UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0209 (LC)
Case No: LP/27/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Modification - Law of Property Act 1925 s.84 - restriction limiting use of land to use for a sports ground or for the erection of detached houses for use as private residences only - land derelict - no prospect of future use for sports ground - land zoned for residential development - no prospect of planning permission being given for a development of solely detached houses - applicant willing to accept the addition of further provisions restricting use of land under section 84(1C) - application succeeds in part under paragraph (a) and in part under paragraph (aa) of section 84(1)

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

BETWEEN:

DERREB LIMITED **Applicant**

- and -

BLACKHEATH CATOR ESTATE RESIDENTS LIMITED **Objectors**
PROF MARTIN PRINCE AND MRS MIE PRINCE
MR PAUL HARPIN AND MS CLARE WHITE

Re: 106 Manor Way,
Blackheath,
London SE3 9AN

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Before: His Honour Judge Huskinson and Mr P McCrea FRICS

Sitting at: Royal Courts of Justice, London WC2A 2LL
On 15-16 May 2017

Janet Bignell QC, instructed by Derreb Ltd, for the Applicant
Timothy Mould QC, instructed by Blackheath Cator Estate Residents Limited
Professor Prince appeared in person on behalf of himself and Mrs Prince
Mr Harpin appeared in person on behalf of himself and Ms White

The following cases are referred to in this Decision:

Derreb Limited v White and Harpin and Others [2015] UKUT 0667 (LC)

Re Greaves' Application (1965) 17 P&CR 57

Re Forestmere Properties Ltd's Application (1980) 41 P&CR 390

Re Truman, Hanbury Buxton & Co Ltd's Application [1956] 1 QB 261

Driscoll v Church Commissioners for England [1957] 1 QB 330

Re Associated Property Owners Ltd's Application (1965) 16 P&CR 89

Re Marcello Developments Ltd's Application [2002] RVR 146

DECISION

Introduction

1. In this case the applicant, Derreb Limited, applies to the Tribunal under section 84 of the Law of Property Act 1925 as amended for an order discharging, alternatively modifying, certain restrictions arising under a 1956 deed as to the use of land known as the Huntsman, 106 Manor Way, Blackheath, London SE3 9AN, having a registered title number LM143032. This land is approximately a five-acre site and was formerly the Huntsman Sports Club. The land is hereafter referred to as the Huntsman. The applicant is the freehold owner of the Huntsman.

2. The Huntsman lies at the south-eastern corner of the Cator estate. The Cator estate is a private estate of some 282 acres, containing some 1,500 dwellings, located south of Blackheath village. The estate remained in the ownership of the Cator family until October 1999 when John Cator died. The majority of the estate was laid out in the early 19th century, with dwellings ranging from large houses from that date, to "span" development in the 1950's.

3. Immediately to the north of the Huntsman are to be found the properties of Prof and Mrs Prince (83 Brooklands Park) and of Mr Harpin and Ms White (85 Brooklands Park). As regards 85 Brooklands Park this has a boundary with the Huntsman. As regards 83 Brooklands Park this is separated from the Huntsman by the access way running to the south of 83 (and of 83A) Brooklands Park which gives access to 83A Brooklands Park and to 85 Brooklands Park.

4. The Huntsman at present is accessed along Brooklands Road and Manor Way, both of which are private estate roads the freehold of which is owned by Blackheath Cator Estate Residents Limited (BCER) and maintained by them. The access to the Huntsman is at its north west corner where Brooklands Road and Manor Way meet. There exists a right of way over these roads which was granted to the applicant's predecessor in title and which is enjoyed by the Huntsman as dominant tenement over the relevant estate roads as servient tenement. This was granted by a deed dated 26 August 1993. The rights are granted "at all times hereafter and for all purposes in connection with the use and occupation of [the Huntsman] with or without vehicles…" Accordingly the present situation is that the applicant as owner of the Huntsman enjoys, as a proprietary right appurtaining to the Huntsman, full rights of way over these estate roads belonging to BCER.

5. The Huntsman was the subject of a conveyance dated 5 November 1956 whereby it was conveyed by the vendor (it seems the tenant for life and the trustees of the Cator estate) to the applicant's predecessor in title and was made subject to the following restrictive covenant in paragraph 3 of the first schedule:

> "The property hereby conveyed shall not be used for any purpose other than as a Sports Ground or for the erection of detached houses for use as private residences only such buildings to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor's Surveyor as aforesaid"

There was also a covenant in paragraph 5 of the first schedule requiring (inter-alia) that no part of the Huntsman should be used for any trade or business or manufacture whatsoever and that:

> "…. no building erected or to be erected as aforesaid shall at any time be used for any other purpose than that of a private residence but this restriction shall not affect the present use of the land as a Sports Ground"

6. The Huntsman has not been used as a sports ground since 1999 and currently stands vacant and unused. We conducted a site inspection both of the Huntsman and of the objectors' neighbouring properties and of parts of the Cator estate lying close to the Huntsman, especially the roads leading to and from the Huntsman. The Huntsman is now notably overgrown and unused. What was once the sports pavilion has been demolished.

7. This matter has already come before the Upper Tribunal upon a hearing under section 84 (3A) as to who should be admitted as objectors to the applicant's application for the discharge or modification of the relevant restrictions. In a decision dated 23 December 2015 in *Derreb Limited v White and Harpin and Others* [2015] UKUT 0667 (LC) Judge Edward Cousins decided that all the present objectors were entitled to object to the applicant's application in the following capacities:

> (1) as regards BCER, as registered proprietor of certain estate roads on the Cator estate;
>
> (2) as regards Prof and Mrs Prince, as registered proprietors of 83 Brooklands Park; and
>
> (3) as regards Mr Harpin and Ms White as registered proprietors of 85 Brooklands Park.

8. In summary what is sought by the applicant is that the restrictions should be discharged or modified so as to enable to proceed a scheme of development (hereafter called the proposed scheme) which the applicant proposes to carry out. The proposed scheme involves the carrying out of a residential development on the Huntsman by the construction not solely of detached houses but instead of a mixture of buildings, some of which would be detached houses some of which would be semi-detached or terraced houses and some of which would be flats in apartment blocks. There is a substantial planning history in relation to the Huntsman. At present there does not exist any planning permission yet granted in respect of the proposed scheme. However the applicant contends that, having regard to the evidence referred to below, it is clear that planning permission will indeed in early course be granted for the proposed scheme once the applicant and the local planning authority, namely the Royal Borough of Greenwich ("Greenwich"), have agreed suitable terms pursuant to section 106 of the Town and Country Planning Act 1990 regarding the appropriate contribution towards affordable housing to be made by the proposed scheme.

9. The problem which has arisen for the applicant in relation to the proposed scheme and which the applicant seeks to overcome by this application to the Tribunal is as follows. The Huntsman has not been used as a sports ground since 1999 and is now overgrown and derelict. The Huntsman is no longer designated as open space, but is instead zoned for residential development in the Local Plan and in the Kidbrooke Development Area ("KDA") supplementary planning document. The applicant contends there is no prospect either as a matter of planning or as a matter of market demand that the Huntsman will ever again be actively used as a sports

ground. Instead the appropriate use of the Huntsman is for a residential development. However the restrictions in the relevant covenant prevents the Huntsman being developed for anything other than detached houses. On the other hand planning policy demands (so the applicant contends) that the appropriate residential development should be a mixed development of substantial density which, while it could incorporate some detached houses, must also incorporate other forms of dwelling including semi-detached/terraced houses and flats. In short there is, so the applicant says, no possibility that planning permission will be granted to develop the Huntsman so as to build solely detached houses. However the restriction only allows a development to go ahead if it is indeed limited to solely detached houses. An impasse has therefore been reached which, unless solved by the present application to the Tribunal, will result in the Huntsman being left in its present unused and unkempt state indefinitely or at least until Greenwich makes a compulsory purchase order (thereby extinguishing the relevant restrictions) and enables a residential development to go ahead in accordance with what Greenwich wish, which may be a substantially more intensive development than the applicant's proposed scheme.

10. At the hearing the applicant was represented by Ms Janet Bignell QC. She called four witnesses namely:

(1) Steve Harvey BA (Hons) DipArch ARB RIBA who was the architect who had designed the proposed scheme.

(2) Anthony Francis Richard Collins MRICS MRTPI (and other qualifications) who gave expert evidence regarding Town & Country planning matters.

(3) Clive D Beer MRICS MCIArb (and other qualifications) a director of Savills (UK) Ltd who gave valuation evidence.

(4) Terence James Macey, a solicitor and director of the applicant, who gave evidence on behalf of the applicant itself.

14. At the hearing BCER was represented by Timothy Mould QC. He called as a witness Paul Reid who was previously chairman of BCER and who is a chartered surveyor.

15. At the hearing Prof Prince represented himself and Mrs Prince. Prof Prince gave evidence.

16. At the hearing Mr Harpin represented himself and Ms White. Mr Harpin gave evidence.

17. It is convenient here to set out the relevant provisions of section 84 of the Law of Property Act 1925 as amended:

"(1) the Upper Tribunal shall … have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied –

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or

(aa) that (in a case falling within sub-section (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

…

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

…

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

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

(b) is contrary to the public interest;

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

(1B) 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 Upper 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.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of

the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition. ”

18. For the purposes of the present application the applicant relies upon paragraph (a) and paragraph (aa) of section 84(1). At one stage during the application the applicant also relied upon paragraph (c) of section 84(1) and was minded to advance an argument that in essence the basis of the objections of each of the objectors was frivolous and vexatious. However, at the hearing Ms Bignell, upon instructions, very properly withdrew reliance upon paragraph (c) and did not seek to contend that the objections were frivolous or vexatious.

19. The original position of each of the three objectors (i.e. BCER; Prof and Mrs Prince; and Mr Harpin and Ms White) was that the application should be refused. They submitted that none of the relevant grounds in section 84 had been made out and that in consequence there should be made neither any discharge nor any modification of the relevant restrictions such that the applicant would be unable to proceed with the proposed scheme.

20. During the course of the hearing the position changed. Evidence was given on behalf of the applicant and was the subject of cross examination. Further explanations were given on behalf of the applicant and certain concessions were made. By the end of the hearing before us it was recognised separately by each of the three objectors that the outcome of the present application should not be an outright refusal to discharge or modify the relevant restrictions in any way. It was recognised by the objectors that it would be wrong for the result of the present application to be that the applicant was to remain prevented by the relevant restrictions from carrying out the proposed scheme. However questions remain to be decided as to how that result was to be achieved within section 84 and what accommodation should be made for the objectors, whether by way of the imposition of a further restrictive provision under section 84 (1C) or payment of compensation.

The Evidence

21. The evidence given on behalf of the applicant can be summarised as follows.

22. Mr Harvey gave evidence to the following effect.

23. He has been advising the applicant on architectural matters since May 2009, and had designed the proposed scheme, the footprint and layout of which had been influenced by the Cator estate and the restriction.

24. The proposed scheme comprises 130 dwellings, consisting of 38 detached houses, 25 terraced houses, and 67 apartments. The development along the northern and western boundaries, adjoining the Cator Estate, comprised either detached houses or two apartment blocks (buildings A1 comprising nine flats over five storeys; and A2 comprising six flats over four storeys) which would have the external appearance of large detached houses.

25. The larger blocks of apartments (building C comprising 31 flats over three to five storeys; and building D comprising 21 flats over five storeys), were situated in the south-west corner of the

site, adjoining the Kidbrooke development. The 25 terraced units, with the remaining detached houses, were located at the centre of the site, surrounded by internal estate roads.

26. There would be two vehicular access points on the eastern boundary, providing access from Kidbrooke. From the Cator estate, there would be pedestrian access, but no vehicular access, save for mobility scooters. These access points, and the corresponding internal roads, were designed to mirror the adjoining Kidbrooke development.

27. Mr Harvey considered that the applicant had dealt with BCER's objections to the previous planning applications, under which there was vehicular access from the proposed scheme to and from the Cator estate, by restricting vehicular access as described above, and moving the main access to the scheme to the eastern boundary.

28. As regards Prof and Mrs Prince's objection, Mr Harvey said that there was no overlooking (in a technical sense) from the new development, as 83 Brooklands Park was greater than 41 metres away from the nearest building. A house which had been proposed in a previous scheme, closer to the Prince's property had been abandoned. The planning inspector had commented that the deletion of this house "would overcome the problem with respect to numbers 83 and 83A Brooklands Park". Instead, there was a large landscaped area over which the pedestrian and mobility scooter access would cross. He did not consider that there would be any loss of spaciousness or outlook.

29. As regards Mr Harpin and Ms White's objection, Mr Harvey said that the only properties visible from 85 Brooklands Park would be detached houses, which would not be in breach of the restriction, and it was relevant to consider the context in which number 85 sat. It is adjacent to terraced housing on Richmount Crescent, which were a similar distance away as the proposed detached housing. No issues of overlooking had been raised as part of the planning process. The detached houses had been designed to have their private gardens backing onto the northern boundary of the site, maximising the amount of open space between them and 85 Brooklands Park, and creating more privacy than the previous sports ground use.

30. Mr Collins gave evidence to the following effect.

31. He had surveyed all the properties within the Cator estate and had conducted extensive investigation into the planning history upon each road on the estate. He referred to the history of the Blackheath Cator estate from its earlier times. He drew attention to the fact that in 1957 pressure to increase housing density and the need for housing had led to the compulsory acquisition by the London County Council of about 10 acres of land within the estate which became developed as the Casterbridge Estate which is just to the north of the Huntsman. There are no detached houses on the Casterbridge estate.

32. He drew attention to numerous other developments within the Cator estate since 1956 which had not involved solely detached houses. Upon the Cator estate (excluding the Huntsman) there were in the order of 1500 dwellings of which about 248 were detached houses resulting in 16% of detached houses. The proposed scheme comprises 38 detached houses out of the total number of 130 residential units (29%). The proposed percentage of detached houses to non-detached

residential units on the application land was almost double the percentage which currently exists on the Cator estate.

33. Mr Collins said that the Huntsman is zoned for residential development in the Local Plan and in the Kidbrooke Development Area (KDA) supplementary planning document. The KDA is identified in the London Plan 2016 which was adopted in March 2016. The Huntsman is designated in the London Plan as an "area for intensification" which discourages development of detached houses because such development necessarily requires more land leading to a lessening of density. Mr Collins made reference to the Mayor's Housing Supplementary Planning Guidance (March 2016) which provides further guidance on the London Plan policies for housing. He made reference to the minimum density by way of units per hectare which would be normally expected in accordance with the planning policies. He drew attention to the three separate planning decisions which had been made by Inspectors in relation to the Huntsman and to how at the first inquiry (which led to a decision by Mr Dobsen MA (Oxon) DipTP FRGS dated 26 February 2014) Greenwich had sought to object on the basis that the scheme then proposed provided an insufficient quantity of units. However Mr Dobsen had concluded the then proposed scheme did not constitute an unacceptable under-development. The proposed scheme was firmly based in the scheme considered by Mr Dobsen, save that the access was now to be taken from Moorhead Way to the east (rather than from BCER's estate roads) and also a unit which Mr Dobsen had found objectionable has been removed. Mr Collins pointed out that the proposed scheme is the subject of a resolution on the part of Greenwich (made in September 2014) to grant planning permission subject only to the agreement of appropriate terms under section 106 regarding affordable housing. The subsequent decision letters involved decisions that the proposals regarding section 106 matters were not satisfactory but did not in any way undermine the planning merits of the proposed scheme.

34. Accordingly although planning permission for the proposed scheme has not yet been granted there is every reason to believe with confidence that, once the section 106 matters have been agreed, it will be granted.

35. The proportion of detached houses proposed on the Huntsman is more than would be expected in most developments in London, which Mr Collins considered to be a significant achievement in planning terms.

36. Mr Collins expressed the firm conclusion that there was effectively no chance whatever that planning permission could be obtained to develop the Huntsman by constructing solely detached houses. This would be contrary to the relevant planning policy and would be successfully opposed by Greenwich. Mr Collins was cross-examined at some length by Mr Mould upon this point. It was pointed out to him that the applicant had never applied for planning permission for a development of solely detached houses. Also certain points in the planning documents were put to him to suggest that he may be too pessimistic in his view that planning permission would not be granted for such a development. Mr Collins remained firmly of the opinion already stated. He said that the proposed scheme represents the maximum number of detached houses possible within planning policy and material planning considerations.

37. Mr Collins expressed the view that the restrictive covenant was imposed at a time when the development context for the Cator estate had already changed from a low-density estate of

principally detached houses to one reflecting public policy for higher density housing, typified by terraced houses and blocks of flats. He said that the imposition of the covenant in 1956 was an anachronism seeking to retain a vestige of low-density detached dwellings against an emerging public policy of mixed dwelling types and greater density of development. However in cross-examination he recognised that the covenant may have been taken in 1956 to re-establish a type of development which had fallen away over the years.

38. Mr Collins drew attention to a recent development at 104/104A Manor Way which is a development of 11 apartments on a site previously occupied by a single detached house, the site of which adjoins the Huntsman.

39. Mr Collins said that, as a development of solely detached houses would not receive planning permission on the Huntsman, the retention of the restriction for solely detached houses would sterilise the land. No residential development could be provided.

40. If the restrictions in the covenant are maintained such that the Huntsman remained sterilised, then Mr Collins concluded that the likelihood would be that in due course a compulsory purchase order would be made by Greenwich so that a housing development could proceed. It would not be acceptable to leave effectively derelict such a large area in such an important location (i.e. a location recognised as one which was to make an important contribution towards needed housing). If a compulsory purchase order was made then it would be virtually certain that the ultimate housing development carried out on the Huntsman would be substantially denser and have substantially less detached houses than the proposed scheme.

41. Mr Collins agreed with the observation of Mr Dobsen in paragraph 49 of his decision letter when he said:

> "For their part, objectors describe and emphasise the tranquil character of the private gated Cator estate roads at present, given the relatively small number of vehicles using them compared with the busy distributor roads (such as Lee Road) outside the estate to which they give access. My own site visits confirmed this quality of calm, almost cloistered tranquillity within the Cator estate, which owes much to the virtual absence of through traffic and to the low-volume and intermittent nature of its traffic movements."

42. Mr Beer gave evidence to the following effect.

43. He made clear in his written statement that his instructions had been to compare the difference, in valuation terms, for each objector between (i) the position that objector would be in if the proposed scheme proceeded and (ii) the position that objector would be in if the Huntsman were developed for a residential development in accordance with the restrictions in the covenant, namely a development involving only detached houses.

44. At an early stage in the hearing we enquired of Ms Bignell whether this was in fact the correct comparison to make, bearing in mind the applicant's expert’s own evidence that there was no prospect of a development of solely detached houses being permitted as a matter of planning. We raised the question, for consideration by the parties, as to whether the proper comparison to be made was between the position of the objector if the proposed scheme proceeded and the position

of that objector if the proposed scheme was prevented so as to result in the Huntsman continuing to be an undeveloped and unused site. We asked Mr Beer to express valuation conclusions upon comparisons made for each objector upon this basis.

45. Upon this latter point Mr Beer said that, as a valuer valuing the respective properties of the objectors, he would consider that the continued presence of five acres of what was (in his view) at present a dump in an area where there was high pressure for housing development placed a big question mark (as he put it) over the value of the respective properties. He said that, so far as valuation was concerned, it was necessary to be careful what one wished for. It was more beneficial to the value of the objectors' properties to have a known scheme which was to proceed (namely the proposed scheme) rather than to have the status quo coupled with uncertainty for the future. He said that the market severely punishes uncertainty.

46. Making the comparison between the value of the objectors' properties (i) with proposed scheme and (ii) with a hypothetical development of only detached houses, Mr Beer could not find any diminution in value of any of the objectors' properties.

47. Mr Beer was asked by Mr Mould whether he agreed that, supposing that (contrary to Mr Beer's view) the restriction in impeding the proposed scheme did secure to BCER benefits of substantial value or advantage, the benefit could not sensibly be valued in money terms. Mr Beer responded that if there was a substantial value or advantage then it could be followed through into a value which could be assessed - if there is a substantial advantage it can be valued.

48. In answer to questions from Prof Prince, Mr Beer said that in his view the construction of building A1, which would be about 41 m away from the nearest part of 83 Brooklands Park, and the existence of windows at the fourth and fifth floor of the building would not make any difference to the value of Prof Prince's property. He pointed out that the value of 83 Brooklands Park needed to be assessed in the light of all of its surroundings, rather than limiting one's consideration of questions such as potential overlooking to the presence of one building, namely the proposed building A1. The substantial buildings at 102 and 104 Manor Way already existed. Valuing 83 Brooklands Park in the context of its entire setting, the presence of potential overlooking from a substantial distance from the upper parts of building A1 would not adversely affect the value of 83 Brooklands Park. Mr Beer also pointed out that, upon the hypothetical development of the Huntsman for solely detached houses, there could be a substantial detached house much closer to the boundary of 83 Brooklands Park than building A1.

49. In answer to questions from Mr Harpin, Mr Beer said that he had not researched the current market value of 85 Brooklands Park. He noted Mr Harpin's reference to the potential enjoyment of woodpeckers and bats and other wildlife which at present could be seen on the Huntsman from 85 Brooklands Park, but his view remained that there would be no diminution in the value of 85 Brooklands Park if the proposed scheme were constructed rather than either a scheme of solely detached houses being constructed or the Huntsman being left in its present undeveloped state.

50. Mr Macey gave evidence to the following effect.

51. He agreed that the applicant had never made a planning application for a development of solely detached houses. However he described how in about 2005, after there had been made a

resolution to include the Huntsman in the Kidbrooke Development Area, the applicant had instructed the distinguished architect Mr Quinlan Terry to draw up a scheme for detached houses. Mr Macey and Mr Terry went to meet officers of Greenwich in about 2005 to discuss this scheme, but Greenwich rejected the scheme out of hand and said they wanted no detached houses and 203 dwellings. This was the end of the detached houses proposal. Since then the applicant had been trying to find a middle way of obtaining planning permission with the maximum of detached houses.

52. Mr Macey did not seek to dispute that, if access to the Huntsman was taken across BCER's estate roads, then a development in accordance with the proposed scheme might well place a significantly increased burden on those roads as compared with a development solely for detached houses. Mr Macey drew attention to the clear planning requirement, as recognised in the proposed scheme, that there should only be access to and egress from the proposed development for mechanically propelled vehicles onto Moorhead Way to the east and that the access onto Brooklands Park and Manor Way would be only for pedestrians and pedal bicyclists and mobility scooters (the mobility scooters being the only exception to the prohibition on access for mechanically propelled vehicles).

53. Mr Macey said that the applicant would accept the imposition of a new restriction upon the Huntsman, if the proposed scheme were able to go ahead, namely the imposition of a further restriction under section 84(1C) preventing any access onto Brooklands Park or Manor Way from the Huntsman by any mechanically propelled vehicle (save only mobility scooters). He accepted that thereby BCER would have the ability in its own proprietary right to enforce such a prohibition, rather than having to rely upon Greenwich to enforce a planning condition that there should be no such access.

54. In answer to questions from Prof Prince, Mr Macey agreed that 104 Manor Way was not yet in use. As regards the affordable housing to be provided at the Huntsman, Mr Macey said that this still needed to be agreed with Greenwich through the section 106 procedures but that whatever the outcome of these negotiations this will not alter the proposed scheme. He said the applicant will not revise the proposed scheme at all and will meet all the affordable housing requirement (whatever that may be) within the proposed scheme.

55. In answer to questions from Mr Harpin, Mr Macey confirmed that it was a part of the proposed scheme that there would be built along the northern part of the Huntsman solely detached houses, such that the nearest built development to 85 Brooklands Park would be detached houses (i.e. development of the type contemplated by the restrictive covenant). In the light of concern expressed by Mr Harpin as to whether this might change for the future, Mr Macey indicated that the applicant would be prepared to agree to the imposition of a new restriction limiting the northern row of housing on the Huntsman to being detached houses only and preventing them being converted into multiple units of occupation and preventing the flat roof areas on the rear elevations (i.e. the elevations facing 85 Brooklands Park) from becoming used as utility areas rather than merely areas from which the buildings could be maintained.

56. On behalf of BCER, Mr Reid gave evidence to the following effect.

57. The Blackheath Cator estate extends to about 282 acres and contains about 1500 dwellings of mixed ages types and designs and is a central part of the designated Blackheath Park conservation area. Many of the roads and common areas on the estate are owned by BCER, which is responsible for the maintenance of the roads pavements and verges on the estate and for traffic control on the estate. BCER is not a residents' committee, but its shareholders are estate residents. BCER considers itself to be one of the principal safeguarders of the appearance and amenity of the estate.

58. The restrictive covenant restricts the use of the Huntsman to use either as a sports ground or for the erection of detached houses for use as private residences only. This therefore enables BCER to control what development may be brought forward on the Huntsman and to resist any development which might impact negatively on the estate roads (for example by overburdening them) and which might potentially alter the nature, quality and/or mode of use of the estate roads. Unrestricted development of the Huntsman site might affect the amenity value of the estate roads.

59. Mr Reid disagreed with the applicant's suggestion that the character of the estate had substantially changed by the construction of non-detached dwellings. The housing surrounding the Huntsman is predominately low rise.

60. Prof Prince gave evidence to the following effect.

61. The Cator estate still possesses an essentially low intensity character having been so developed over the last two centuries. There have been no substantial changes in the character of 83 Brooklands Park or the neighbourhood which is a conservation area. The housing surrounding the Huntsman remains predominantly low rise detached and semi-detached properties.

62. The proposed scheme would involve a residential development of a more intense character than that evident on the Cator estate. It would lead to loss of privacy, quiet, spaciousness, outlook and ambience the preservation of which could reasonably be expected to have formed part of the reason for the imposition of the restrictions.

63. Prof Prince had a particular concern with respect to building A1 which is a five-storey apartment block in close proximity to 83 Brooklands Park and which would overlook its front (and only) garden and would have direct lines of sight into the kitchen and a first-floor bedroom. Prof Prince noted that the proposed apartment block appeared to have external balconies and a roof terrace overlooking his garden and bedroom.

64. Prof Prince considered that the present market value of his property was about £1.35 million, but this was not offered by way of a professional valuation.

65. At the end of his evidence Prof Prince accepted (in answer to a question from the Tribunal as to what end result he submitted should be achieved) that he did not ask for a complete refusal to modify the restrictions so that the proposed scheme could not go ahead at all. He recognised there could be an advantage in having resolved the uncertainty regarding future development at the Huntsman. However he invited the Tribunal to consider imposing new restrictions to meet his concerns and/or to consider an award of compensation in his favour.

66. Mr Harpin gave evidence to the following effect.

67. He pointed out that the restriction gave the owners of 85 Brooklands Park a measure of control as to what development could be brought forward on the Huntsman. He gave evidence (in his written statement) in agreement with that of Prof Prince as summarised in paragraphs 61 and 62 above.

68. His property at 85 Brooklands Park was a single-storey architect-designed dwelling. It would be particularly affected by the development on the Huntsman.

69. The use of the Huntsman as a sports ground was a use, while it continued, of substantial benefit to 85 Brooklands Park. Since then nature has taken over and there is a quality of life for 85 Brooklands Park arising from the wildlife which can be seen and the tranquillity which can be enjoyed at his property.

70. The proposed development would also add to the traffic on Moorhead Way which runs behind 85 Brooklands Park and which will be an additional disturbance to him.

71. Mr Harpin considered the value of his property to be in the order of £1.5 million. He said that Ms White's assessment of value was £1.4 million.

72. Mr Harpin submitted a copy of an email from a Mr Mark Epps MNAEA, the proprietor of Winkworth Estate Agents in Greenwich, in which Mr Epps expressed the view that whilst the erection of two storey houses being built next to 85 Brooklands Park would only have a marginal effect of its value, the erection of three storey houses would certainly have a detrimental effect, for the obvious reasons of aesthetics, light and privacy. However the Tribunal was not provided with any form of witness statement from Mr Epps, and he did not attend the hearing.

73. At the end of his evidence Mr Harpin accepted (in answer to a question from the Tribunal as to what end result he submitted should be achieved) that he did not ask for a complete refusal to modify the restrictions so that the proposed scheme could not go ahead at all. However he invited the Tribunal to consider imposing new restrictions to meet his concerns and/or to consider an award of compensation in his favour.

The applicant's submissions

74. On behalf of the applicant Ms Bignell advanced the following submissions.

75. She recognised that, as matters had developed at the hearing, each objector was now willing to accede to a modification of the covenant to some extent (rather than resisting any discharge or modification), but nevertheless it was still necessary for the applicant to bring itself within one of the relevant provisions of section 84.

76. As regards ground (a) of section 84 (1), Ms Bignell recognised that it was a rare case in which an application on ground (a) succeeded. However she submitted that the applicant was entitled to succeed upon this ground in the present case.

77. Ms Bignell drew attention to the fact that it was clear that there no longer existed any person who could be described as the Vendor's Surveyor. This expression, as appears from paragraph 1 of the first schedule to the 1956 conveyance, is a reference to "the Surveyor for the time being of the Vendor or other the owner or owners for the time being of the Cator Estate at Blackheath". The evidence showed that the vendor was dead, the trustees had sold away the remaining estate holdings and there no longer existed any person who could be described as the owner or owners for the time being of the Cator estate at Blackheath. That part of the restriction which prevented any built development unless the plans and elevations etc had been submitted to and approved by the Vendor's Surveyor should in any event to be deemed obsolete. The approval of the plans for any buildings would be given by the local planning authority namely Greenwich. None of the objectors claimed to have the right as a successor to the vendor to require the applicant to obtain the approval of that objector's surveyor.

78. Ms Bignell pointed out that ground (a) contains various disjunctive elements each of which can open the way to a conclusion that the restriction ought to be deemed obsolete. It is necessary to consider (i) changes in the character of the property (i.e. the Huntsman), and (ii) changes in the character of the neighbourhood and (iii) any other circumstances of the case which the Tribunal may deem material. Also the power is to discharge **or** modify any relevant restriction and is a power to do so wholly **or** partially.

79. She submitted that when the covenant was imposed in 1956 there was no reason to think that the Huntsman could not continue to be used for a sports ground alternatively could be used for the erection of detached houses. In the light of the evidence that there was no possibility of detached houses only being constructed and the evidence that the Huntsman was not and could not anymore be used as a sports ground, she submitted that the restriction to use for a sports ground or detached houses should be deemed obsolete. Further changes in the character of the neighbourhood could be seen from the fact that the three immediately adjacent properties were now all divided into flats including 104 Manor Way which was a recently constructed apartment block (built in the general shape of a detached house). Also there have been changes in the character of the properties owned by two of the objectors, because in 1956 there was a single title which has subsequently become subdivided twice so as to constitute 83, 83A and 85 Brooklands Park. The character of the Cator estate itself had changed with a substantial number of developments of houses which were not detached or of flats.

80. In the result the restriction to use for a sports ground or for detached houses only should also be deemed to be obsolete. Ms Bignell referred to Preston & Newsom Restrictive Covenants 10th edition at pages 385 and 388. She also referred to *Re Greaves' Application* (1965) 17 P&CR 57 and to *Re Forestmere Properties Ltd's Application* (1980) 41 P&CR 390.

81. As regards the applicant's case under ground (aa) of section 84(1) Ms Bignell observed that it was not disputed by the objectors that the proposed use of the Huntsman namely for a residential development was a reasonable user and the proposed scheme was reasonable user.

82. As regards the planning situation Ms Bignell pointed out that, despite the cross-examination of Mr Collins by Mr Mould, no objector had called any expert planning evidence. She invited the Tribunal to accept Mr Collins's conclusions first that there was effectively no prospect of a planning permission being granted for solely detached houses and secondly that there was no

reason to doubt that planning permission would at an early date be granted for the proposed scheme, which was merely awaiting the resolution of the section 106 matters regarding affordable housing.

83. As regards whether the public interest limb in ground (aa) was satisfied, Ms Bignell recognised that it required special circumstances to put the public interest above private property rights. However there was no public interest in the Huntsman remaining derelict and undeveloped. The site needs to be put to a good public use. There is the likelihood (see the evidence of Mr Collins and Mr Beer) that if the restriction is not discharged or modified so as to allow the proposed scheme to go ahead then there will be made a compulsory purchase order. She submitted the public interest limb of ground (aa) was satisfied in the present case.

84. As regards ground (aa) and section 84(1A)(a), Ms Bignell submitted that, in impeding the proposed user (namely the development of the proposed scheme), the restrictions did not secure to any of the objectors any practical benefits of substantial value or advantage to them. She referred to the evidence from Mr Beer upon the valuation matters. As regards BCER they will be protected by planning conditions and the terms of the contemplated planning permission which will provide that there is only access for mechanically propelled vehicles from the east. However the imposition of a fresh restriction, to be given in favour of BCER, as a form of belt and braces protection (as Ms Bignell put it) is something that the applicant is happy to offer. On the basis that such a restriction is imposed there will be less traffic upon BCER's estate roads if the proposed scheme goes ahead than if the hypothetical development of solely detached houses went ahead, because such a development would go ahead on the basis that rights of way could be taken over the estate roads.

85. As regards Prof Prince and 83 Brooklands Park, Ms Bignell pointed out that no building was to be built close to the boundary. Building A1 will be 41 metres away at its closest point. There will be open space between 83 Brooklands Park and this building. If the Huntsman were developed in a manner contemplated by the restrictive covenant, namely for detached houses only, it may be noted there is no restriction in the covenant upon the location of those houses or on their height. The apparent open flat areas at fourth and fifth floor level at building A1 are respectively only 400 mm and 1 metre wide and are not intended as amenity areas but merely as areas for maintenance of the building and perhaps the placing of some form of window box planting. The balconies are on the other side of the building. Persons in the garden of 83 Brooklands Park will already be aware of the presence of the substantial building at 104.

86. As regards Mr Harpin and 85 Brooklands Park, there will exist as the nearest built development to him detached houses. These will shield any view of the larger apartment block namely building C behind them.

The objectors' submissions

87. On behalf of BCER Mr Mould advanced the following submissions.

88. BCER were the owners of and custodians of the roadways (or many of them) on the Cator estate. BCER were especially concerned regarding the two roadways leading to the north western

boundary of the Huntsman, namely Brooklands Park and Manor Way. These roadways had a spacious quiet and lightly used atmosphere for the benefit of all those entitled to use them.

89. The existing restriction, namely to detached houses only, would operate to place a density control upon the intensity of the development which in turn would limit the quantity of vehicular traffic which could use the estate roads in exercise of the rights of way which the Huntsman site enjoyed over them. BCER was anxious to preserve this state of affairs.

90. There is in fact at present no planning permission for the proposed scheme. It is noted that the applicant contemplates that any planning permission granted will require access as indicated in the proposed scheme, namely access to the east from Moorhead Way, with only pedestrian or cycle or mobility scooter access onto the estate roads from the northwest of the Huntsman. However it would be unsatisfactory for BCER to have to look to rely upon Greenwich as local planning authority to enforce such a requirement. There was the prospect that in due course, whether sooner or much later, a different view might be taken and planning permission for access onto the estate roads might be given along with permission for such other built development as might be required to enable access for mechanically propelled vehicles to enjoy such access.

91. The modification sought by the applicant should not be granted unless a new restriction to this effect is imposed whereby BCER will enjoy the right to enforce such a restriction as proprietors of the estate roads.

92. BCER also sought a restriction regarding the existing boundary wall at the north east corner of the Huntsman site in the form of a restriction upon removing such boundary wall unless it was not reasonably practicable to maintain it.

93. Unless new restrictions to the effect mentioned above were imposed the Tribunal should conclude that the applicant's case under ground (aa) was not made out.

94. As regards the applicant's case under ground (a), Mr Mould submitted that this was not made out. He pointed to the absence of any planning permission for the scheme at present. It was wrong to suggest that the original purpose of the restrictive covenant could no longer be served. He drew attention to the judgement of Romer LJ in *Re Truman, Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261. The restriction can and does continue to serve its original purpose, which was to limit the uses to which the Huntsman might be put and the type of buildings that might be erected on the site, with the intention of ensuring that the use or development of the site remained in keeping with the prevailing character of the Cator estate for whose benefit the restriction was imposed. While there may have been significant developments on the Cator estate since 1956 involving development other than detached houses, the estate still retains its distinctive character as a relatively low-density tranquil private residential estate.

95. As regards the applicant's case under ground (aa), Mr Mould submitted that the case falls to be resolved under this ground. He submitted that the public interest limb sets a high hurdle - it must be shown that the need for the development is so important and immediate as to justify interfering with private rights. He submitted that this high level is not attained in circumstances where there is no planning permission for the proposed scheme and where there has not even been made an application for planning permission for solely detached houses.

96. In conclusion on behalf of BCER Mr Mould resisted any discharge or modification under ground (a) (save perhaps the removal of the requirement to obtain the approval of the Vendor's Surveyor); he resisted any discharge of the covenant under ground (aa); he resisted any modification of the covenant under ground (aa) so far as concerns reliance on the public interest limb; but he did not resist a modification of the restrictions (sufficient to allow the proposed scheme to go ahead) provided there is imposed under section 84 (1C) new restrictions as discussed in paragraphs 90 and 91 above.

97. As regards the submissions of Prof Prince and Mr Harpin, they indicated that they had made their position clear during the course of their evidence and did not make a separate closing address. We have regard to all that they said during the course of their evidence.

Post-hearing submissions

98. At the end of the hearing we invited the parties, if so advised, to submit to the Tribunal a draft of any proposed further provisions restricting the use for building on the Huntsman which the Tribunal was invited to consider imposing in accordance with its powers under section 84(1C).

99. Following some correspondence and the exchange of various versions, much of a draft order was agreed. The remaining issue between the applicant and the objectors is this. Mr Mould submitted, with Mr Professor Prince and Mr Harpin taking the same view, that BCER were content with the document as proposed by the applicant, save that any development should be built out in accordance with the scheme of development shown on the plans and elevations submitted under planning reference 14/1585/F (the reference of the scheme for which Greenwich made a resolution to grant planning permission), a list of which should be annexed to the order. Mr Mould submitted that that this was the basis of the application to the Tribunal.

100. Mr Macey submitted that the effect of the restriction being amended in the way the objectors request - which was not a position advanced by them at the hearing - would be that in addition to the restrictions which the objectors sought, the objectors would have, in perpetuity, control over each and every detail of each and every dwelling constructed on the site.

101. Mr Macey than submitted a revised version of the draft order, in which an area which encompasses approximately the northern third of the Huntsman, should be subject of more restriction than the remainder of the site. Mr Mould submitted that the objector's position was unchanged by this revision.

Discussion

102. From our inspection of the Huntsman we accept that the site is now substantially overgrown and retains no sports facilities. We accept that having regard to its existing state, to the relevant planning policies, and to the lack of any demand for renewed use of the Huntsman as a sports ground, there is effectively no prospect that the Huntsman will once again be used as a sports ground.

103. We accept Mr Collins' analysis of the relevant planning considerations so far as concerns the question of whether there is any real prospect that a planning permission might be granted for development of the Huntsman by the building of solely detached houses. Despite being carefully questioned in cross examination upon this point Mr Collins remained firmly of his opinion there was no such prospect. He explained his reasons fully to us. None of the objectors called any planning expert evidence to contradict Mr Collins' view. We find that there is no prospect of planning permission being granted for the development of the Huntsman for solely detached houses - i.e. a development strictly as contemplated by the restrictive covenant.

104. We accept the accuracy of Mr Collins' substantial research regarding the extent of developments on the Cator estate over the years, and especially since 1956, and the extent to which there have been developments involving buildings other than detached houses including terraced housing and flats. It cannot be said that the estate is one only of detached houses. It includes much other residential development. This is especially evident on the Casterbridge estate to the north of the Huntsman. The Casterbridge estate is strictly part of the Cator estate, but it has a different history (having been the subject of a compulsory purchase order and a local authority development) and is notably different in character from the bulk of the Cator estate.

105. Having made a site inspection we are in agreement with Mr Dobsen in his decision letter where he noted the quality of calm almost cloistered tranquillity within the estate. As observed by Mr Dobsen this owes much to the virtual absence of through traffic and to the low volume and intermittent nature of traffic movements. However these traffic considerations are by no means the sole contributor to the tranquillity of the estate. It is a continuing notable feature of the Cator estate that it continues to have substantial areas of detached housing and this also makes a significant contribution to the tranquillity and pleasing character of the estate. This tranquillity and pleasing character is in particular evident in Brooklands Park and in Manor Way where they lead towards the boundary of the Huntsman.

106. The relevant restriction prevents the use of the Huntsman for residential development unless such development is for detached houses and also requires that the appropriate approval is obtained from the Vendor's Surveyor.

107. We accept that it is no longer possible to identify any person as being the relevant Vendor’s Surveyor because the vendor is dead and there are no other “owner or owners for the time being of the Cator Estate". In these circumstances we find that the restriction requiring that the built development is "to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor’s Surveyor as aforesaid" ought to be deemed obsolete within ground (a) of section 84 (1).

108. We next consider the restriction to use for the erection of "detached houses for use as private residences only".

109. Leaving aside the impact of any planning policies, the erection of detached houses on the Huntsman would in our view be entirely in keeping with the nature of the Cator estate. We do not find that the nature of this estate has changed to such an extent that there is no longer any advantage in development being for detached houses as opposed to semi-detached/terraced houses

or flats. We do not consider the imposition of the covenant in 1956 was already an anachronism, as at one stage suggested by Mr Collins. We do not consider its continued enforcement, if only planning permission so allowed, would be an anachronism - instead its enforcement would involve the erection of housing of a kind which complemented and preserved the pleasing nature of the estate.

110. Ms Bignell referred us to in *Re Truman, Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261. In that case an application under ground (a) failed and the relevant covenant was not found to be one that should be deemed obsolete. However important observations were made by Romer LJ at page 272. He stated that the covenants were imposed for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who own houses on the estate. Romer LJ then said:

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in section 84(1)(a)."

111. In the present case however there has been no substantial change in the nature of the area of a kind contemplated in this passage of the judgement. When the covenant was imposed the area was a residential area. The restriction was imposed to control the nature of such residential development as might be constructed upon the Huntsman. The area remains a residential area. The nature of the proposed development is residential. This is not a case where a residential area has become substantially a commercial area. The restriction would (if planning considerations permitted) operate to control the nature of the development and ensure it was of a form which was consistent rather than inconsistent with the neighbouring development on the Cator estate. If the present restriction were discharged then it would be open to a developer to build on the Huntsman in a manner which was inconsistent with the neighbouring development on the Cator estate. Indeed we find that in the absence of the restriction this is what would have happened. Greenwich has sought to obtain a denser development with more units. We conclude that, were it not for the determination of the applicant to comply so far as possible (consistent with planning) with the restriction, the result would have been a substantially more intense development which would have been significantly more prejudicial to the nature of the Cator estate (and in particular to the objectors) than the applicant's proposed scheme.

112. The purpose of the restriction was not: to limit development to detached houses only and to impose no limitation if detached houses only could no longer be achieved. The purpose of the restriction was: to limit development to detached houses only and for there still to be control over what should be built if detached houses only could no longer be achieved. As was recognised in *Driscoll v Church Commissioners for England* [1957] 1 QB 330 a covenant may still serve a useful purpose even if the purpose originally contemplated (here the purpose of having solely detached houses) can no longer be achieved. This is because the covenant enables those entitled to the benefit of it to keep control of what is built. They may no longer be able to require that solely detached houses are built, but they may be able to prevent a development prejudicial to them even

though, as a matter of planning, such a development may be acceptable. See the analysis in paragraphs 13-11 and following in Preston & Newsom.

113. In support of the applicant's case under ground (a) Ms Bignell referred to certain other cases:

(1) *Re Greaves' Application* concerned a covenant imposed in 1922 restricting the use of the relevant land to private cultivation for allotments. The demand for allotments had ceased. If the covenant remained the land would continue in effect as jungle. It was concluded that the covenant should be discharged under ground (a). However in that case the purpose of the covenant was to retain property as allotments and there could be no continuing purpose in this, hence a suitable built development was allowed. In the present case the restrictive covenant contemplates controlling the use of land for residential development. The proposed development is a residential development. Having some control of such development beyond merely planning powers is a matter of advantage to the objectors.

(2) *Re Forestmere Properties Ltd's Application* concerned a covenant requiring a building to be used as a cinema only. The cinema was defunct and it was common ground the building probably would never again be used for that purpose. Planning permission had been obtained for the construction of flats which the applicant said would constitute an improvement. The Lands Tribunal was prepared to discharge the covenant limiting use to a cinema as long as some replacement covenant was imposed. The Tribunal noted it was certain the land would never again be used as a cinema. The Tribunal observed that the restriction should not be kept alive in order to give control over matters which have no connection with the cinema use - *Driscoll v The Church Commissioners* was referred to. However in the present case when considering the matter under ground (a) it is necessary to notice that the control which we consider to be of value to the objectors to retain is control which does have a connection with the very use which the covenant contemplates, namely residential development.

(3) *Re Associated Property Owners Ltd's Application* (1965) 16 P&CR 89 is a short report of a case which in our view turned very much on the specific facts and does not assist on any point of principle.

(4) *Re Marcello Developments Ltd's Application* [2002] RVR 146 (a decision of the Lands Tribunal dated 30 March 2001 LP/31/2000) included the consideration of whether certain separate covenants should be discharged or modified under ground (a). As regards what was referred to as the use restriction, namely a restriction on use of the buildings for any purpose other than as private dwelling houses or professional residences, it had been declared in Chancery Division proceedings that the use for purpose-built blocks of flats would be in breach of the restriction. The President, George Bartlett QC, in paragraph 34 of his decision in the Lands Tribunal stated:

> "The purpose of restricting the use of buildings to use as private dwelling houses or professional residences was evidently to create and preserve a particular character of occupancy on an estate developed with detached or semidetached houses. No restrictions were imposed in relation to density, height, bulk or design of the buildings. The objective of the restriction was to control the use, but not the construction, of buildings on the land. The only use of the buildings to have been constructed on the land has been, for over 50 years, as flats. Because of this and other flat developments the character of occupancy both in Broughton Avenue and in the neighbourhood is a mixture of houses and flats, in contrast to the evident expectation at the time the covenant was imposed, that the neighbourhood would be one of houses only."

The Tribunal pointed out that the proposed development (including for flats) was in accordance with the character of occupancy in the road and in the neighbourhood as a whole as it had become since the use restriction was imposed. To the extent that the use restriction impeded the development it was therefore to be deemed obsolete. However in the present case we conclude that the Cator estate in this locality retains a tranquil character to which detached houses substantially contribute. There has not been any change in character such as was detected in the *Marcello* case.

114. In conclusion we find that:

(1) the restriction to detached houses only is not one which is, by reasons of changes in the character of the property or the neighbourhood or other circumstances of the case, to be deemed obsolete.

(2) As regards the restriction to use as a sports ground we refer to our findings in paragraph 102 above and to the decided cases referred to above including in particular *Re Greaves' Application*. We conclude that a restriction to use as a sports ground ought to be deemed obsolete within ground (a) of section 84 (1).

(3) We dismiss the applicant's application under ground (a) save to the extent recorded in subparagraph (2) above and in paragraph 107 above.

115. We now turn to consider the applicant's case under ground (aa).

116. We conclude that the applicant's proposed use for the Huntsman, namely the construction of the proposed scheme, is a reasonable user of the land.

117. We conclude that the continued existence of the restriction would, unless modified, impede this reasonable user.

118. It is next necessary to consider the matters arising under subsection (1A) namely whether we are satisfied that the restriction, in impeding the proposed scheme, either:

i. does not secure to persons entitled to the benefit of the restriction any practical benefits of substantial value or advantage to them; or

ii. is contrary to the public interest.

If we are so satisfied it is necessary to consider whether money will be an adequate compensation for the loss or disadvantage (if any) which the objectors will suffer from the discharge or modification.

119. As regards the first point, in reaching a conclusion upon this we can take into account the effect of any further provision restricting the use of the Huntsman which we may conclude to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicant, see section 84 (1C).

120. We consider first the position of BCER. We consider justified its concern regarding the potentially increased use which could be made of the private roadways on the estate if the proposed scheme (as opposed to merely to a development solely for detached houses) were to go ahead. We have already recorded the pleasing tranquil and almost cloistered nature of the roadways. We also consider justified its concern that there should be a greater control over the proposed scheme being able to take access from the estate roads than merely planning conditions and the potential planning powers of Greenwich. In due course the decision on access might change or there might be a fresh development on the Huntsman such that Greenwich as the local planning authority no longer sought to prevent use of the estate roads. There is in our view a difference in kind between on the one hand BCER having as a proprietary right the ability itself to prevent use of the estate roads by mechanically propelled vehicles (save for mobility scooters) going to and from the scheme and on the other hand BCER having to look to Greenwich to enforce such restriction.

121. However during the course of the hearing the applicant made clear it would agree to the imposition under section 84(1C) of a further provision restricting the use of the estate roads for access to or from the proposed scheme for any mechanically propelled vehicles save for mobility scooters. A draft order has been prepared and, subject to a point we will return to, has been agreed between the parties.

122. We conclude that, on the basis that the applicant does accept this further provision restricting the use of the estate roads, the restriction in impeding the proposed scheme does not secure to BCER any practical benefit of substantial value or advantage to it. Indeed we conclude that BCER will in fact be in a better position with the proposed scheme going ahead (with this further restrictive provision in place) than it would have been in if there had been a development strictly in accordance with the restrictive covenant, namely for solely detached houses, because in those circumstances access to such a development would have been possible across the estate roads.

123. When considering the position of Prof Prince (83 Brooklands Park) and Mr Harpin (85 Brooklands Park) it is necessary to revert briefly to the point we raised in paragraph 44 above. This involves considering whether the comparison to be made, when deciding whether in impeding the scheme the covenant secures to them any practical benefits of substantial value or

advantage to them, is a comparison between the position with the proposed scheme being built and a notional development of solely detached houses, or is it a comparison between the position with the proposed scheme being built and the Huntsman remaining undeveloped (anyhow for the time being). None of the objectors made any submissions to the effect that it was the latter. Ms Bignell submitted it was not the latter but did not elaborate upon her argument.

124. We were concerned whether, bearing in mind the evidence which we accept that there is no prospect of planning permission being granted for a solely detached house development, it would be wrong to use such a situation as one of the comparators. We had in mind the commentary in Preston & Newsom at paragraph 13-35 and following. However in the present case we accept the evidence of Mr Beer to the effect that the market dislikes uncertainty and that in fact the position in valuation terms of 83 and 85 Brooklands Park is better with the proposed scheme proceeding than with the Huntsman remaining derelict and posing, as Mr Beer put it, a large question mark - with the prospect of a compulsory purchase order being made and an eventual development of greater intensity than the proposed scheme going forward. Accordingly for the purpose of deciding whether, in impeding the scheme, the restriction secures to these objectors any practical benefits of substantial value or advantage to them we are prepared to proceed upon the basis, which is more beneficial to the objectors and which is the basis urged upon us by Ms Bignell, that the appropriate comparison to make is between the position of the objectors (i) with the proposed scheme and (ii) with a hypothetical scheme of solely detached houses. We do this without deciding that this is the correct comparison to make.

125. Bearing in mind the position reached at the end of the hearing and the proposed new draft restrictions which the applicant would be prepared to accept under section 84(1C) we can examine the position of 83 and 85 Brooklands Park fairly briefly.

126. As regards those properties we note that Mr Beer concluded that in valuation terms there was no difference in respect of either property between the proposed scheme being built and a solely detached house scheme being built. However the question is whether there are practical benefits of substantial value or advantage to the objectors. Value is one consideration and advantage is another.

127. We consider that Prof Prince was legitimately concerned with the potential overlooking of his first-floor bedroom and (especially) his garden from the upper parts of the five-storey building A1. We consider that Mr Harpin was legitimately concerned with being reassured that the buildings on the northern boundary would be and would remain detached houses in single occupation without outside amenity space at the higher levels on the north elevation (i.e. facing his property).

128. When the proposed scheme is considered on the basis that it goes ahead subject to the further provisions restricting the use of the Huntsman and the buildings thereon as we describe below, we conclude that neither Prof and Mrs Prince (83 Brooklands Park) or Mr Harpin and Ms White (85 Brooklands Park) would sustain the loss of any practical benefit of substantial value or advantage. Accordingly on this basis (i.e. that the relevant further restrictive provisions are imposed) we consider that section 84(1A)(a) is established, because in these circumstances we do not consider that either objector would suffer any loss or disadvantage from the modification of

the relevant restriction - accordingly it would not be necessary to seek to assess any monetary compensation.

129. In the light of the forgoing we must next consider whether we should exercise the discretion of the Upper Tribunal and make the order which is sought under section 84, discharging the relevant restriction regarding the approval of the Vendor's Surveyor (under ground (a)) and modifying the relevant restriction regarding the construction solely of detached houses under ground (aa) so as to allow the proposed scheme to proceed. We consider that we should do so. It is clearly unsatisfactory for the Huntsman to remain a derelict and undeveloped site. Planning policy indicates the site should be developed for residential use. All three objectors have ultimately recognised, in the light of certain concessions made by the applicant, that the proposed scheme should not be prevented.

130. In these circumstances we do not consider it necessary or appropriate to give separate consideration to whether the restriction, in impeding the proposed scheme, is contrary to the public interest.

131. We now consider the remaining points of dispute following the exchange of various versions of the draft order.

132. We remind ourselves at this point that the application for modification was:

> "…to the extent necessary to enable any planning permission granted by the Royal Borough of Greenwich under reference 14/1585/F, or planning permission granted in similar terms (whether by the local planning authority or the Secretary of State on appeal) to develop the application land for residential uses to be implemented and the development thereby carried out…."
>
> (our emphasis)

133. Accordingly, the applicant allowed itself some latitude so as not be confined solely to application 14/1585/F, but any similar alternative permission. Whilst Mr Macey confirmed that it was the applicant's intention to develop in accordance with application 14/1585/F following the completion of an agreement under s106 of the Town and Country Planning Act, we can understand the applicant's concern that it would be beholden to the objectors to an unrealistic level of detail if a provision as suggested by the objectors (see paragraph 99 above) were included. However, we consider that the applicant's latest iteration of the draft agreement, accepting more restrictions on the northern element of the Huntsman, would afford it rather more latitude than is reasonable in all the circumstances.

134. Whilst the additional restrictions which the applicant has agreed to are sufficient as regards the objectors' immediate concerns, we are not persuaded that this should allow the applicant almost unlimited flexibility on the remainder of the site. We consider that the restriction should be modified to an extent which limits the applicant to the basic terms of the proposed development, but does not extend to providing the objectors effectively with a veto on relatively minor levels of detail. We are keen to avoid providing a vehicle for further litigation between the parties.

135. We consider that the appropriate modification of the restriction should be on the terms set out below, which is based upon the wording of the travelling draft order which has been exchanged between the parties and the terms of which appear to be undisputed save in respect of the point of disagreement mentioned above:

> The restrictive covenants set out at paragraphs 3 and 5 of the First Schedule to the Conveyance of the Huntsman 106 Manor Way, Blackheath, London, SE3 9AN ('the Property'), as noted in the Charges Register to the registered title to the Property, Title No. LN143032, shall be substituted by the following:-
>
> First Schedule
>
> 3. a. The property hereby conveyed ('the Property') shall not be used for any purpose other than for the erection of dwellings for use as private residences, such dwellings that abut the northern boundary of the Property to be detached houses that are not in multiple occupation, and that have no outside leisure space on the upper floors
>
> b. The buildings shown within the area coloured blue on the plan annexed hereto numbered T(10) PO1, including building A1 shall be constructed as shown on the elevations numbered T(20) E01 (North Terrace: South Elevation) and T(20) E02 (Central Block: North Terrace Elevation) on the scheme of development proposed under planning application reference 15/2819/F ('the Scheme') and laid out in the positions shown on plan numbered T(10) P01 and any building in substitution of any such building shall be no higher than the building which it shall substitute, no closer to 83 Brooklands Park and no closer to 85 Brooklands Park than the building on the Scheme which it shall substitute, and building A1 shall contain no outside leisure area on the upper floors on the northern side
>
> c. The elevations of the dwellings that abut the Northern Boundary of the Property shall be constructed as shown on elevation T(20) E03 (North Terrace: Rear Elevation) of the Scheme and annexed hereto and laid out in the position shown on plan numbered T(10) P01 of the Scheme and annexed hereto, and in regard to such dwellings
>
> > (i) no balcony shall be created so as to project from the northern elevation of any such dwelling
> >
> > (ii) the flat roof areas at second floor level and roof areas at third floor level of any such dwelling shall not be used externally or adapted for external use, so as to overlook or enable overlooking of the property known as 85 Brooklands Park registered under title number SGL27961
> >
> > (iii) any such dwelling shall not be occupied other than as a single dwelling and shall not be divided or otherwise converted into apartments, flats or other multiple units of occupation
>
> d. All of the buildings shown as detached houses within the area coloured blue on the plan T(10) PO1 or any building in substitution thereof shall not comprise dwellings other than detached houses.

e. As regards that part of the Property which is not coloured blue on the plan annexed hereto numbered T(10) PO1, no building shall be erected thereon the height of which subtends an angle of elevation (when measured respectively at the at the midpoint of the boundary of 83 Brooklands Park with the Property and at the midpoint of the boundary of 85 Brooklands Park with the Property) which is greater than the largest angle of elevation which would be subtended (when measured as aforesaid) by any building on this part of the Property if this part of the Property was developed in accordance with the plans which form part of the planning application reference 14/1585/F in respect of which Greenwich resolved in September 2014 to grant planning permission.

f. The total number of dwellings constructed upon the Property shall not exceed 130 dwellings.

g. Upon the commencement of construction of any dwellings on the Property or any part thereof and at all times thereafter the following shall apply:-

(i) access to and egress from the Property for any motorised vehicle (other than for mobility scooters) shall be provided to the east of the Property only

(ii) access to and egress from the Property over any private roadway comprised on 15 May 2017 in title number SGL 25810 shall be restricted to pedestrians, pedal cycles and mobility scooters only

(iii) details of the entrance to the Property from the west for pedestrians pedal cyclists and mobility scooter users shall be agreed with the planning authority which details shall so far as reasonably practicable prevent the unlawful passage of motorised vehicles other than mobility scooter users, provided that the existing brick boundary to the Property shall be retained insofar as reasonably practicable

(iv) existing trees shall be retained unless recommended to be felled or pollarded on grounds of safety or to mitigate against subsidence risk and new trees planted on the northern boundary of the Property pursuant to a scheme agreed with the planning authority

h. 'Dwellings' shall include retirement and sheltered housing.

5. No part of the land or any building erected or to be erected thereon shall at any time be used for the purpose of the business or the professional occupation of a schoolmaster schoolmistress boarding house keeper auctioneer or estate agent or of any other trade business or manufacture whatsoever nor shall any notice or inscription board plate or placard relating to the same or any of them be placed in or upon or about the premises and no building erected or to be erected as aforesaid shall at any time be used for any other purpose than for dwellings for use as private residences including retirement and sheltered housing

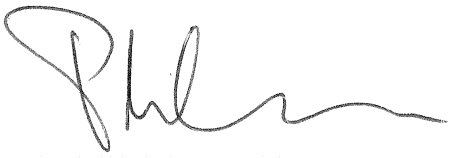
Determination

136. The application succeeds in part under ground (a) and in part under ground (1)(aa) and an Order shall be made by the Tribunal on the terms above provided, within three months of the date of this substantive decision, the applicant has notified the Tribunal in writing of its acceptance of the terms of the proposed modification.

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

5 September 2017

His Honour Judge Huskinson



P D McCrea FRICS

ADDENDUM TO DECISION

138. We refer to our substantive decision dated 5 September 2017 wherein we determined in paragraph 136:

> "136. The application succeeds in part under ground (a) and in part under ground (1)(aa) and an Order shall be made by the Tribunal on the terms above provided, within three months of the date of this substantive decision, the applicant has notified the Tribunal in writing of its acceptance of the terms of the proposed modification."

139. After the issuing of this decision the applicant made an application to the High Court seeking a declaration that the relevant restriction was not binding on the applicant's land. In consequence the Tribunal ordered a stay of the three month period mentioned in paragraph 136 upon the terms set out in the order dated 1 December 2017.

140. The applicant (by its solicitor's letter dated 13 September 2018) has notified the Tribunal that it will not consent to the modification proposed and has (by its solicitor's letter dated 2 October 2018) invited the Tribunal to dismiss its application for a remedy under the Law of Property Act 1925 section 84.

141. The first named and the third named objectors have made representations to the Tribunal that the Tribunal should, in consequence of the foregoing, decline to make an order for the discharge or modification of the relevant restriction.

142. However by its solicitor's email dated 22 October 2018 the applicant further pointed out that it had in any event been successful upon its arguments regarding the requirement for the approval of plans by the vendor's surveyor.

143. As regards this point we concluded in paragraph 107 above that it is no longer possible to identify any person as being the relevant Vendor's Surveyor because the vendor is dead and there are no other "owner or owners for the time being of the Cator Estate". In these circumstances we found that the restriction requiring that any built development is "to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor's Surveyor as aforesaid" ought to be deemed obsolete within ground (a) of section 84 (1).

144. The foregoing remains our conclusion upon this point. This remains a substantive part of our decision and continues in effect notwithstanding the applicant's request that we dismiss the application. However we recognise that in the High Court proceedings which have been commenced and pursued by the applicant it is contended that the land is not burdened by the relevant restriction. If the applicant is successful in establishing this in those High Court proceedings then this order will be of no effect as the land will not be burdened by the relevant restriction.

145. By a further email dated 26 October 2018 from the applicant's solicitor it is pointed out that the use as sports field was also established as obsolete in our decision (see paragraph 114(2) above). However we do not consider it would be appropriate to discharge or modify the restriction in relation to this point for the following reason. The relevant restriction is in the following terms:

> "The property hereby conveyed shall not be used for any purpose other than as a Sports Ground or for the erection of detached houses for use as private residences only such buildings to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor's Surveyor as aforesaid"

The Tribunal is not in this decision making any order for the modification or discharge of the restriction regarding "or for the erection of detached houses for use as private residences only". The present situation is that the land can be used either for that use or as a sports ground. If the Tribunal removed the reference to a sports ground the Tribunal would be narrowing rather than widening the permissible uses for the land which would be contrary to the intention of section 84.

146. In these circumstances we make the following orders.

147. The stay referred to in paragraph 139 above is lifted.

148. The Tribunal allows the applicant's application under section 84(1)(a) and modifies the relevant restriction by removing the requirement that any building erected on the land is "to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor's Surveyor as aforesaid"

149. Save as provided in paragraph 147 above the applicant's application for modification or discharge of the relevant restriction is dismissed.

149. The parties are directed to make written representations regarding costs within 14 days of the date of this Order (each party making any such representations is to ensure that such representations are copied to all of the other parties). For the avoidance of doubt, if it remains the contention of any party that the determination of the costs of these proceedings should be reserved until the expiration of the period of six weeks after the conclusion of the High Court proceedings then that party may so argue in the representations upon costs that that party makes within the aforesaid 14 day period – and in those circumstances the Tribunal will decide whether so to reserve the determination of costs or whether costs can now be determined in the light of such representations as have been made.

Dated 26 October 2018

His Honour Judge Huskinson

Peter D McCrea FRICS

Further Addendum to Decision

150. This Further Addendum is to deal with the question of costs.

151. The applicant makes no application for costs against any of the objectors.

152. Prof Prince and Mrs Prince make no application for costs.

153. BCER and, separately, Mr Harpin and Ms White make applications for costs against the applicant.

154. The applicant's application has been disposed of as recorded in paragraphs 148 and 149 above. Apart from the point in paragraph 148 the applicant's application for modification or discharge of the relevant restriction was dismissed. The point in paragraph 148 was a matter of subsidiary importance as compared with the principal aspect of the applicant's application, namely that there should be discharged or modified the covenant restricting the use of the Huntsman to use as a sportsground or for the erection of detached houses for use as private residences only.

155. The practice directions which have been issued in relation to the Upper Tribunal (Lands Chamber) provide so far as presently relevant as follows in relation to costs involved in an application under section 84 of the Law of Property Act 1925:

> With regard to the **costs of the substantive proceedings**, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered pay any of the applicant's costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably.

156. We consider that, for the reasons advanced in the written submissions on behalf of BCER and of Mr Harpin and Ms White, those objectors have in substance been successful in their objections. The substance of the applicant's application was that an order should be made so as to discharge or modify the covenant restricting the use of the Huntsman to use as a sportsground or for the erection of detached houses for use as private residences only - the intention being to allow there to proceed a development involving construction of dwellings other than detached houses for use as private residences only. The objectors resisted any such order being made modifying or discharging this restriction. In the result no order modifying or discharging this restriction has been made.

157. Neither of these objectors have acted unreasonably.

158. We see no reason why the usual order regarding cost should not be made and we therefore make it, namely we order that the applicant pays to each of these two objectors (namely to BCER

and to Mr Harpin and Ms White) their costs of these proceedings on the standard basis to be assessed by the Registrar if not agreed.

His Honour Nicholas Huskinson

P D McCrea FRICS FCIArb

16 January 2019