

ENGLAND AND WALES / JUDGMENT

MDM Civil Engineering Limited v Scott Morgan

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Neutral Citation Number: [2026] UKUT 00347 (LC) IN THE UPPER TRIBUNAL (LANDS CHAMBER) AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925 Case No: LC-2025-372 Royal Courts of Justice, Strand, London, WC2A 2LL 10 September 2026 TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007 RESTRICTIVE COVENANTS – MODIFICATION – restriction of development to two dwellings – planning permission for third dwelling – sole objector not having benefit of restriction – no practical benefit of substantial value to person with benefit of covenant – Tribunal’s discretion – application granted – S.84(1), Law of Property Act 1925 BETWEEN: MDM CIVIL ENGINEERING LIMITED -and- SCOTT MORGAN Applicant Objector Land at Gray Lane, Witham St Hughs, Lincolnshire, LN6 9GF Peter D McCrea OBE FRICS FCI Arb 12 August 2026 Reza Choudhury, by direct access, for the applicant The objector represented himself © CROWN COPYRIGHT 2026 The following cases were referred to in this decision: Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] UKSC 45 Re Barter’s Application [2017] UKUT 451 Re Shaw’s Application (LP/71/2007) Re Truman, Hanbury Buxton & Co Ltd’s Application [1956] 1 QB 261 Shepherd v Turner [2006] EWCA Civ 8 Re Bass Ltd’s Application [1973] 26 P&CR 156 Re The University of Chester’s Application [2016] UKUT 0457 (LC) Stockport v Alwiyah Developments [1983] 52 P&CR 278 Bennett’s and Tamarlin Ltd’s Application [1987] 54 P&CR 378 Cresswell v Proctor [1968] 1 WLR 906 Jones v Rhys-Jones (1974) 30 P&CR 451 Re Beech's Application (1990) 59 P & CR 502 Re O’Callaghan’s Application [2020] UKUT 077 (LC) Butler v Flagship Housing Group [2026] UKUT 0182 (LC)

Introduction

2. 3. 4. RAF Swinderby in Lincolnshire, about 11 miles south-west of Lincoln, was one of the second phase of airfields constructed in the late 1930’s in the run up to war, becoming home to the first Polish squadrons as part of No.1 Group RAF. An active RAF base from 1940 until its closure in 1993, it is now the site of a new village, Witham St Hughs, and only the former Officers and Airmen’s married quarters remain. To the northeast of the village, in a cul-de-sac, there was a building called ‘The Ark’, which served a variety of community-based uses. The Ark was demolished for development, but a restrictive covenant limited the Ark site (‘the property’) to two dwellings, which were subsequently completed. The current owner, MDM Civil Engineering Limited (‘MDM’), wishes to build a third dwelling on the undeveloped remainder of the Ark site (the application land) and applies to the Tribunal for the modification of the restriction to allow it to do so. This is objected to by the owner of one

of the two houses, Mr Scott Morgan. I inspected the application land and surrounding estate on 10 August 2026, accompanied by MDM's director, Mr Mark Kane, and Mr Morgan, and heard the application on 12 August at the Royal Courts of Justice. MDM were represented by Reza Choudhury of counsel, who called Mr Kane, Mr Clive Bosworth who owns 1 Gray Lane, and an expert valuation witness, Mr Charles Kingsley-Evans MRICS. Mr Morgan represented himself and gave evidence. The application is unusual because, as I shall explain, Mr Morgan does not have the benefit of the restrictive covenants, and therefore much of the evidence, and Mr Kingsley-Evans' expert view of the effect of modification on Mr Morgan's property, is irrelevant to the application. The restrictive covenant and the application 5. The application is to modify a restrictive covenant affecting the application land contained within a Transfer of the property dated 1 May 2019 made between Rysa Lodge Residential Properties Limited ('Rysa') as Transferor and M&D Homes Limited ('M&D') as Transferee. 6. Clause 12.4 of the Transfer was in these terms: "The Transferee covenants with the Transferor for the benefit of the remainder of the Transferor's development and each and every part thereof to the intent so as to bind the Property into whosoever hands the same may come but not so as to render the Transferee personally liable in damages for any breach of covenant of a restrictive nature after he shall have parted with all interest in the Property provided he shall have complied with his obligations contained in paragraphs 6 to 9 inclusive of Schedule 3 that the Transferee will observe and perform the stipulations and restrictions set out in schedule 3." 7. By paragraph 1 of schedule 3, M&D covenanted 'not to use or suffer to be used the Property for any purpose other than as two private dwellinghouses.' 8. 9. 10. 11. 12. 13.

Facts

14. The application is brought under grounds (a) (aa) and (c) of section 84(1) of the Law of Property Act 1925. The application form indicated that ground (b) was relied upon, although Mr Choudhury, sensibly, did not pursue this at the hearing. Ground (a) is made out when by reason of the changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete. Ground (aa) is satisfied where the restriction impedes some reasonable use of the land for public or private purposes, and the Tribunal is satisfied that, in so doing, the restriction secures no practical benefits of substantial value or advantage to the person with the benefit of the restriction, or the restriction is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for any loss or disadvantage which the beneficiary of the restriction will suffer from the proposed discharge or modification. In determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal is required to take into account the statutory development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area (section 84(1A)). It must also have regard to the period at which and context in which the restriction was imposed and any other material circumstances (section 84(1B)). Ground (c) is satisfied where that the proposed discharge or

modification will not injure the persons entitled to the benefit of the restriction. If one of the grounds is satisfied, the Tribunal shall 'have the power' to discharge or modify restrictive covenants affecting land. As the Supreme Court explained in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 a determination under section 84(1) therefore involves a two-stage process. First, in what the Supreme Court called the 'jurisdictional stage', the Tribunal must be satisfied that one of the prescribed grounds is made out. If so, in the 'discretionary stage', the Tribunal must then decide whether and to what extent to exercise its power to discharge or modify. If it discharges or modifies the covenant, the Tribunal may direct the payment of consideration to make up for any loss or disadvantage suffered by the person entitled to the benefit of the restriction. This can be under one of two heads, either (i) a sum to make up for any loss or disadvantage suffered in consequence of the modification or discharge, or (ii) a sum to make up for the effect which the restrictions had, at the time they were imposed, in reducing the consideration then received for the land affected by them (section 84(1)). Since 2012, much of the former airbase has been owned by Rysa. The Ark site was located to the rear of the former airmen's quarters on what is now Nettleton Drive – a series of two-storey semi-detached houses similar to former local authority housing types. There was a large oak tree, protected by a Tree Preservation Order, in front of the Ark building, which was accessed from Nettleton Drive to the east. 15. In November 2017, Rysa submitted an outline planning application for the demolition of the Ark building, and development of the Ark site for two dwellings. The area of the oak tree was excluded from the application. The proposed block plan is reproduced below: 16. 17. 18. Following discussions with the local planning authority, North Kesteven District Council, the proposed development was reduced to one dwelling of 1.5 storeys, and outline planning permission (17/1708/OUT) was granted on 16 January 2018. On 1 May 2019, Rysa sold the Ark site to M&D. M&D had two directors - Mr Kane and a Mr Dean Broddle. There were negotiations between Rysa and M&D about the price, which was linked to the number of houses which could be built. A price of £75,000 was agreed on the basis that development of the site would be limited to two houses. In late 2019, Mr Kane applied for planning permission for two dwellings which was granted (19/1746/FUL) on 10 March 2020. The development was to be carried out 'in complete accordance with the details shown on the approved plans' and would look like this: 19. 20. Those houses were built out by M&D. In October 2020, plot 2, which became known as 2 Gray Lane, was bought by a Mr Sinclair and Miss Revill, who sold it to Mr Morgan (the objector) on 26 July 2023. Mr Clive and Mrs Rosamund Bosworth bought no 1 in December 2020 and still live there. On 18 December 2020, Mr Kane submitted a planning application to build a third dwelling, between the existing two and 18/20 Nettleton Drive, but the application was withdrawn. However, the planning authority had been made aware that the access to the two houses had not been constructed in line with the previous consent, shown on the plan above, and it was necessary for Mr Kane to submit a retrospective application to regularise the position. This was granted (21/0627/VARCON) in July 2021. The access to the two houses was moved to the south, meaning the central area on which the oak sat could separately be accessed. 21. In August 2021, Mr Kane tried again to obtain planning permission for a third dwelling. This

was refused by the council (21/1216/FUL) in December 2021, and that refusal was upheld on appeal by the Planning Inspector (APP/R2520/W/22/3300117).

22. Mr Kane and Mr Broddle, who up to then had built many houses on the estate, fell out, and Mr Broddle ceased to be a director of M&D on 25 March 2022. 23. 24. 25. In July 2022, Mr Kane made a third attempt to obtain planning permission for another dwelling. The council's refusal (22/1084/FUL) was again subsequently upheld on appeal (APP/R2520/W/23/3318864). In her decision of 4 January 2024, the Inspector noted that the council had approved the felling of the oak tree. In evidence, Mr Kane explained that the tree was causing damage to nearby properties, and an insurance company had made a successful application for the removal of the Tree Preservation Order. Mr Kane then paid for the tree to be taken down. Much of it remains on site. On 18 October 2023, the title of the application land was subject to two successive transfers – first from M&D Homes to Mr Kane, and later the same day, from Mr Kane to another of his companies, MDM Civil Engineering Limited (the applicant). Mr Kane explained in evidence that he was owed money by M&D, and these transactions were a method of him being repaid. In February 2025, Mr Kane tried for the fourth time to gain planning permission for a third dwelling, this time with success. Planning permission (25/0163/FUL) was granted on 16 July 2025. Curiously, the Officer's report indicated "Planning History: None". Mr and Mrs Bosworth supported the application, and Mr Morgan indicated to the planning authority that his stance was 'neutral until our concerns are considered and addressed'. He was concerned by tree planting, landscaping layouts, vehicle tracking and completion and surfacing of Gray Lane, but did indicate that "we would welcome the plot being completed on Gray Lane to finish the development off and are generally happy with the layout and plans submitted...". By this time, houses had been built to the south. Whether this influenced the council's change of heart is not obvious, but in any event planning permission is now in place. The consented layout looked like this, with 1 and 2 Gray Lane to the west, and the revised access shown: A brief history of the reference 26. 27. 28. The application to the Tribunal for modification of the restrictions to enable a third dwelling to be built was submitted by Mr Kane on behalf of MDM on 15 September
2025. Rysa was named as having the benefit of the restrictions, but no plan showing the benefitted land was included. In the absence of such plan, the Tribunal directed that notice of the application be given to Rysa, and to the occupiers of 1 and 2 Gray Lane, 12-22 Nettleton Drive, and 43-49 Thistle Way (the properties indicated in the application as neighbouring the application land). The Tribunal's application form requires the applicant to provide 'details of planning permissions applied for, granted, or refused relating to the application land in the last 5 years (enclose a copy of any current approval)...'. Mr Kane included a copy of the latest planning permission but made no reference to the wider planning history of the site. On 31 December 2025, the Tribunal received Mr Morgan's Notice of Objection. MDM had 14 days from receipt of the Notice to say whether or not it accepted that Mr Morgan was entitled to the benefit of the restriction; it did not do so, so Mr Morgan's objection was accepted by the Tribunal, and he was admitted as a party to the

proceedings. Admission of an objector as a party to the proceedings when no issue has been raised by the applicant about their entitlement to participate is a purely procedural step which does not involve any determination by the Tribunal that the objector has the benefit of the restriction.

29. Mr and Mrs Bosworth submitted a Notice of Objection, dated 31 December but not filed with the Tribunal until 5 February 2026. Before the Registrar could consider whether this late objection should be admitted, Mr and Mrs Bosworth withdrew their putative objection on 10 February 2026. 30. On 10 February 2026 the Tribunal received a detailed letter from Sophia Wesley-Key, Director of Rysa, copied to Mr Kane. While indicating that Rysa did not intend to file a formal objection and take part in the Tribunal proceedings, as they considered the costs of doing so would be prohibitive, Ms Wesley-Key's long and detailed letter, with enclosures, included a number of matters that she wished the Tribunal to take account of when considering the application, and in particular when deciding whether to exercise its discretion to modify the restriction. I outline these below.
31. Mr Kane and Mr Morgan were unable to agree the contents of the hearing bundle so, regrettably, each produced their own version of the bundle, and I have had regard to both. At the hearing, Mr Choudhury stressed that some of the material in Mr Morgan's bundle was unagreed, but there was no application by either party for the other's material to not be admitted. Evidence 32. In his witness statement, which he supported with a statement of truth, Mr Kane said that he was not aware of the existence of the covenant until he was contacted by Rysa, who informed him that a covenant was in place. He noted that Rysa were not objectors.
33. Mr Kane said that since the covenant was imposed the character of the area had changed significantly. The site was now enclosed by residential properties, and the wider area had seen substantial development with a large number of new homes. The area is now clearly residential in nature, and the covenant no longer reflects the current character of the locality. Planning permission had been granted for development on the site, confirming that the land is suitable for residential use. Prior to the grant of planning permission, the site was subject to enforcement action, preventing the use of the land for storage, and as a result the site could not be put to any practical or lawful use and was effectively obsolete. 34. The continuation of the restriction, Mr Kane said, prevented the reasonable and proper use of the land. The intention had always been to complete the development so that residents within the gated site could live in a fully completed and finished environment, including a completed driveway and layout. The inclusion of a third dwelling formed part of that overall plan and would ensure development is completed properly. In its current condition, the site is unfinished and unattractive and there is concern that it has a negative impact on nearby property values. At least one neighbour had expressed support. The covenant was imposed by Rysa which had raised no objection to modifying the covenant; this indicated that the covenant no longer provided any practical benefit of substantial value.

35. Mr Kane indicated that reference had been made by Mr Morgan to a statement from Mr Dean Broddle, but no witness statement from Mr Broddle had been served on Mr Kane nor had any such statement been provided to the Tribunal. 36. To put that last paragraph into context, I return to the letter from Ms Wesley-Key, mindful that Rysa has not submitted an objection and that her letter and attachments, while they were included in the bundle and are therefore before the Tribunal, are untested. Ms Wesley-Key felt strongly about the application. She believed that the Tribunal is entitled to take account of her letter, noting that in *Re Barter's Application*
- [2017] UKUT 451, the Tribunal took account of a letter from a County Council who held the benefit of a restriction but did not respond to the application formally in the Tribunal, which I return to below. 37. Enclosed with her letter was a 'Statement of Truth' from Mr Broddle, who it will be remembered was Mr Kane's co-director in M&D until March 2022. Mr Broddle said M&D Homes was owned and operated jointly by them both, and that they were both party to the discussions to buy the Ark site. During the extended period of discussions, they agreed to buy the land for £75,000, and that 'during those discussions, both Mark Kane and I had verbal conversations with Robin Key (Ms Wesley-Key's father) when they discussed the value of the site by reference to plots'. They all knew that there was a capability to apply for an additional plot, but M&D did not want to pay the additional consideration to include the value of a third plot, being £34,500. They did not want to pay the legal fees to draft an overage agreement, and so the restrictive covenant was inserted into the transfer instead.
38. Mr Broddle went on: "It is my view and belief that Mark Kane knew of the existence of the restrictive covenant and the honourable deal which was done with Robin Key, a director of Rysa Lodge Residential Properties Limited, at the time in 2019. The deal being that we were purchasing two plots for £75,000 and that if we would have wanted to place a further plot on the Property we would need to pay a further sum of money in line with the plot prices for the other plots... It is also my view that both Mark Kane and I knew that we would have needed to have paid extra to purchase the Property without the restrictive covenant in place. We had intentions at the time of building out two plots and then, if the price was right, approaching Rysa Lodge Residential Properties Limited to seek permission to build a third plot."
39. Ms Wesley-Key said that the price negotiations for the sale of the land 'were initially carried out with both Mark Kane and Dean Broddle by me, my late father... and my brother Jamie'.
40. Mr Kane disputes this version of events and denies knowledge of the restriction or the basis on which the price was arrived at. He says that he concentrated on building houses, and it was Mr Broddle's job to carry out all of the negotiations on the acquisition of sites. I note at this point that all of the emails which were attached to Ms Wesley-Key's letter to the Tribunal were between Mr Broddle and Rysa, and it was Mr Broddle who signed the Transfer. 41. Returning to Ms Wesley-Key's letter, she stressed that Rysa did not agree with the modification. In circumstances when the restriction was entered into as recently as

2019, it seemed surprising to her that the application was seeking to rely on ground (a), especially considering that Mr Kane was a director of the original covenanting party. If one of the grounds of s.84(1) was made out, she believed that the Tribunal should not exercise its discretion to modify this recent restriction on what was, in effect, an application by the original covenantor. Alternatively, it should do so on the basis that it directs that the applicant pay consideration to Rysa to make up for the effect on the price received in 2019 as a result of the restriction being imposed. The price for three plots would have been £112,500, and the applicant should therefore pay £37,500 to Rysa.

42. While their objection was withdrawn, Mr and Mrs Bosworth filed witness statements in support of the application, and Mr Choudhury called Mr Bosworth to give evidence. He said that the modification of the restriction would enable the development to be completed, improve the overall appearance of the site, and would provide a clear benefit to the current homeowners. 43. 44. I finally turn to Mr Morgan's evidence. Mr Morgan owns 2 Gray Lane, which is land that was conveyed in the Transfer of 1 May 2019. Rather than having the benefit of the restriction, it carries the burden. Unfortunately, he had misunderstood and misinterpreted references to the restrictions in his title deeds, and he accepted during the hearing that he does not have the benefit of the covenants. Accordingly, the evidence of Mr Kingsley-Evans, which centred on the effect of the modification on Mr Morgan's property, is irrelevant and it is not necessary for me to say any more about it. However, as I explained at the hearing, Mr Morgan remained a party to the proceedings and continued to make his submissions regarding the application. It is not the Tribunal's practice to exercise its discretion under section 84(1) simply because no one with the benefit of the restriction has chosen actively to participate in the proceedings. It remains for an applicant to persuade the Tribunal that one of the statutory grounds is made out and that the restriction should be modified or discharged. The matters raised by Mr Morgan are, to some extent, relevant at the jurisdictional stage of the Tribunal's determination whether or not they have been voiced by a party with the benefit of the restriction. Matters of uncontested fact (such as the date of the Transfer) relied on by Ms Wesley-Key are relevant to the discretion stage, whether or not Rysa has chosen to participate in the application. Discussion Ground (a) – obsolescence
45. Mr Choudhury, referring to the decision of the Tribunal (Paul Francis FRICS) in *Re Shaw's Application* (LP/71/2007) and *Re Truman, Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261, submitted that for the purposes of considering ground (a), the question that requires to be answered is whether the purpose for which the restrictions were imposed can no longer be served. In doing so, he submitted, the Tribunal should consider the purpose of the original covenant, and secondly the changes which have occurred which demonstrate that the purpose can no longer be fulfilled or furthered by the restriction. As for the original purpose, Mr Choudhury submitted that this was purely financial, as opposed to preserving any right to privacy, air or light. As for the second, he relied upon Mr Kane's evidence that the character of the estate has changed significantly, with the application land now being surrounded by residential properties. 46. I do not accept those submissions. Whilst there has been some development on the wider estate, and to the south of the application land,

the houses to the north and east of the application land remain unchanged, and what was a small infill site remains a small infill site. There have been no real changes in the character of the property, with the two houses built in accordance with the restriction, nor in the essential character of the neighbourhood. I am not persuaded that there are any other material circumstances which would render the restriction, entered into within the last 7 years, obsolete. 47. Ground (a) has therefore not been made out. Ground (aa)

48. Mr Choudhury relied on the familiar observation of Carnwath LJ in *Shepherd v Turner*

[2006] EWCA Civ 8, regarding the general purpose of ground (aa) in providing a fair balance between the needs of development in the area, and the protection of private contractual rights, before turning to the equally familiar list of questions in *Re Bass Ltd's Application* [1973] 26 P&CR 156.

49. Whilst obtaining planning permission does not provide a guarantee of success, (see for instance *Re The University of Chester's Application* [2016] UKUT 0457 (LC)), it is a persuasive indicator and I accept Mr Choudhury's submission that the proposed 'user' of the land as a relatively modest dwelling is reasonable. 50. 51. 52. The proposed user is plainly impeded by the restriction. The next question is whether the restriction secures 'to the persons entitled to the benefit' of it a practical benefit of substantial value or advantage. As I have explained above, this is Rysa, and not Mr Morgan, and Mr Choudhury submitted that since Rysa had not participated in the proceedings, the restrictions cannot be held to secure to them a practical benefit. There was, in the evidence bundle, the material from Ms Wesley- Key and Mr Broddle, on which Mr Choudhury's submitted I should place no weight. I accept that limited weight can be placed on these statements, as neither Ms Wesley-Key nor Mr Broddle gave sworn evidence tested by cross-examination but that does not make the matters to which my attention has been drawn irrelevant. In any event, referring to the observations by Eveleigh LJ in *Stockport v Alwiyah Developments* [1983] 52 P&CR 278, Mr Choudhury submitted that on the evidence the purpose of the restriction was a pecuniary, rather than a practical, one. The question is whether the continuance of the restriction secures a practical benefit, and not a bargaining power secured by the price of its release, and accordingly the restriction did not secure to Rysa a practical benefit.

53. While the burden remains on the applicant to demonstrate that a ground has been made out, there is no evidence before me from Rysa that would indicate that its remaining properties would be adversely affected by modification of the restriction. Ms Wesley- Key did not indicate that there was; the thrust of her letter was that if the Tribunal were satisfied that one of the grounds under s.84(1) had been made out, compensation should be awarded to reflect the price that M&D would have had to paid had three dwellings been allowed. 54. 55. On the limited evidence before me, I accept that the restrictions do not secure to Rysa a practical benefit of substantial value or advantage, and that ground (aa) has been made out. Ground (c) Since the application under ground (aa) has been made out, I need say little about ground (c), which would be made out if the applicant can demonstrate that the proposed modification (as opposed to the proposed development in itself) would not 'injure'

Rysa. Mr Choudhary relied on the Lands Tribunal's decision in *Bennett's and Tamarlin Ltd's Application* [1987] 54 P&CR 378 in submitting that the loss of an opportunity to demand a price for the release of a restriction is not an injury for the purpose of ground (c). I accept that ground (c) has also been made out. The Tribunal's discretion 56. 57. The applicant having established that I have jurisdiction to modify the restriction, I turn to whether I should exercise the Tribunal's discretionary power to do so. Several aspects require consideration. First, whether anything turns on Mr Kane being a director of both the original covenantor and of the applicant. I accept his evidence that he was not aware of the restriction. While there are some indications that this might not have been the case, the assertions of Ms Wesley-Key and Mr Broddle have not been submitted in evidence and are untested; the contemporaneous documents support Mr Kane's evidence that he was unaware of the restriction, as the relevant emails were addressed to Mr Broddle alone and he signed the transfer documents. But whether he was or was not aware does not matter; nor does Mr Choudhary's acceptance that under 'black letter company law' as he put it, M&D can be taken to be aware of the restriction. MDM is the applicant before the Tribunal, and I can safely assume that it can be taken to be aware of the restriction in the transfer between Mr Kane and MDM. 58. There might be an argument that, as a Director of both M&D and MDM, Mr Kane could be considered to stand in the shoes of the original covenantor, but to my mind the more relevant point is the very recent nature of the restriction – being just over six years old when the application was made. 59. In *Re Barter's Application*, the Tribunal (Martin Rodger QC, Deputy Chamber President, and Mr Paul Francis FRICS) said this, from [38]: "38. There was a time when covenants of very recent origin were treated almost as sacrosanct. The judgments of the Court of Appeal in *Cresswell v Proctor* [1968] 1 WLR 906 (in particular those of Harman and Danckwerts LJ) regarded with revulsion a "startlingly prompt" application by an original covenantor for the release of a covenant entered into only three years earlier. While it was not doubted that the Tribunal had the power to release a covenant recently entered into by the applicant, it was suggested by Danckwerts LJ that the exercise of the power in those circumstances was "not within the true intention of section 84" and by Harman LJ that in the absence of a material change of circumstances it would be "shocking" and "quite out of the question."

39. A more temperate approach has become established since the decision of the Court of Appeal in *Jones v Rhys-Jones* (1974) 30 P&CR 451 in which it was explained that there is no general principle that the shortness of the time between the imposition of a restrictive covenant and an application for its modification is a decisive factor against granting the application. If the language of the Court of Appeal in *Cresswell* had appeared to lay down any such principle it had gone further than was required for the decision in that case. The true principle is that the shortness of the time since the imposition of the covenant and the closeness of the applicants' connection to the original covenantor are factors which can be taken into account as justifying a refusal of an application. Stephenson LJ's explanation at page 459 has subsequently been taken to represent the correct approach: "Without the assistance of authority I would have thought that the shortness of the time which has

elapsed since the burden of a covenant was imposed on an original covenantor or was transferred to a subsequent purchaser was a factor which could properly be put into the scale against modification or discharge whether the application under section 84 be made by an original covenantor (and when it would weigh more) or by a subsequent purchaser (when it would weigh less). The older the covenant, however, the more time there would have been for other factors such as changes in the property benefited by the restriction to come into the reckoning in favour of modification and the easier it may be for the Tribunal to relieve an applicant of a burden which he has recently shouldered."

40. The approach taken by the Court of Appeal in *Jones* was followed by the Lands Tribunal (Judge Marder QC) in *Re Beech's Application* (1990) 59 P & CR 502 in which the Tribunal refused to discharge a covenant imposed in January 1987, less than 3 years before an application made by the original covenantor. The Tribunal held that none of the statutory grounds had been satisfied, but said that if any had been, it would nevertheless have refused to exercise its discretion in favour of the applicants in those circumstances (see pp. 510-511).
41. On the other hand, in *Re Graham's Application*, a decision of the Lands Tribunal (A J Trott FRICS) of December 2007 (LP/83/2005), the fact that a covenant had been entered into only a little over 5 years before the application for its release, was not regarded as sufficient, in the circumstances of that case, to justify a refusal to discharge the restriction." 60. 61. After that review of some of the relevant authorities the Tribunal in *Re Barter's Application* considered there no unfairness in leaving the original parties to negotiate and, in view of the very recent origin of the covenant and the applicant's status as original covenantor, it was satisfied that the respect due to the parties' contract outweighs other factors, and the application was dismissed. In *Re O'Callaghan's Application* [2020] UKUT 077 (LC), (at [55]) the Tribunal described an application brought by the original covenantors within three years of their first having agreed to be bound by the covenants, as "unusual" and said that "Both the fact that the applicants seek release from their own bargain, and the fact that they do so soon after making that bargain without any change of circumstances having occurred, are powerful considerations against the exercise of the Tribunal's discretion." 62. Having reviewed *Re Barter's Application* and *Cresswell v Proctor*, the Deputy President went on [57]: "The authorities on "prompt" applications establish that the shortness of the time since the imposition of a covenant and the closeness of the applicants' connection to the original covenantor are factors which can be taken into account as justifying a refusal of an application. In this case there is no suggestion that there has been any relevant change of circumstance. The applicants are themselves the original covenantors. The ink is dry on their Transfer, but only just."
63. More recently, in *Butler v Flagship Housing Group* [2026] UKUT 0182 (LC), I dismissed an application to modify a restriction entered into less than three years earlier, the applicant having subsequently transferred the title from his company to himself. 64. 65. 66. 67. Accordingly, the recent nature of the restriction in this application, coupled with, to an extent, the linkage between the original covenantor and the applicant, weigh against the

exercise of discretion. On the other side, having inspected the application land, in my judgment the proposed dwelling would, as Mr Morgan indicated to the planning authority, 'finish the development off'. Planning consent is in place, and the development would be of benefit to all concerned, whether they have the benefit of the restriction or not. On balance, I am persuaded that I should exercise the Tribunal's discretion to modify the restriction to allow the dwelling as permitted by the planning permission to be built. The final point for me to consider is any consideration that should be paid to Rysa. There is force in Ms Wesley-Key's point that if modification were ordered with no or minimal compensation, the applicant would benefit from a windfall which they would not be able to achieve through negotiation. And there are clear reasons to believe (although they are not formally in evidence) that the original purchase price was reduced as a result of the Ark site being restricted to two houses. The description of the original negotiations has the ring of truth about it and the applicant is not in a position to contradict it. It explains why land which was capable of accommodating a third dwelling was sold on terms which prevented its development. 68. I consider it to be appropriate to direct the applicant to pay to Rysa a sum to make up for this reduction in price. Ms Wesley-Key does not argue for anything above the figure which is said to have been discussed at the time, of £37,500. I am satisfied that it is just for the applicant to pay this sum. Disposal 69. I determine that, subject to the condition I will mention, the restriction set out in paragraph 1 of schedule 3 to the Transfer dated 1 May 2019 shall be modified pursuant to grounds (aa) and (c) of section 81(1) of the Law of Property Act 1925, by the addition of the following: "1a. Notwithstanding paragraph 1, a third single-storey dwellinghouse shall be permitted to be constructed only in accordance with the planning permission granted by North Kesteven District Council under reference 25/0163/FUL on 16 July 2025 and subject to the conditions thereto. Reference to that planning permission shall include (1) any subsequent planning permission that is a renewal of that planning permission or which permits the construction of a dwellinghouse not materially different from, and no higher than, that permitted by that permission and (2) any other matters approved in satisfaction of the conditions attached to that or a subsequent permission." 70. 71. An order modifying the restriction as outlined above shall be made to the Tribunal on condition that, within three months of the date of this decision, the applicant shall have confirmed their acceptance of the proposed modification and shall have provided proof to the satisfaction of the Registrar that they have paid £37,500 to Rysa. If for any reason Rysa is not prepared to receive that payment, the applicant may apply to the Tribunal for reconsideration of the condition. This decision is final on all matters except costs. The parties are now invited to make submissions on costs, and a letter giving further directions for the exchange of submissions accompanies this decision. Mr Peter D McCrea OBE FRICS FCI Arb 10 September 2026 Right of appeal Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for

permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

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