

UPPER TRIBUNAL (LANDS CHAMBER)



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LT Case Number: LP/3/2009**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – open land – covenant prohibiting erection of any building – application to modify to permit construction of 17 dwellings and seven garages – application refused – Law of Property Act 1925 s84(1) (aa).

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

BY

GEORGE WIMPEY BRISTOL LIMITED

and

**GLOUCESTERSHIRE HOUSING
ASSOCIATION LIMITED**

**Re: Approx 1.8 acres of open land
Mill Lane
Prestbury
Gloucestershire**

Before: N J Rose FRICS

**Sitting at Cirencester Magistrates' Court, The Forum, Cirencester, GL7 2PL
on 25-27 January 2011**

Andrew Francis, instructed by Shulmans, solicitors, of Leeds for the Applicants.

Edward Peters, instructed by Lyons Davidson, solicitors, of Bristol for Mr and Mrs Beardmore and Mrs Walmsley, Objectors

Mr Martin Cotter, one of the Objectors, in person.

Mr Geoffrey Day, one of the Objectors, in person and for the remaining Objectors with permission of the Tribunal.

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The following case is referred to in this decision:

Re Bass Ltd's Application (1973) 26 P & CR 156

The following cases were also cited:

Re Azfar's Application [2001] EW Lands LP/10/2000

Re Bushell's Application (1987) 54 P&CR 386

Re Davies's Application (1970) 25 P & CR 115

Re Fairclough Homes' Application [2004] EW Lands LP/30/2001

Re Farrow's Application [2001] EW Lands LP/18/2000

Gilbert v Spoor [1983] 1 Ch 27

Re Gossip's Application (1972) 25 P & CR 215

Re Hamden Homes' Application [2001] EW Lands LP/38/1999

Re Henderson's Conveyance [1940] 1 Ch 835

Re Livingston's Application (1982) P & CR 462

Re North's Application (1997) 75 P & CR 117

Re Poulton's Application (1969) 21 P&CR 664

Re Saddington's Application (1964) 16 P&CR 81

Re Sheehy's Application (1991) 63 P&CR 95

Re Tarhale Ltd's Application (1990) 60 P&CR 368

Wakeham v Wood (1981) 43 P&CR 40

Re Williams' Application (1987) 55 P&CR 400.

Shephard v Turner [2006] EWCA Civ 8

Re Jilla's Application [2000] 2 EGLR 99

Re GBP Construction Ltd's Application LP/56/2007, 20 February 2009, unreported

Re Robinson's Application [2009] UKUT 159 (LC)

Re Cain's Application [2009] UKUT 212 (LC)

Vertical Properties v New Hampstead Garden Suburb Trust Ltd & Ors [2010] UKUT 51 (LC)

DECISION

Introduction

1. This is an application by George Wimpey Bristol Limited (Wimpey Homes) and the Gloucestershire Housing Association Limited (the Housing Association) under section 84(1) of the Law of Property Act 1925 (the Act) for the modification of a restrictive covenant affecting freehold land on the south side of Mill Lane, Prestbury, Gloucestershire (the application land) so as to permit residential development.

2. The restriction was imposed by a conveyance dated 25 June 1936 between Henry Edward Ripley (the Vendor) and Lilian Valentine Simpson (the Purchaser), by which the Purchaser covenanted

“for the benefit of the adjoining land of the vendor on the West and South sides of the land hereby conveyed that no building shall be erected on the piece of land to the west of the line drawn on the said plan between the points marked ‘A’ and ‘B’...”

The line A-B forms the eastern boundary of the application land.

3. The application land is mainly within Title No.GR298806, of which the first applicant, Wimpey Homes is the freehold proprietor. Wimpey Homes has transferred two small areas within the application land to the Housing Association, and these are now registered under Title No.GR309762.

4. On 30 October 2006 detailed planning permission was granted by Tewkesbury Borough Council for the erection of 124 dwellings and the provision of public open space, nature conservation area and associated access on land between Noverton Lane to the south and Mill Lane to the north. The approved details included the construction of 17 dwellings, one triple garage and 6 double garages on the application land. The 17 dwellings comprised 7 detached houses, 3 townhouses, 4 affordable terraced houses, one affordable flat above a garage and 2 affordable flats, one above the other. Details of an additional 107 units were also approved. The latter have been erected by the applicants on land to the east of line A-B, which is not subject to a restrictive covenant.

5. On 31 January 2008 proceedings were commenced against Wimpey Homes in Bristol County Court by Mr and Mrs Geoffrey Beardmore of Shandon, Noverton Avenue, Prestbury and Mrs Mary Walmsley of Little Meadows, Noverton Lane, Prestbury, claiming the benefit of the restriction and seeking an injunction to restrain Wimpey Homes from building on the application land. The Housing Association was added as a second defendant to the claim by order dated 15 May 2008. Wimpey Homes applied under section 84(9) of the Act to stay the claim pending the resolution of the present application. On 4 November 2008 an order was made by consent granting such a stay.

6. The application was made under paragraphs (aa), (b) and (c) of section 84(1) of the Act. Ground (b) was withdrawn at the commencement of the hearing and ground (c) was withdrawn in the course of closing submissions.

7. Objections to the application are outstanding from the following owners of dwelling houses in the vicinity of the application land: Mr Leslie Green (Fairgarth, Noverton Lane), Mr Martin Cotter (The Spinney, Mill Lane), Mr and Mrs Malcolm Garrett (High Beeches, Noverton Lane), Mr and Mrs Frederick Stevens (Ivyhurst, Noverton Avenue), Mr John Foley (Mallards, Noverton Lane), Mr Kenneth Lewis (Portelet, Noverton Avenue), Mr Paul Ballinger (2 Noverton Avenue), Ms Charlotte Pumfrey (12 Noverton Avenue), Ms Angela Hook (16 Noverton Avenue), Mrs Laurina Blankenspoor (20 Noverton Avenue), Mrs Mary Walmsley (Little Meadows, Noverton Lane), Mr and Mrs Geoffrey Beardmore (Shandon, Noverton Avenue), Mr and Mrs Michael Bassett-Smith (Grey Gables, Southam Road), Mr and Mrs Michael StJohn-Green (Robinswood, Noverton Lane), Mr David Wade (5 The Stables, Mill Lane), Ms Jennifer McLachlan (Hawthorns, Noverton Avenue), Mrs Marianne Hughes (8 Noverton Avenue), Mr Geoffrey Day (Newcourt House, Mill Lane), Mr James Simons (Foxcote, Noverton Lane), Mrs Joyce Marriott (6 The Stables, Mill Lane), Mr Philip Timings and Mrs Anne Hughes (7 The Stables, Mill Lane) and Mr and Mrs Paul Adams (Greka, Noverton Avenue). It is agreed that all the objectors are entitled to the benefit of the restriction.

8. Mr Andrew Francis of counsel appeared for both applicants. He called factual evidence from Mr Gregg Wilkinson, the Land and Planning Director employed by Wimpey Homes, and expert evidence from Mr Richard Brogden BSc, MRICS, a partner in Bruton Knowles, based in the Gloucester office. Mr Edward Peters of counsel appeared for the objectors, Mr and Mrs Beardmore and Mrs Walmsley. He called all three of his clients to give factual evidence. He also called Mr P A F Chambers FRICS, a director of Perry Bishop and Chambers Limited of Cirencester, who gave expert evidence. Mr Cotter appeared in person and gave evidence in support of his objection. Mr Day also appeared in person and, with permission of the Tribunal, for the remaining objectors, and gave evidence.

9. On the morning of the third day of the hearing, before closing submissions, I made an accompanied inspection of the application land. I also inspected the objectors' properties externally and, in some cases, internally as well.

Facts

10. From the evidence I find the following facts. The application land is situated on the northern fringes of Prestbury, about one mile from the centre of Prestbury itself and about 4 miles from the centre of Cheltenham. Prestbury is considered to be one of the best residential areas of Cheltenham. When the 1923 Ordnance Survey plan of the area was prepared, all the land between Mill Lane to the north and Noverton Lane to the south was occupied by a single residence, Prestbury Court, with its substantial range of outbuildings, together with one other house in large grounds immediately north-east of the application land, known as Burnside. Since that date Prestbury Court has been demolished. It has been replaced by a number of

large detached properties to the west of the application land, the stable block has been converted to a number of residential units, and the garden and agricultural land has been the subject of substantial residential development. This has resulted in the existence of 79 residential units to the west, south and south-east of the application land, plus the 107 units built by Wimpey Homes to the east of that land, pursuant to outline planning permission dated 23 March 2006 and approval of reserved matters on 30 October 2006. That planning permission was granted despite opposition from a large number of householders in Prestbury. The permitted development was at a higher density than most of the houses previously constructed on the site of Prestbury Court. It included some pockets of “affordable housing” which are now owned by the Housing Association.

11. Before Wimpey Homes started work on the 17 units and 7 garages, the application land was laid to rough grazing, with a small area of woodland copse adjacent to Mill Lane. The countryside to the north and east forms part of the attractive, undulating landscape comprising the lower slopes of the Cotswolds scarp. This landscape is included in an Area of Outstanding Natural Beauty. There are belts of trees on the southern and western boundaries of the application land which are subject to a Tree Preservation Order. The protected belt on the southern boundary extends for some distance beyond the eastern boundary of the application land.

12. The house and garden known as “Subajan” is also bound by the covenant. Subajan is a single house in a very large plot, with a frontage to Mill Lane, immediately to the north-west of the application land and just east of The Spinney and its immediate neighbour to the west, Newcourt House. It was built in the 1960s, pursuant to a limited deed of release dated 2 March 1961. By that deed properties with the benefit of the covenant (including the then owners of The Spinney, Shandon and Pontelet, whose current owners are among the objectors to the present application) permitted the construction of one house only on the Subajan plot. That house comprises one of the 79 units referred to in para 10 above.

13. On 3 May 2007 solicitors instructed by Mr and Mrs Beardmore wrote to Wimpey Homes. They drew attention to the restrictive covenant and asked the developer to cease installing services in preparation for the construction of a housing development on the application land. Nevertheless, Wimpey Homes continued to make preparations to build and finally started building on 6 November 2007. They continued to lay foundations and partially erect buildings for a further five months. After Mr and Mrs Beardmore commenced court proceedings, a large number of workers were transferred from work at the far end of the site to the east of line A-B on to a large building near to the centre of the application land. Work on this building continued until a substantial part of the structure had been completed. It was then used for storage of building materials. By the time building works ceased on the application land Wimpey Homes had started construction on all the proposed houses and garages.

14. The topography of the area rises generally in a north-easterly direction. Mill Lane rises from 83m AOD adjacent to a house known as Le Vignoble, two doors west of Newcourt House, to 89.6m adjacent to the application land (that is, between Subajan and Burnside). The properties east of the line A-B commence with ground floors in excess of 92m.

15. Following the approval of reserved matters dated 30 October 2006, the permanent work undertaken by Wimpey Homes on the application site included the construction of drainage works, part of the estate road leading to an emergency exit point at Mill Lane, and works to the watercourse at the northern end of the site.

16. The application land is currently used for the storage of construction materials in temporarily sited containers. It was also used by construction workers for car parking and other general storage associated with the residential development.

Case for the objectors

17. There are outstanding objections from the owners of 22 houses. Five of these – Portelet, Little Meadows, Shandon, Greka and part of Hawthorns – have a boundary adjoining or including the woodland belt which abuts the application land. The remainder are situated at varying distances to the west and south-east.

18. The detailed grounds of objection varied, depending on the locational relationship of each objector's property to the application land. They included the following: disturbance during construction works; risk of flooding; loss of natural habitat for wildlife; light pollution; increased crime, traffic congestion and noise; loss of privacy, views, openness and overall amenity; the proposed modification would set a precedent for further modification(s) of the restriction; loss of property value.

19. Mr Chambers considered that the effect of the proposed modification would be to reduce the freehold value of Shandon from £550,000 to £450,000 (a reduction of 18.18%) and that of Little Meadows from £600,000 to £525,000 (12.5%). Mr Adams and Mr Day produced written reports from Mr Cameron Clarke FRICS of Cotswold Surveyors Limited of Cheltenham. Mr Clarke expressed the view that the value of Greka would be reduced by 25% and that of Newcourt House by 5% if the proposed modification was approved. Mr Lewis was unable to give evidence because of ill-health, but he submitted a report from Mr Clarke assessing the reduction in value of Portelet at 25%. Mr Cotter produced a letter from Mr David Evans of Savills, Cheltenham office, which recommended "considering a reduction in the selling price" of The Spinney of around 6 to 8%. In contrast to Mr Chambers, neither Mr Clarke nor Mr Evans was called to give evidence before the Tribunal.

20. The objectors did not accept that the proposed user of the application land was reasonable. They submitted that, although the proposed development had planning permission, that was not determinative of the question. Numerous previous attempts to obtain planning permission had been rejected as inappropriate. The planning inspector who reported in December 2003 on the Tewkesbury Borough Local Plan to 2011 recommended that the application land, together with land to the east which was subsequently developed with 107 dwellings, should be allocated for approximately 110 dwellings. The development proposed on the application land would take the total to an unreasonably high figure of 124.

Case for the applicants

21. Mr Brogden considered that the proposed user of the application land was reasonable. He pointed out that, before it granted planning permission in 2006, the local planning authority was satisfied that the proposed development complied with policy at both local and national levels. He produced a schedule showing the distance from each objector's property to the nearest boundary of the application land and to the nearest proposed dwelling. He pointed out that there was existing residential property situated closer to each of the objectors' properties than any of the proposed buildings.

22. Mr Brogden said that the development on the application land for which the modification was sought was in accordance with the historic pattern of development in the area, development plan policies and the planning permission. He considered each of the matters which had been raised in support of the objections. He estimated that the proposed building works could be completed within a construction period of seven months. He agreed that this work would create some additional disturbance. He considered, however, that such work comprised less than 10% of the overall works associated with the planning permission and that it could be undertaken at the same time as outstanding site works required for the benefit of the existing residential development to the east of the application land. On flooding, Mr Brogden said that drainage details were carefully considered before they were approved by the local planning authority. There was no reason to believe that flooding would result from the proposed development and affect the value of nearby properties. On natural habitat, he said that the planning permission controlled the management of the application land, including open land within the curtilage of the dwellings, open space and a balancing pond. The Tree Preservation Order was to be retained, but with bat and bird boxes fitted. He accepted, however, that the planning permission would create a managed habitat rather than a natural one.

23. Mr Brogden did not believe that artificial light emanating from the proposed development would have a significant impact on the objectors' properties and he felt that the fears expressed about increased crime, traffic and noise were unjustified. He accepted that a number of properties could be seen from the application land, particularly in mid-winter when leaf foliage was at a minimum. Those most affected would be those adjoining the southern boundary (including Little Meadows) and in particular Greka due to its proximity to the boundary, its orientation and its two storey construction. On the question of views and openness, Mr Brogden agreed that there was a possibility that the properties immediately adjoining the southern and western boundaries of the application land would be affected, together with some properties further away with a direct view into the land.

24. Mr Brogden pointed out that, when it granted planning permission for the proposed development, the local planning authority stated that its impact on neighbouring properties had been carefully assessed, and it was considered that there would be no undue impact on their amenity. Considering all the issues identified by the objectors as a whole, rather than attributing a value to each of the component parts, he did not think that the overall effect of the proposed modification on the objectors' amenities would be as great as the sum of the parts.

25. In Mr Brogden's opinion, the properties most adversely affected by the proposed development were Portelet, Shandon, Greka and Little Meadows. Despite the relative proximity of Fairgarth, immediately to the west of Little Meadows, it was not easily visible from the application land and would not be affected to the same degree. Hawthorns, situated immediately to the east of Portelet, was mainly affected by the development to the east of line A-B, which was not subject to the restriction. The Spinney and 2 Noverton Avenue might become aware of the houses on the application land, but to a marginal extent at most. Nos.8, 12, 16 and 20 Noverton Avenue would not be affected by the development. They were already suburban dwellings surrounded by a variety of residential properties. The presence of their existing neighbours would be the single biggest factor contributing to their overall amenity. The properties of the remaining objectors were separated from the application land by other residential property and the proposed development would have no impact upon them. Having inspected all the objectors' properties, Mr Brogden was of the opinion that only Portelet, Shandon, Greka, Fairgarth, Little Meadows and Hawthorns might secure practical benefits if the proposed user of the application land was prevented.

26. Mr Brogden then considered whether those benefits were of substantial value or advantage. In his view each of the houses would fall in value if the covenant were modified as proposed. His valuations of those properties, and his assessments of the diminution in value, were as follows:

Property	Value	Diminution in value
Fairgarth	£525/550,000	£ 2,000
Portelet	£200/250,000	£ 2,000
Little Meadows	£525/550,000	£10,000
Shandon	£525/550,000	£17,500
Hawthorns	£200/250,000	£ 1,000
Greka	£600/620,000	£25,000

These figures related only to the long-term effects of the modification, but Mr Brogden was of the view that any disturbance during construction would be minimal. In his opinion, the practical benefits secured to the objectors by the restriction were not of substantial value or advantage and money would be an adequate compensation for the loss or disadvantage which would be suffered by the owners of the six properties whose values would be reduced. This was because the character of the area would not change as a result of the proposed modification. It would be a residential area whether or not the 17 houses were erected.

Conclusions

27. As I have said, the only surviving issue is whether the application should succeed on ground (aa). In order to decide that issue it will be convenient to adopt the approach set out by the Tribunal (J Stuart Daniel QC) in *Re Bass Ltd's Application* (1973) 26 P & CR 156.

Question 1. Is the proposed user a reasonable user of the land for private purposes?

As in *Re Bass*, it difficult in the face of the planning permission to say that the proposal is not a reasonable user. The main justification for the contrary view put forward by the objectors is the fact that, if the restriction is removed, the total number of dwellings erected on the application site and the applicant's land to the east will be 124, which is 14 more than the number recommended in the inspector's report on the Tewkesbury Borough Local Plan to 2011. There is, in my judgment, no force in that contention. The inspector's suggested figure was expressed as an approximation only. Moreover, the inspector reported in December 2003. In their subsequent report to the local planning authority on the outline planning application for residential development, the planning officers advised that it was necessary to increase the density above that recommended by the inspector in order to reach the lowest density threshold for new residential developments set out in PPG3 (30 to 50 dwellings per hectare). I am satisfied that the proposed user is reasonable

Question 2. Does the covenant impede the proposed user?

It is agreed that it does.

Question 3. Does impeding the proposed user secure to the objectors practical benefits?

It is agreed that it does, at least so far as the following objectors' properties are concerned: Little Meadows, Greka, Shandon, Portelet, Hawthorns and Fairgarth. For present purposes I propose to concentrate on these six properties in the first instance, since they would clearly be most affected by the proposed modification.

Question 4. If the answer to question 3 is affirmative, are those benefits of substantial value or advantage?

In the case of Little Meadows and Shandon I had the benefit of expert evidence on behalf of both the applicant and the objectors. Mr Brogden considered that the proposed modification would reduce the value of Little Meadows by £10,000 (or approximately 3.25%) and that of Shandon by £17,500 (or less than 2%). Mr Chambers strongly disagreed. His estimates of the diminution in value were, respectively, 12.5% and 18%. Having heard the evidence and inspected the two properties, I consider that Mr Chambers is closer to the mark. I bear in mind that it is possible, from both premises, to see the new Wimpey Homes estate of 107 dwellings on land which is not subject to the restrictive covenant. I also bear in mind that the rear views from both houses and their gardens are partly interrupted by the TPO protected tree screen and that both properties are at present overlooked to a limited extent by adjoining houses. In my view, if the restriction is not modified, Little Meadows and Shandon will continue to enjoy a semi-rural location, with outstanding views over open land to the beautiful hills in the distance. On the other hand, authorisation of the proposed development would result in the location of these houses changing to one of a largely suburban character, with a resultant loss of views, privacy and overall amenity. I find that the value of the freehold interest in each property with the benefit of the restriction is £550,000 and that this would be reduced as a result of the proposed modification by 15% in the case of Shandon (to £467,500) and by approximately 12.5% in the case of Little Meadows (to £480,000).

28. I place little weight on valuation reports produced for other objectors, since the authors were not called to give evidence. In the light of the evidence generally, however, I conclude that in the case of the four remaining properties which, it is agreed, secure practical benefits from the restriction, the reductions in value resulting from the modification would be

Greka -	15%
Portelet -	12.5%
Hawthorns -	10%
Fairgarth -	7.5%

29. In my judgment the practical benefits of the restriction to the owners of these four properties, and those of Shandon and Little Meadows, are of substantial value and advantage. The applicant has therefore failed to substantiate ground (aa).

30. That conclusion means that question 6 (whether money would be an adequate compensation for the modification) does not arise. Neither do questions 5 and 7 apply, since it has not been suggested that the restriction, in impeding the proposed user, is contrary to the public interest. It also means that I do not need to decide whether grounds 3 and 4 have been established in relation to the houses of the remaining objectors. I propose nevertheless to state the conclusions I have reached on questions 3 and 4, so far as they relate to Newcourt House and The Spinney, in deference to the contribution to the proceedings made by their owners, Mr Day and Mr Cotter.

31. Both gentlemen were concerned about flooding. A stream runs down Mill Lane, but when it reaches The Spinney it channels into a pipe which goes under the road and beneath the foundations of two cottages on the other side of Mill Lane, before rising to the surface and continuing back into a stream some 100 yards further down the road. Before Wimpey Homes started their building works, on one or two occasions each year the volume of rainwater would be greater than the capacity of the pipe and the excess water would flow down the road, often in significant quantities. Since construction of the new Wimpey houses the road floods about 10 times each year. Mr Cotter considered that the extra flooding was due to the fact that, formerly, the area now built upon delayed the arrival of water into the stream by a matter of hours or even days. The application site still provided an area where water was retained for a period. If this area were developed with 17 houses, water running onto and falling upon the whole of the Wimpey Homes site would immediately hit the stream via their drainage system.

32. Mr Cotter added that flooding now occurred in his rear garden, providing an indication of the volumes of water that were held in the fields before the development, most of which were now quickly channelled into the stream. Wimpey Homes had admitted responsibility for flooding the kitchen of Subajan, to the north-east of The Spinney. They compensated the owner and dug a drainage pond in attempt to deal with the problem. This pond, however, was half full even on a dry day and performed no function. Mr Cotter felt that to eliminate the final strip of land still acting as a water break would be a disaster. Mr Day was also concerned about the risk of flooding, not in Mill Lane but in his large rear garden.

33. Mr Brogden agreed that, on the first two occasions when he visited Mill Lane, the road was totally flooded following a rain storm. Although he is not a hydrology expert, he relied on the fact that the drainage details for the Wimpey Homes development had been approved by the local planning authority as demonstrating that the objectors' concerns about flooding were unfounded. In cross-examination, however, he accepted that he was aware of an incident in the locality where a drainage scheme, designed to cope with a flood event following a 1 in 100 year storm, had been approved by the local authority but had failed and flooded within one year.

34. In the absence of any expert evidence on behalf of the applicants to show that the increased flooding which has occurred since Wimpey Homes started building houses in the vicinity is not connected with that development, I find that the concerns about flooding expressed by Mr Cotter and Mr Day are reasonable. I also conclude that Mr Cotter was justified in opposing the proposed modification on the grounds that it would provide a precedent for a further modification, permitting the construction of two additional houses on the site of Subajan, his close neighbour. Planning permission has been granted for the erection of those houses and, if implemented, would alter the character of this part of Mill Lane by introducing a form of development at a much higher density than that existing at present. In my judgment, the restrictive covenant, by impeding the proposed development, secures to Mr Day and Mr Cotter the practical benefits of allaying their reasonable concerns about intensified flooding and relatively high density development in Mill Lane, and that those practical benefits are of substantial advantage.

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

36. A letter concerning costs accompanies this decision, which will take effect when the question of costs is decided.

Dated 14 March 2011

N J Rose FRICS