Since a negotiated settlement did not appear achievable and it was necessary to proceed with the development in order to protect the position on the outline planning permission, an application was made to the Tribunal. By letter dated 5 July 2002 the applicants made a written offer to Upton to pay £20,000 for the release of the covenant, with each party bearing its own costs. No reply to that letter was received and at no stage during the proceedings did Upton put forward proposals for settlement.

85. While Upton was entitled to call two valuation experts in accordance with an order from the Tribunal, it was clear that the two were not ad idem in their evidence. This increased the length of their cross examination and resulted in several adjournments while they reconsidered their evidence. Upton was invited at the end of Mr Sheehan's evidence to reconsider its position and in particular whether it was appropriate to call further evidence from Mr Shelmerdine. It decided to call him and this extended the hearing by least two days. Moreover, it was necessary for the applicants to obtain an order of the Tribunal for there to be a meeting of experts in order to narrow the issues, prior to the hearing.

86. So far as the alleged ransom strip is concerned, the applicants say that this was first drawn to their attention by a letter from Upton's solicitors dated 22 October 2002, eight days before the hearing of the application. They suggest that by raising this issue, particularly at such a late stage, Upton was responsible for significantly increasing the length of the hearing and, consequently, the applicants' costs.

87. The applicants ask for costs to be awarded in their favour on the standard basis, except for the costs of dealing with the ransom strip, which should be assessed on the indemnity basis.

88. Upton points out that the application was made under paragraphs (a), (aa), (b) and (c). It failed on ground (a) and ground (b) was not pursued. Furthermore, although the Tribunal felt it unnecessary to make a finding on ground (c), Upton submits that the applicants would have failed on that ground. This, it says, is because "injury" includes the loss of the ability to procure a payment of money or a profitable participation in a proposed development. Upton suggests that a considerable part of the proceedings (both before and during the hearing) was taken up with grounds (a) and (c).

89. Upton also says that the applicants have failed to the extent that throughout they sought the discharge, and not merely the modification of the restriction. The applicants' success has thus been only partial; there has been no clear-cut winner. Moreover, the applicants did not seek Upton's consent to their proposed development under the terms of the restriction, but first obtained outline planning permission and then presented it with a fait accompli. Also, once the applicants learned that Mr Rodman had sold the brown land to Upton, they refused to continue negotiations. Instead they initiated the application to the Tribunal and the matter, as might be expected, became contentious.

90. Taking these various matters into account, and also the fact that the access issue did not result in many costs being incurred prior to the hearing, Upton submits that the applicants should pay 25 per cent of Upton's costs or, at the very least, that there should be no order for costs.

91. In my judgment, the main factors to be borne in mind when considering the question of costs are these. The applicants have largely succeeded in their application. They were unsuccessful in two respects. Firstly, they only obtained a modification of the restriction and not its discharge. I consider, however, that the costs attributable to the application for discharge, which would not have been incurred if the application had been limited to modification only, are likely to have been insignificant. Secondly, the applicants did not succeed in substantiating grounds (a) and (b). A small but significant part of the costs of the application, both at the hearing and before, was attributable to the applicants' unsuccessful attempt to prove paragraph (a). The applicants did succeed on ground (aa) and on valuation and, in my view, most of the hearing was taken up with evidence and submissions on those two issues. I consider that it would be inappropriate for me to speculate on the outcome of paragraph (c) at this stage, having previously made a decision not to consider it on the substantive issue. As to (b), none of the hearing was taken up with that issue, although the applicants should be responsible in any event for the pre-hearing costs of dealing with the objections which were withdrawn. In my view, the issue of access to the paddock was a difficult one and, although unsuccessful, Upton was fully entitled to raise it. Moreover, I am not persuaded that the costs of dealing with the point would have been significantly lower if it had been raised earlier in the proceedings. Nor am I satisfied that the costs of the proceedings were increased as a result of the need to apply to the Tribunal to order a meeting of experts.

92. In my view there is no merit in the suggestion that the applicants presented the objectors with a fait accompli or that the application to the Tribunal reduced the prospects of an amicable settlement. The applicants reached agreement with all the other objectors. They also made a genuine effort to reach agreement with Mr Rodman and, by way of the formal offer in July 2002, with Upton.

93. In his recent decision in *Re Norfolk and Norwich University Hospital NHS Trust's Application* (LP/41/2001, unreported) the President, George Bartlett QC, said:

> "In any application for costs in a contested section 84 case it is important to bear in mind the nature of the proceedings. In such proceedings the applicant is seeking to have removed or reduced rights which were conferred on the objector or his predecessors by force of contract. If an objector successfully resists such an application he will usually be awarded his costs. The converse, that a successful applicant should normally receive his costs, does not, however, apply. An unsuccessful objector may be ordered to pay part or all of the applicant's costs; or there may be no order as to costs; or he may receive part or all of his costs where, although the covenant is ordered to be discharged or modified, compensation is awarded to him. Which of these courses is followed by the Tribunal will depend principally on the nature and degree of the applicant's success and the conduct of the parties. In exercising its power to award costs the Tribunal will always bear in mind

> the nature of the proceedings, which must ordinarily put an objector in a more favourable position in relation to costs than the unsuccessful party in ordinary civil litigation."

94. I respectfully agree with those observations and consider the current application with them in mind. The applicants have succeeded on the issues which accounted for the bulk of the costs and that should be reflected in my award. I accept the applicants' submission that Upton did not make an offer to settle and put forward every conceivable objection to the application. I also agree that Upton's decision to insist on calling Mr Shelmerdine, at a time when the weight likely to be attached to his evidence had been significantly reduced by concessions made by Mr Yeo and Mr Sheehan, could well have been the subject of disapproval of by the Tribunal if it had been taken in the course of "ordinary civil litigation". Bearing in mind the President's observations in *Norfolk and Norwich*, however, I do not consider that Upton should be penalised in costs for its robust approach to the present proceedings, or for its decision to call Mr Shelmerdine in an attempt to recover a position which had been weakened by two of its earlier witnesses.

95. Accordingly, I order that the applicants shall recover from Upton three quarters of their costs incurred after the certificate of compliance and excluding the costs of dealing with the objections which were withdrawn. Such costs if not agreed are to be assessed by the Registrar of the Lands Tribunal on the standard basis.

Dated: 13 March 2003

(Signed) N J Rose