

## APPLICATION TO THE UPPER CHAMBER

### IN THE CASE OF BEACH ROAD CAR PARK (SOUTH) DISCHARGE OF RESTRICTIVE COVENANTS

#### COUNCIL OF THE BOROUGH AND COUNTY OF THE TOWN OF POOLE

#### STATEMENT OF CASE

##### BACKGROUND

- 1 A plan of the site in question is attached as **Appendix 1**. The freehold of the site is held by the Borough of Poole subject to a lease of a telecommunications mast to Vodafone and a lease of an electricity sub station to Southern Electricity Board. Title is held at the Land Registry No. DT372044. Adjoining land to the south is dedicated as public open space.
- 2 A Deed of Conveyance dated 30<sup>th</sup> April 1926 between(1) Henry Bury and (2) Edward William Fisher (**Appendix 2**) reserved certain restrictive covenants against the site currently in the ownership of the Borough of Poole as follows: -

*“ 1. Not to erect or permit to be erected buildings whatsoever except for the purpose of not more than six dwelling houses with or without stables or garages and the usual or necessary outbuildings and that each such dwelling house shall be of the value of not less than £1,000.00 and shall have at least one statute acre of land attached thereto and shall not be erected until the site and elevation thereof and the site of the necessary offices stables and garage shall have been approved by the Vendors or their successors in title to The Branksome Park Estate or their surveyor and shall nor will alter any such buildings or offices shall have been erected alter or permit to be altered the site or elevation thereof without such approval as aforesaid.*

*2. Not at any time thereafter to carry on or permit to be carried on upon the said parcel of*

*land and premises any trade or business not to do or suffer anything to be done which may be a nuisance annoyance or disturbance to the Vendors their heirs or assigns as aforesaid or the neighbourhood and shall not nor will use or permit to be used any such building or buildings except for the purpose of a private dwelling house or private dwelling houses only and will keep the said parcel of land and the premises as ornamental or kitchen garden or pleasure ground . ”*

(This has been transcribed as accurately as possible since the copy in our possession is difficult to read).

3 A Deed of Release and Covenant dated 19<sup>th</sup> June 1931 between (1) The Branksome Park Association Ltd and (2) The Mayor Aldermen and Burgesses of the Borough and County of the Town of Poole (**Appendix 3**) permitted part of the subject land to be constructed and used as a car park. This deed represents a partial release of the covenants.

4 A Licence and Deed of Covenant dated 12<sup>th</sup> March 1958 between (1) The Branksome Park Association Ltd and (2) The Mayor Aldermen and Burgesses of the Borough of Poole (**Appendix 4**) modified the covenants to permit the use of the entire site as a car park subject to certain covenants, the most notable of which being: -

*“Not to erect or permit to be erected any buildings on the said land coloured green or brown on the plan annexed hereto without first submitting plans and elevations thereof for approval to the Grantor and obtaining its*

5 The original Branksome Park Association Ltd was dissolved on 3<sup>rd</sup> June 1990.

6 The council has identified part of the Beach Road car park as surplus to operational requirements and is seeking to dispose of it in the open market. In exercising due diligence to obtain best consideration for public assets, a planning design brief has been prepared which supports the development of between 50 and 70 flats on the site

(Appendix 5). As a result the council is seeking to discharge the restrictive covenants prior to placing it on the market.

7 During the preparation of the planning design brief, a full public consultation was carried out. Questionnaires were made available on the council offices (the requirements of the planning regulations on consultation of such documents) and in addition letters and questionnaires were sent to local residents who lived in the vicinity of the site. A press release was issued on the 3<sup>rd</sup> January 2017 and this was picked up as a story in the Bournemouth Echo. Prior to this the council had also consulted on the site as part of the Local Plan review (summer 2016) which involved various drop-in sessions throughout the Borough, letter drops, website publication and press releases. No covenant beneficiary came forward as a result of either consultation process.

8 A company known as The Branksome Park Association Ltd has been contacted independently of the consultation process and several attempts have been made to mediate with it, however to date it has not been possible to establish whether the company which purports to benefit from the restrictive covenant is entitled to enforce it or (if this is the case) to agree the financial consideration required to discharge the covenant. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 The Upper Chamber is respectfully asked to discharge the covenant on the following grounds: -

10 LACK OF ENFORCEABILITY

Following the liquidation of the original Branksome Park Association Ltd, a John Stanborough purchased a property known as 'Cerne Abbas' in the late/early 1970's/1980's and subsequently townhouses. Historically 'Cerne Abbas' was the family home of the Bury family, one of the original parties to the 1926 Conveyance and a beneficiary of the restrictive covenants contained within that document.

- 11 The benefit of the covenants of the original Branksome Park Association Ltd is being claimed by virtue of historic ownership of 'Cerne Abbas'. However The Branksome Park Association Ltd is not the same company as named in the original deed of covenant since the current company known by that name was not created until 26th June 1981. It was then called Blindimage Ltd and changed its name to The Branksome Park Association Ltd on 26th June 1982 (see the first set of accounts filed by The Branksome Park Association Ltd formerly Blind Image Ltd dated 1981/82 - **Appendix 7**). The eligibility of this company to benefit from the restrictive covenant is therefore disputed due its inability to prove title.
  
- 12 The covenants are expressed to be for the benefit of The Branksome Park Association Ltd or their successors in title. The surrounding area has been extensively developed over the years and individual flats sold. In theory, therefore, adjoining owners who purchased land directly from The Branksome Park Estate after the date of this Deed could seek to enforce the benefit of the covenants under the Conveyance of 1926. However the Conveyance of 1926 does not make reference and sample checks of the Land Registry Site Plan from three adjoining properties (DT99042, DT10900 and DT62240 - see **Appendix 8**) are silent in respect of the benefit of restrictive covenants. Moreover, the extent of the land currently directly owned by The Branksome Park Association Ltd has not been provided. Enforceability of the restrictive covenants is therefore in doubt. However the Council have been provided with documents pertaining to Title number DT 94722 (**Appendix 9**) which is for land approximately 200 meters north of the site in question. These documents do show that the current company "The Branksome

covenants that were given to the original company with that name transferred to them when they were called Blindimage Limited by the original Branksome Park Association Limited before it was dissolved. Please see the letter from The Branksome Park Association Limited's solicitors Moore Blatch Transfer of Whole dated 29th December 1981 and office copy entries held by the Land Registry under the aforesaid title number.

13 A letter from Osborne Clarke (solicitors acting on behalf of Vodafone Ltd) dated 26<sup>th</sup> January 2017 is attached (**Appendix 10**). This has been submitted in support of the council's application to the Upper Chamber telecommunications mast on site. An email from Osborne Clarke dated 19<sup>th</sup> January 2017 (**Appendix 11**) and a report by Ellis Jones received on 6<sup>th</sup> October 2016 (**Appendix 12**) represent additional and independent legal opinion that the covenants are unenforceable. Moreover it is understood that in 2004 McCarthy and Stone successfully applied to the Lands Tribunal to vary / release restrictive covenants benefitting The Branksome Park Association Ltd on a development site for flats in The Avenue, Poole. The action was not defended and no evidence as to title to the covenants or ownership of them was submitted. The Lands Tribunal discharged the covenants in this case.

14 Ground a) S84 LAW OF PROPERTY ACT 1925

The covenants which restrict the development of the application land were drawn up 85 years ago at a time when the area was sparsely developed. The nature of the area has changed significantly during the interim and the application land is now surrounded by blocks of flats varying in height between 4 and 7 storeys. The planning design brief prepared by the local planning authority envisages a flatted development no higher than 6 storeys in keeping with surrounding development. Changes in the character of the estate have therefore rendered the original purpose of the covenant obsolete.

15 Ground b) S84 LAW OF PROPERTY ACT 1925

The Deed of Covenant dated 12<sup>th</sup> March 1958 subjects future residential development of the site to the prior approval of plans and elevations. This tends to imply a modification of the original restrictive covenant.

16 Ground c) S84 LAW OF PROPERTY ACT 1925

The planning design brief is designed to be sympathetic to adjoining development whilst not being visually intrusive. A six storey structure will be screened by mature trees approximately 20m in height and will not be visible to any adjacent buildings. It is therefore submitted that a development of this height would not cause injury to any existing adjoining owners who may be beneficiaries of the restrictive covenant. It is therefore not possible to envisage any circumstances whereby the discharge of the restrictive covenant would cause injury to the surrounding occupiers.

## APPENDICES

Appendix 1 - Site plan

Appendix 2 - Deed of Conveyance dated 30<sup>th</sup> April 1926

Appendix 3 - Deed of Release and Covenant dated 19<sup>th</sup> June 1931

Appendix 4 - Licence and Deed of Covenant dated 12<sup>th</sup> March 1958

Appendix 5 - Planning Design Brief

Appendix 6 - [REDACTED]

Appendix 7 - First set of accounts filed by The Branksome Park Association Ltd formerly Blind Image Ltd dated 1981/82

Appendix 8 - Land Registry Title documents DT99042, DT10900 and DT62240

Appendix 9 - Land Registry Title number DT94722

Appendix 10 - Email from Osborne Clarke dated 26<sup>th</sup> January 2017 c o n f i r m i n g V o d a f o n e support for the submission to the Upper Chamber

Appendix 11 - Email from Osborne Clarke dated 19<sup>th</sup> January 2017 providing independent legal opinion on the enforceability of the restrictive covenants

Appendix 12 - Report by Ellis Jones received on 6<sup>th</sup> October 2016 providing independent legal opinion on the enforceability of the restrictive covenants