UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 212 (LC)
LP/30/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – covenant restricting development to one dwelling per plot – building scheme – proposal to erect two additional dwellinghouses within grounds of existing property – whether restrictions obsolete – whether practical benefits of substantial value or advantage secured by the restrictions – whether proposal would cause injury – application granted and modification ordered – Law of Property Act 1925, section 84(1)(a), (aa) and (c)

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

BY

SYLVIA MARY CAIN

Re: Waverley Lodge, Waverley Avenue, Fleet, Hants GU51 4NN

Before: P R Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
30 September and 1 October 2009

Timothy Morshead, instructed by Harrington and Carmichael, solicitors of Camberley, for the applicant
Nicholas Taggart, instructed by CVS solicitors of London W1, for the objectors

The following cases are referred to in this decision:
Re Truman Hanbury Buxton & Co Ltd's Application [1956] 1 QB 261
Re Gossip's Application (1973) 25 P & CR 215
Re Bass Ltd's Application (1973) 26 P & CR 156
Re Collins (1974) P & CR 527
Dobbin v Redpath [2007] 4 All ER 465

The following cases were additionally referred to in argument:
Re Bradley Clare Estates Ltd (1987) 55 P & CR 126
P W & Co v Milton Gate Investments Limited [2004] Ch 142
Gilbert v Spoor [1983] CH 27 (CA)
Re Bromor Properties Ltd's Application (1995) 70 P & CR 569
Elliston v Reacher [1908] 2 CH 374 at 384
Allen v Veranne Builders (1988) NPC 11
Baxter v Four Oaks Properties Ltd [1965] CH 816
Re Dolphin's Conveyance [1970] CH 654
Re Turner's Application (2005) LT Ref: LP/45/2003 (Unreported)
Re Chandler's Application (1958) 9 P & CR 512
Re Purnell's Application (1987) 55 P & CR 133
Re Brierfields Application (1976) 35 P & CR 124
Re Cordwell [2008] 2 P & CR 270
Re GPB Construction Ltd's Application (2009) LT Ref: LP/56/2007 (Unreported)
Re Forgacs' Application (1976) 32 P & CR 464
Shepherd v Turner [2006] 2 EGLR 73

DECISION

Introduction

1. The applicant in this case, Mrs Sylvia Mary Cain, seeks the modification of restrictive covenants burdening land at Waverley Lodge, Waverley Avenue, Fleet, Hants (the application land) so as to permit the construction of two additional detached residential dwellings and garages within the grounds, together with a replacement detached garage for the existing house, in accordance with outline planning consent granted on appeal (ref: APP/N/1730/A/05/1172910) on 24 July 2005.

2. An initial application was made to the Tribunal on 27 April 2007, and this was amended on 25 April 2008. The modifications sought were to what was effectively a "one house per plot" restrictive covenant, and one preventing the construction of any building within 40 feet of Waverley Avenue. It became clear during the hearing that a modification in respect of the building line was neither required nor necessary, and Mrs Cain withdrew that part of the application. The applicant relied upon paragraphs (a), (aa) and (c) of section 84(1) of the Act. The material restriction relating to the application land (registered at the Land Registry under title number HP667154) was set out in conveyances dated 4 August 1936 between (1) Herbert Pool and (2) Hilda Eastwood, and 5 November 1937 between (1) Herbert Pool and (2) William Henry Ewart Gott. No copy of the 1936 conveyance is known to have survived, and for the purposes of this decision, I refer to the relevant conveyance as "the 1937 conveyance". The restriction, set out in the First Schedule, reads:

> "2. NOT more than one dwellinghouse (which shall be detached) shall be erected or allowed to stand or remain upon the said piece or parcel of land hereby conveyed with or without suitable outbuildings and no such dwellinghouse or out buildings shall be constructed of timber metal or asbestos PROVIDED ALWAYS that a garage may be constructed of wood with a brick base or foundation and roofed in with tiles of sand faced baked clay or a tool shed not exceeding eight feet by six feet in area and seven feet in height or an ornamental summer house may be constructed of wood on a brick base or foundation and roofed with tiles of baked clay Provided that no part of such outbuilding shall be nearer to the road than the front main wall of the dwellinghouse erected or to be erected on the said property."

The land benefiting from the covenant was described in clause 2 as:

> "FOR the benefit of the Stockton Estate and every part thereof (other than the said property hereby conveyed) shewn by the colours blue green and brown on the said plan and all owners for the time being of every part thereof."

3. There are 15 objectors, all of whom were admitted. Fourteen were represented and twelve of them produced witness statements; two also produced supplemental statements. The objectors are:

1. Dr C W & Mrs L Healey, Bracken, Waverley Avenue, Fleet.
2. Mr C I & Mrs M A Johnson, Somerton, Waverley Avenue, Fleet.
3. Mr P M & Mrs H R Ashley, Chase House, Waverley Avenue, Fleet.
4. Mrs J Britton, Beeches, Waverley Avenue, Fleet.
5. Dr DG & Mrs S E Skinner, Denehurst, Waverley Avenue, Fleet.
6. Mr J B & Mrs K Steele, Hamwell, Waverley Avenue, Fleet.
7. Mrs J Hector, Lyndhurst, Waverley Avenue, Fleet.
8. Mr T G & Mrs C J Wheeler, The Courtyard, Waverley Avenue, Fleet.
9. Mr A G & Mrs I J Cooke, The Paddock, Waverley Avenue, Fleet.
10. Mr T H & Mrs R Mitchell, Waverley Cottage, Waverley Avenue, Fleet.
11. Mrs C Williams & Mr D Newman, Yelverton, Waverley Avenue, Fleet.
12. Mr J & Mrs S Osborne, Chalfont, Waverley Avenue, Fleet.
13. Mr G & Mrs C Crawford, Grantham House, Waverley Avenue, Fleet.
14. Mr J & Mrs R Whatley, The Oak House, Waverley Avenue, Fleet.
15. Mr G A & Mrs J W M Elliott, Richmond, Waverley Avenue Fleet. (Inactive)

4. Mr Timothy Morshead of counsel appeared for the applicant, calling Mrs Cain as a witness of fact, and Mr Christopher Paul LeCointe MRTPI, Operations Director of RPS Planning & Development Ltd, who adopted, with consent, the planning report and supplemental report that had been prepared by his associate, Ms Venessa Clipstone, who was absent on maternity leave and unavailable to attend the hearing. The applicant had also obtained a witness statement in support of her application from a nearby resident (who was not called), together with expert reports on valuation and highways. Neither Mr Andrew McLaren of ASM Surveyors (valuation), nor Mr Gary Frostick of Bellamy Roberts (highways), was called. Their evidence had been agreed with the objectors' expert, and they had each signed the joint statement of facts.

5. Mr Nicholas Taggart of counsel appeared for the objectors and called Mr Stephen Downham FRICS MCI Arb, a director of Hughes Ellard, Chartered Surveyors of Fareham, Hants who gave expert evidence. He also called four of the objectors, Mr Steele, Dr Healey, Mr Johnson and Dr Skinner.

6. On 29 September 2009, I carried out an accompanied inspection of the application land and its immediate surroundings including the whole of Waverley Avenue, and the parts of Stockton Avenue (off which Waverley Avenue forms a crescent), to which the benefit of the restrictions are said to apply.

The application land and surrounding area

7. Waverley Avenue, lies to the north west of Fleet centre within walking distance of the railway station and Fleet Road, the town's main shopping street. It is within the North Fleet Conservation Area, which was established in 1987, and was defined under the Hart District Local Plan. It is a private, unadopted but partially lit road without pavements and is only partly metalled, the remainder unmade and finished with hoggin/scalpings.

8. Waverley Lodge comprises an imposing detached two-storey Arts and Crafts style private house and garage set well back from Waverley Avenue in mature gardens and grounds extending to 0.68 ha (1.68 acres) that include an open-air swimming pool and hard tennis court (disused), together with lawned areas, borders, shrubberies and substantial rhododendron banks. The house was one of the original units constructed following the subdivision of part of the Stockton Estate into development plots in the 1930s, and is not directly visible from the road (in the summer months), due to the high hedge and tree screen along the front boundary. The Stockton Estate is now a mature, low-density residential area of about 32 acres encompassing Waverley Avenue, Stockton Avenue and a few properties fronting Elvetham Road. The original Stockton House, which remains, and occupies a central island site bounded by Waverley and Stockton Avenues, is now a private school.

The proposed development

9. The plans and elevations of the development that achieved planning consent on appeal in July 2005, were prepared by Macmillan Penfold, Chartered Architects of Fleet, on the applicant's personal instructions. They show the retention of the existing house which lies towards the northern boundary of the application land and faces north/south, together with two new detached houses and garages and a new detached double garage and garden store for the existing house, it lying immediately to the west of it, approached off a driveway that follows the line of the current drive along the northern boundary. New house no.1 and its attached double garage is designed to be approached off the same drive as currently exists and will occupy the site of the existing garage and the swimming pool. It will be set back approximately 63 metres from Waverley Avenue. New house no.2 and its attached double garage will be constructed towards the southern boundary of the land (towards the adjacent property, Somerton), some 25 metres from the road, and will be approached off its own driveway which will be a spur off the drive serving the other two properties. Thus, the single access onto Waverley Avenue will be retained in its existing position.

10. It was agreed between the parties that the introduction of the proposed two new properties would result in an increase of approximately 12 vehicle movements per day, and that that was not significant. There would be no significant diminution in value to properties within Waverley Avenue or elsewhere in the neighbourhood resulting from the development, but the immediately adjoining houses might suffer a reduction of up to 5%, however, no specific figures were applied.

The building scheme

11. An issue arose as to the extent of the former Stockton Estate over which the benefits of the restriction were enjoyed, and thus which property owners had the right to object. Whilst all the objectors listed above were admitted, and the planning experts had signed a declaration stating that they had agreed "the extent of the restrictive covenant area for the Stockton Estate as set out in Figure 2 of the RPS Planning Statement (August 2006)", it transpired that the document they had referred to was a plan appended to a conveyance of 1943. That plan differed from the one that formed part of the relevant conveyance in that it depicted a number of additional sub-divided plots within the area that had been shown coloured on the 1937 conveyance, together with a further coloured area that includes the properties now occupied by Beeches (Mrs Britton), Chalfont (Mr Osborne) and The Paddock (Mr & Mrs Cooke). In his opening skeleton argument, Mr Morshead set out the differences in the context of the extent to which the Residents' Association had acquiesced in the further plot subdivisions, and the additional developments that had taken place, since the covenant was imposed. At the hearing, and in his closing submissions, he argued that the 1937 plan clearly showed the extent of the benefitted land: 10 plots on the green land (including the application land), 5 on the brown land and one on the blue, totalling 16 plots. That was the extent of the building scheme at the time, and it was only the properties that fell within the coloured areas that were entitled to object. Thus, the objections received from Messrs Britton, Osborne and Cooke should not be taken into account as they have no locus.

12. Mr Morshead said that the planning experts (who were not lawyers) had assumed the larger area as depicted in the 1943 plan simply for the purposes of the exercise that they had been instructed to undertake. It was not disputed that, post 1943, the benefit of the common one house per plot restrictions extended over the larger area, but, it was submitted, those benefits could not translate backwards to relate to the conveyance upon which Mrs Cain's application was based. The land occupied by the additional coloured area depicted on the 1943 plan was shown as six, uncoloured, plots on the 1937 plan. Thus, if that area had been included within the scheme in 1937, those additional plots would have made the total 22.

13. The importance of establishing the relevant extent of the area of the building scheme, Mr Morshead said, went to his arguments as to the level of acquiescence by the beneficiaries when comparing the original extent of the scheme with the pattern of development that has actually occurred – as delineated on a plan showing the estate at the present day (bundle 2, p324). For instance, if the additional 6 plots referred to above should be included, they have actually been developed out into 11 units. I return to the question of acquiescence later.

14. Mr Taggart said that as the planning experts had agreed, by reference to the 1943 plan, the extent of the benefited land, which included the disputed objectors' properties, Mr Morshead could not resile from that. The lawyers' instructions to the planners were clear: "to narrow down and agree where possible … identification of the original plots based upon OS base plots." In their signed statement of agreed facts and issues, they had envisaged (at para 2.11) legal representations about whether any particular property had been built in breach of the covenant, but not whether that property had the benefit. Mr Morshead had given no prior

warning that he was to question the *locus* of some of the objectors, and Mr Taggart submitted that his actions at this stage have caused prejudice to the objectors in that they have continued to instruct, and pay for, the advice of their legal representatives in the belief that they continued to be entitled to defend their rights. Further, as a matter of principle, it is possible for property rights and liabilities which would not bind parties in law, to become binding in equity, even those who are successors in title to estopped parties (see *P W & Co v Milton Gate Investments Limited* [2004] Ch 142.

15. As to the extent of the benefited properties, and the admissibility of the objectors who occupy plots that were coloured on the 1943 plan, but not the 1937 plan, I reject Mr Taggart's submission that the applicant is estopped from contending that, as a matter of law, the objectors Britton, Osborne and Cooke do not have the benefit of the restriction. The agreement which the planning experts reached was in the context of, and wholly for the purposes of the proceedings. It would be wrong, in my view, for the Tribunal to address the application or objections on what, if Mr Morshead is right (which I think he is) would be a wrong basis of fact and law. If, as is contended, the planning experts were in error in agreeing the area to which the scheme related (as applicable to the application land), it would not be right for the Tribunal to proceed on this erroneous basis. I therefore find for the applicant on this issue, and do not, therefore, take the evidence of the three affected objectors into account. To the extent that they have been put to any expense by the agreement on the part of the applicant, this is a matter that is capable of being rectified in any order for costs that the Tribunal may in due course make. The extent of the building scheme to be taken into account in this application is that which is depicted on the 1937 plan (16 plots).

16. The principles relating to the establishment and extent of building schemes (or schemes of development as they are otherwise known) are well settled in law (see, for instance, *Elliston v Reacher* [1908] 2 CH 374 at 384, *Allen v Veranne Builders* (1988) NPC 11, *Baxter v Four Oaks Properties Ltd* [1965] CH 816 and *Re Dolphins Conveyance* [1970] CH 654 at 663). They were designed to avoid problems and difficulties in enforcement where an original vendor (in this instance, the Stockton Estate) endeavoured to set up a comprehensive scheme of covenants designed to be enforceable by and against all owners from time to time of land on the estate governed by the scheme, irrespective of the order in which the common vendor sold those plots. Thus, they will be for the benefit of all the lots intended to be sold, and it therefore might appear to be the case that the objectors listed above, who I have determined to exclude, should be included. That would be the case were it not for the fact that the plan referred to in the restriction in the 1937 conveyance is specific as to the extent of the scheme, i.e., the coloured areas referred to.

The statutory provisions

17. The grounds upon which the application was made are set out in section 84(1)(aa) and (c) of the Law of Property Act 1925 which provide:

> "84-(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) 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 in which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete;

(aa) that (in a case falling within subsection (1A) below) the continued existence [of the covenant] would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified impede such user;

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

Subsection (1A) provides:

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

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

(b) is contrary to the public interest

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

The applicant's case

18. Mr LeCointe is operations Director of RPS Consulting, is based at their Oxford office and has practised as a Chartered Town Planner since 1985. He said that he had read and agreed with the contents of Ms Clipstone's report and supplemental statement, and adopted the declaration of truth provided in them. He admitted that he had not visited the application land or surrounding area, but said that on the basis of Ms Clipstone's findings and the photographs and plans provided, he was in agreement with the description, in planning terms, that had been expressed by the planning officer and inspector in respect of the initial planning application and the appeal. He accepted, in cross-examination, that in terms of the thin end of the wedge, it appeared from the plans that he had seen that there would be opportunities for further sub-division elsewhere on the estate, particularly within the retained grounds of Stockton House.

19. Ms Clipstone's expert witness report, and her supplemental statement that served to update it, set out the planning context (over which there were no issues of disagreement with the objectors' expert) together with, in considerable detail, the history of plot sub-division and developments that have occurred throughout the Stockton Estate (in accordance with the 1943 conveyance plan) since the covenants were first imposed. She noted that, in respect of Mrs Cain's original application for planning permission, the planning officer in his report to

committee had recommended its approval. The proposed density of the development, at 4.4 units per hectare was not contrary to policy URB 18, but failed to meet the density criteria set out in PPG3 in that it was well below the recommended minimum. Nevertheless, having regard to the conservation area designation, and the overall density of the area, he considered the proposals to be perfectly acceptable. The planning committee, however, refused the application, and Mrs Cain submitted an appeal. Ms Clipstone said that, in resolving to grant permission, the Inspector noted the proposed siting on the application land and, whilst one of the new houses (like many other properties on the estate), and the replacement garage would be visible from the road, they would be largely screened by the existing trees and shrubs. There would be no impact upon the character of the Conservation Area, and in his opinion the site was sufficient in size to accommodate the development without the new buildings appearing cramped. The issue of whether the shared access for the three properties would constitute a "cul-de-sac" was not considered important. The air of spaciousness, which is a dominant characteristic of the area would not, the Inspector said, be compromised.

20. As to those plots that had been subdivided from those originally depicted, Ms Clipstone said that she had agreed with Mr Downham that six new dwellings had been created and there were two conversions from existing properties. Tree Tops and Pine House, located on the corner of the southern end of Waverley Avenue and Stockton Avenue had both been built upon what was the original plot of Thornhill (which remains). Treetops, a 5 bedroom detached house had only recently been completed and planning consent for it was obtained on 8 January 2006. Grantham House and Sevenoaks were two detached houses constructed by Charles Church Homes in accordance with planning consent gained in 1998, within what were the rear gardens of 33 and 35 Elvetham Road, Fleet. The plot occupied by 'Chandael' opposite the northern junction of Waverley Avenue and Stockton Avenue, had been sub-divided, and an additional dwelling constructed (Stuart Court) with access off Queen Mary Close. Reference was also made to the subdivision of the plot occupied by High Trees, Stockton Avenue. A new house, 'Wellingtonia', had recently been constructed on it in accordance with planning consent obtained in June 2005. The High Trees plot was on the area that was not coloured on the 1937 plan, but was included on the 1943 plan. Although it post-dated Ms Clipstone's reports, Mr Morshead pointed out that a planning application had been subsequently submitted in June 2009 for the erection of one detached property on a plot sub-divided from Chelwood (which adjoins High Trees).

21. Mrs Cain said that she and her late husband purchased Waverley Lodge in 1975, which was shortly after the Lands Tribunal decision in *Re Collins* (1974) P & CR 527 was issued, refusing an application following the grant of planning permission in 1972 for a development of 32 flats on Waverley Lodge, and adjacent land. Shortly after they moved in, the plot of land immediately to the north became available and was purchased by a Mr & Mrs Cain (no relation). They constructed a house which was named Shimoda, and also sold off two further plots for development. Those plots, and part of the site upon which Shimoda was built, were outside the area covered by the restrictive covenants, although the western part of Shimoda's plot (over which access was gained onto Waverley Avenue) was affected. The property has subsequently been renamed Hamwell and was now owned and occupied by Mr & Mrs Steele, who were objectors to this application.

22. Mrs Cain explained that following the death of her husband in 1998, a prospective developer made an offer for her property, subject to planning. His application for permission was unsuccessful, and it was not pursued to appeal. The offer was withdrawn. She said that, seeing the application land as her pension, she engaged an architect in 2003 who prepared the plans for which consent was eventually obtained on appeal in 2005. It is her intention, if successful in this application, to sell the house and land with the benefit of the permission, and move to something smaller.

23. Although there were only about 16 properties on Stockton Avenue in 1975, a further six had since been constructed on sub-divided plots, apparently, she said, in contravention of the one house per plot restrictions. She said that, in making the application, she was doing everything "by the book", and could not understand why none of the objectors had sat down with her to discuss the proposals for the application land, nor the animosity that had been forthcoming for what, she said, was a high quality and appropriate development that was sympathetic to the environment. She pointed out that the plot sizes for the proposed two new houses, at 0.23 and 0.26 Ha (0.56 and 0.64 acres), respectively were larger than some of those that had been developed on infill plots and were entirely in keeping with the ethos of the estate.

24. In cross-examination, Mrs Cain accepted that the properties of the objectors, through the benefit of the restrictive covenant, were entitled to the air of spaciousness that it was intended to maintain, and that, with the developments that had occurred, that ambience had been whittled away to a certain extent. However, the effects had certainly not been sufficient to alter the low-density nature, and overall feel of the area, and neither would her own development if it went ahead. She admitted that she had been secretary to the Residents Association in the 1980s, and that part of its *raison d'être* was to protect the covenants that had been initially imposed. She had been asked to resign, she said, as a result of her making the application for planning consent.

Objectors' case

25. Mr Downham is a chartered surveyor who has been practising in Hampshire since qualifying in 1974. He is a member of the RICS President's Panel of approved arbitrators, and regularly accepts appointments to act in that capacity and as an expert witness in residential and commercial property matters. He said that he had been asked to provide his expert opinion as to whether the character of the area in which the application land is located remained today as it was in the 1930s, the impact of the proposed development in terms of its effect upon the neighbourhood, transport and highways implications and the effect, if any, on values of neighbouring properties. He was also asked to consider whether the modification as sought would lead to further applications, and whether it would deprive the objectors of practical benefits of substantial value or advantage.

26. Regarding the developments that had taken place on sub-divided plots (as agreed with Ms Clipstone), Mr Downham said that in his view all of them were harmful to the ethos of the estate. In particular, Grantham House and Sevenoaks are clearly visible from the road, increase the "apparent building mass" and appear cramped on their plots. He said that the

Residents' Association had initially objected to Charles Church's proposals but following revisions to the plans (including a reduction in size of the dwellings) and bearing in mind the previously unkempt and overgrown nature of the plots, they agreed not to object. Tree Tops, he said, was very tight on its plot and further significant development of that nature would, in his opinion, seriously impact upon the overall street scene. However, in cross-examination, he agreed that apart from the fact that they would be located next to much larger plots, the applicant's proposed development would be significantly less harmful due to the new properties being much better shielded from the road. He agreed with the planning Inspector's description of the location, and that it was that character as described that needed to be preserved.

27. Mr Downham agreed that it was not possible now to replicate the density envisaged when the estate was first lotted up and sold off as plots. As to the thin end of the wedge, he agreed that, with there having been at least 6 plot sub-divisions on the estate prior to the applicant's proposals, those proposals could not, on their own, be said to have created the risk of future applications for modification or discharge. Those risks had been created earlier. He also agreed that his concerns about the risk of future development were directed towards ground (a) and that if the application was successful on ground (aa), those concerns would, to an extent, be dissipated.

28. There being no particular issues relating to additional traffic (apart from Mr Steele's concerns), Mr Downham was not cross-examined on this subject. As to valuation impact, he had agreed with the applicant's valuation expert, Mr McLaren, that the development of the application land "will not result in any significant diminution in value of properties generally within Waverley Avenue, or indeed others in the neighbourhood that benefit from the covenants." However, it was also agreed there could be diminution "of up to 5% of market value in respect of those properties that immediately adjoin the site." With no specific compensation being sought from those owners, Mr Downham was not cross-examined on valuation issues either.

29. Mr Steele is the owner of Hamwell (formerly Shimoda) which abuts the northern boundary of the application land. His principal concern was that there would be a shared driveway running along the full length of that boundary, and that the tranquillity and privacy of his garden would be compromised. He also expressed concerns (mirrored in most of the other objectors' witness statements) that modification in this instance could lead to further applications elsewhere on the estate, and the proposals would have a detrimental affect upon the ethos of the estate. In cross–examination, Mr Steele accepted that there were two other properties on the estate that shared a drive (The Beech/Wellingtonia), that the drive he was referring to on the application land was already there (serving the garage of Waverley Lodge in its current location), and that the new plot 2 would be accessed by a spur off that drive, rather than along it.

30. Dr Healey, of Bracken, Waverley Avenue (next door but one to the south of Waverley Lodge) said that when acquiring the property in 1982, he and his wife were reassured by the existence of the one house per plot restrictions, in that the ambience and character of the

neighbourhood were likely to be retained. Although he was aware of some development that had occurred (the two Charles Church plots behind 33 and 35 Elvetham Road), he said that was an improvement upon what had been there previously. He said that it had not been the policy of the Residents' Association in the past to block developments that were not harmful to the estate, and that would be in keeping with its ethos and character. In his view, the applicant's proposals were not in keeping. There would be three triangular shaped plots with a compressed access onto Waverley Avenue. The proposals would constitute overdevelopment of the site, whereas, as he had previously indicated to Mrs Cain, a development comprising one new house within the grounds of Waverley Lodge would have been acceptable.

31. Mr Johnson is the owner of Somerton, Waverley Avenue, which abuts the south western boundary of the application land. He and his wife bought the property in October 2005, and he said that they were aware of the planning consent on the application land at that time. Nevertheless, he said that he believed the restrictive covenant to be absolute, and that in his view they paid a substantial premium for their property as a result. He said that the location of the second new house would seriously invade the privacy that they currently enjoyed, especially in their rear garden, and he was also concerned about noise. In cross examination, Mr Johnson accepted that he was aware there was a risk that the restrictive covenant might be modified, but it was his "hope and expectation" that it would not be.

32. Dr Skinner, of Denehurst, Waverley Avenue, acquired his property in 2001. He said that he and his wife found one of its main attractions to be the large gardens and tranquil surroundings. It was an area of generally low density development and directly opposite the application land, which also occupies a large, partly wooded, plot. In his view, the proposed development would result in the loss of a wild life habitat and a large number of protected trees, would be of cramped appearance and would also result in increased road traffic.

33. None of the other objectors gave evidence. Their witness statements, although individually produced and worded, followed a generally common theme. For example, Mr Ashley of Chase House said that the restrictions, which are in common form, are part of a building scheme. It was the duty of the Residents' Association, of whom most residents were members, to safeguard the covenants, and uphold one of its aims: "to secure the continuing ethos and amenities of Waverley Avenue in accordance with the criteria contained in the reciprocal Stockton Covenants appertaining to the properties having frontages and addresses on the Avenue." He said that apart from two houses constructed in 1997/98 [the Charles Church houses] with the implied consent of the owners of properties forming part of the scheme (permission having been given by the Residents' Association), there had been no other breaches. A previous attempt to modify the covenants upon the application land had failed (*Re Collins*), on the basis that the proposed increase in density of houses, and the creation of small culs-de-sac would be contrary to the preservation of the ethos and character of the estate. He said that the modification sought would deprive the covenantors of practical benefits of substantial value or advantage, and there would be an increased risk of further applications on other large plots on the estate.

Submissions

34. Mr Taggart submitted, in terms of ground (a) that it was for the applicant to demonstrate that the covenants have become obsolete, "by reason of changes in the character of the property or the neighbourhood or other circumstances", and referred to *Re Truman Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261. In that case, he said, the application was refused because the neighbourhood had not become so commercial as to render the restriction obsolete.

35. It was not being suggested by anyone that the character of the property had changed, but in terms of the character of the estate, it was instructive to note that the wording of Mrs Cain's application itself said: "The principal object of the covenants was to preserve an overall low density of development throughout the area benefiting from the covenants. The area remains one of low density development." On that basis, Mr Taggart said, it was difficult to see on what basis the argument for obsolescence brought about by a change in character of the area could succeed.

36. He said that a major part of the applicant's case was the question of previous breaches, and the alleged acquiescence of the residents, and said that case law had established that some breaches to a scheme of covenants were not necessarily sufficient to render the scheme obsolete – see *Re Gossip's Application* (1973) 25 P & CR 215. It was accepted that there had been some breaches (6 in all), and Mr Downham had said that some of them were harmful to the character and ethos of the area. However, he maintained (as did Mr Steele) that the overall ambience and 'ethos' remained. This meant that, not only were the restrictions not obsolete, but they also provided the covenantors with practical benefits of substantial value or advantage.

37. So, turning to ground (aa), Mr Taggart said that whilst it was accepted that Mrs Cain's proposals were on a much smaller scale than those for which modification had been sought in *Re Collins*, it would be necessary for Mrs Cain to establish a very different change in circumstances since that 1974 decision for her application to succeed either under ground (a) or (aa). Practical benefits have been held to include the ethos or character of an estate in other cases, Mr Taggart submitted, and a particularly helpful recent example was the Court of Appeal decision in *Dobbin v Redpath* [2007] 4 All ER 465 as it made reference to a number of earlier well known cases, and dealt with the question of the additional weight that the Tribunal should give to "the special interest of the beneficiaries of the covenants of the building scheme" when deciding if the covenants confer practical benefits.

38. Mr Taggart went on to refer to *Re Chandler's Application* (1958) 9 P & CR 512, in the context of the residents' ability to exercise control over the way in which a neighbourhood is developed. He did not agree with Mr Morshead's suggestion that *Re Chandler* should be distinguished as it was made under ground (a) which, he had said, set a harder test than that which applied under ground (aa). Mr Morshead had submitted that Parliament's actions in adding ground (aa) in 1969 should be taken as showing that it is no longer the case that a desire to maintain a building scheme is something of intrinsic value to the benefiting owners. That,

Mr Taggart said, was not a proposition to be found in any textbooks, but in any event, he said, there are a number of post 1969 cases that showed the ability to enforce restrictive covenants was of intrinsic value. For example, *Re Purnell's Application* (1987) 55 P & CR 133, *Re Brierfield's Application* (1976) 35 P & CR 124 and *Gilbert v Spoor* [1983] Ch 27. In the latter, it was held that an owner of benefited land "is entitled to the estate being administered in accordance with the mutual covenants, or local law", and seen in context, Mr Taggart said, Waller LJ's reference to local law shows he was plainly of the view that any undermining of local law would be harmful to local land owners.

39. Mr Morshead submitted that compared with the delineation of the 1937 estate, the pattern of development that had occurred on that area now consisted of 12 houses (instead of 10) on the green plots, 11 houses (instead of 5 on the brown plots) and 1 house on the blue plot, making a total of 24 (of which two were, in fact, sub-divisions of existing properties). If the additional 6 plots contended for on the 1943 plan were to be included, they had in fact now been built out with a total of 11 plots. That overall total of 35 properties compares to 16 (1937 – an increase of over 100%) or 22 (1943 – an increase of 59%), and was proof that the owners of properties on the Stockton Estate had acquiesced in far denser development than was originally contemplated. Even if the "original plots" were taken as those units of property first conveyed by the common vendor (rather than as depicted in the 1937 conveyance) the planning experts had, Mr Morshead said, agreed that a further 6 had been subdivided to create two plots out of one. It was, as much as anything else he said, unfair for the residents who have happily gone along with other development proposals on the estate to now suddenly object to what, in reality, was a proposal for a development that was wholly in keeping with the overall ambience and ethos of the estate, and was to take place on what was agreed to be the second largest plot (after Stockton house itself).

40. Although it was not necessary for it to be shown that the covenant is obsolete under ground (a), Mr Morshead submitted that it was clear that the pattern of development that had occurred over the years had made the original intention (no more than 16, or at the most, 22 individual plots) impossible to achieve. The estate had changed beyond all recognition, and it could not be said that that intention ever materially shaped the development that has occurred. With the beneficiaries of the restriction having acquiesced in the state of affairs that now prevailed, equity would not support the grant of an injunction, because the object can no longer be achieved. These were classic circumstances that support a finding of obsoleteness; for example see: *Re Bradley Clare Estates Ltd* (1987) 55 P & CR 126.

41. As to ground (aa), Mr Morshead said that it was only questions 3 and 4 of the 7 posed in *Re Bass Ltd's Application* (1973) 26 P & CR 156 that were in issue: Does impeding the proposed user secure to the objectors practical benefits and, if so, are those benefits of substantial value or advantage? It seemed, Mr Morshead said, to be the thin end of the wedge concern that was most agitating the objectors. Whilst it was fully accepted that maintaining a scheme of covenants, including a one house per plot rule, was capable of being a benefit of substantial value or advantage, the significance of any objection made on this basis must depend upon all the circumstances. In *Re Purnell*, the application had been refused because "to protect the unique character of an estate that had remained unchanged since the 1920s".

Likewise, in *Re Cordwell* [2008] 2 P & CR 270, the Tribunal had found that an existing building scheme remained intact, and afforded that factor "significant weight."

42. By contrast, Mr Morshead said that the circumstances in this application were very different. The integrity of the scheme had already been severely compromised in that development had never taken place according to a fixed pattern of plot sizes, and it was not possible, therefore, to preserve any particular density of development. It was also pertinent to note that the application land was uniquely large within the estate as a whole (apart from the school), and approximately double the size of the next largest plot. Whilst there might be some other plots suitable for one additional house (an example being the recent application for planning consent on a plot to be divided from "Chelwood"), the objectors had not identified any particular plot that might come forward for development of two additional houses in the future. It would be immediately apparent from a site inspection that the proposed development on Waverley lodge would not be harmful to the area and, indeed, it was not being suggested by the objectors that it would be. As opposed to the proposals in *Re Collins*, Mrs Cain's prospective modification would not threaten the introduction of high-density development on the estate.

43. Each case, Mr Morshead said, was to be judged on its own merits (see *Re Forgacs' Application* (1976) 32 P & CR 464), and that was precisely what the Tribunal had done in *Re GPB Construction Ltd's Application* (2009) LT Ref: LP/56/2007 (Unreported). In that decision, I said, at para 51:

> "The residential objectors complain that the character of the area will be changed if the modification is allowed. I do not agree. I accept Mr Bevans' [the applicant's expert] evidence regarding the size of the proposed plots in comparison with those that already exist, and see no reason to suppose that the marginal increase in density will have any marked effect upon this pleasant and attractive residential location."

44. As to the residents' requirement for, and to be able to maintain, a "right of veto", as specifically referred to in the objection of Mr Ashley, amongst others, Mr Morshead said that quite apart from questions of who should be the ultimate arbiter, it was somewhat incongruous that on the one hand they could waive restrictions when it suited yet, when it did not, could attempt to turn back the clock and try to argue that the scheme remained intact. The precedent had already been set, and thus modifying the restriction on the application land would not set one – it would follow it. It was a fact, he said, that the objectors in this case were attempting to get a decision from the Tribunal which they can use to banish all future proposals, no matter how harmless they may be, without having to consider them, as they have done in the past, on a case by case basis. It is not the Tribunal's function, under section 84, he said, to improve a situation (for the residents) that their own past acquiescence had created to the integrity of the building scheme.

45. There was no evidence, either from Mr Downham, or from the objectors other than Mr Healey (in response to a question from the Tribunal – and not mentioned in his witness statement or evidence in chief) that suggested the proposed development on the application land would harm the estate. It was important to note, Mr Morshead said, that the restrictive

covenant was for the protection of the estate. Persons with the benefit were entitled to protect their land from harm arising from development on the application land. The question, therefore, was whether the proposals would be harmful outside the site – features which were only experienced within the land were either irrelevant or of very little weight.

46. Regarding affect on value, Mr Morshead said that no claim for compensation had been made from any of the objectors. The possibility that there might be an up to 5% diminution in value on the immediately adjoining properties was described by Mr Downham as "marginal". It was only if success by the applicant here led to a proliferation of successful applications, thus leading to a marked change in the character of the estate, that he had said values might fall, generally, by 10 – 15%. There was no suggestion that a development on the subject land along the lines of that which the applicant proposed would cause any such change

47. It was accepted that there were circumstances where it was right for the Tribunal to have particular regard to the protection of a building scheme for its own sake, but it was instructive to note that, in *Shepherd v Turner* [2006] 2 EGLR 73, a modification was ordered even though there was no evidence of previous breaches. Thus, even a fully intact scheme was not immune where the proposed modification was not deemed harmful. Regarding Mr Taggart's reliance on *Re Chandler's Application*, Mr Morshead said that was no authority for an application under ground (aa) or (c) (see again *Re Shepherd & Turner*).

48. Finally, in connection with ground (c), it was submitted that with the proposed development clearly showing no harm would be occasioned to any of the objectors, they would not be injured, and the application should also succeed on that ground.

Conclusions

49. I consider firstly ground (a). The question for me to answer is whether there has been any material change in the character of the application land or the neighbourhood in which it is located. There was no suggestion that there had been any change in the nature of the application land. As to the neighbourhood, I accept that the estate has now changed from what was originally proposed when the first lotting took place, and the extent of splitting up of plots, and the additional developments that have subsequently occurred, as set out in detail by Ms Clipstone, has served to increase densities to some extent. Nevertheless, even with the new houses, the estate is still of very low density by modern standards, and in my view, its general appearance and ethos is not greatly dissimilar to how it might originally have been envisaged. Any changes that have occurred are, in my view, minor in nature and could by no stretch of the imagination be deemed 'material'.

50. Mr Taggart's references to *Re Truman, Hanbury, Buxton* and *Re Gossip's Application* are apposite, in my view, in that they highlight the fact that some breaches can occur without necessarily creating change to the character of the area sufficient to render the original intention of the restriction obsolete. I do not accept Mr Morshead's submission that the estate has "changed beyond all recognition", and despite the fact that the one house per plot rule has

been eaten into to some extent, none of the developments that have occurred have damaged, to any significant degree, the character of the estate. The application under ground (a) therefore fails.

51. I now turn to the applicant's principal ground, (aa). It is accepted that the proposed use is reasonable, and that the existence of the covenant impedes that user. There is no suggestion that the proposed development would not be in the public interest, and there is no claim for compensation, although the valuers did agree that there could be an "up to 5% reduction in value" to the properties immediately adjoining the application land. Whether, in impeding the proposed use, the restriction provides practical benefits and, if it does, whether they are of substantial value or advantage are the principal questions I have to determine.

52. As Mr Morshead said, the major concern voiced by the objectors was the perceived risk that granting modification in this case would open the floodgates for future applications. It seems to me that whilst opportunities for further development in the area undoubtedly exist (as evidenced, for example, by the recent application on land adjoining Chelwood), the fact that the residents have clearly acquiesced in earlier breaches of the one house per plot rule, must severely weaken any arguments that they may pursue in terms of harm to the estate and the "thin end of the wedge." Having said that, I acknowledge that the benefit of the restrictions is a valuable property right which the beneficiaries are entitled to fight for, and their genuine concerns have been taken fully into account.

53. Mr Downham accepted in cross-examination that, whilst in his view, the other developments that had occurred had caused harm to the estate, the applicant's proposals would be significantly less damaging, and he also had no issue with the planning inspector's description of the location or the impact of the proposals. I agree with both Mr Downham and the Inspector. In my view, the proposed development for which the applicant gained permission on appeal in 2005 is entirely in keeping with the ambience and ethos of the estate as it currently exists (and is not markedly different from what might have been envisaged in 1937), and will not, in my judgment, have any detrimental affect upon it. I note that Dr Healey said that it had "not been the policy of the Residents' Association to block developments that caused no harm to the estate, and that would be in keeping with its ethos and character." He was of the view that the applicant's scheme would constitute over development, and would not be in keeping. I disagree. The layout of the development, and the resulting plot sizes fall well within the density range (it being agreed that there are substantial variances in plot sizes throughout the estate), and if anything, the new houses will be better screened from the road and other properties than is the case with a number of the other recent developments. If the proposals were, for instance, for the sort of intense development that was envisaged in *Re Collins*, then the effect would, of course, be very substantially different to what is proposed here.

54. Mr Taggart pleaded that I should (per *Dobbin*) give additional weight to the special interest of the beneficiaries of the covenants of the building scheme when deciding if the covenants confer practical benefits. However, the difference here to what Lawrence Collins LJ said in the Court of Appeal decision (para 25), is that the proposals would not, in my view,

adversely affect the density and character of the building scheme as it exists. In all the other cases Mr Taggart referred to, the proposed modifications would have had a harmful impact, and they are not, therefore, relevant in this instance for the reasons that I have given.

55. Mr Johnson was aware of the restrictive covenant when he purchased Somerton, and although his property is likely to be the most affected in that the new plot 2 will be located quite close to his northern (side) boundary, he would have known that, and that there was a strong likelihood the development might proceed. No evidence was produced to support his contention that a substantial premium reflecting the value of the restrictive covenant formed part of the purchase price. He also expressed concerns about noise from "children playing football or dogs barking" in the garden of the proposed new house, but accepted in cross-examination that there would equally be some aural disturbance from the existing tennis court that was located on the footprint of where the house would be built, and that it was not, in any event, the function of the restriction to police the noisy pursuits of neighbours.

56. Mr Steele, of Hamwell was concerned about the driveway running along his southern boundary, and the additional traffic that might use it. But, in that regard, not only do I fully accept Mr Morshead's submissions, it is also a fact that no additional vehicles are likely to pass along that part of the drive than do now. This is because the new garage for Waverley Lodge will be close to the entrance, and thus the part of the drive closest to Hamwell will still only be serving one property – the new plot 1. Furthermore, it is only the part of Hamwell's plot that is closest to Waverley Avenue that has the benefit of the restriction, the part of the land upon which the house is actually built being outside the covenanted area.

57. Whilst I understand Dr Skinner's concerns, I and am satisfied from my inspection of the application land from within his own house (Denehurst) that any affect upon the current tranquil surroundings will be marginal at most. I have taken into consideration all the other objector's concerns, but conclude that in impeding the proposed development, the restriction does not secure practical benefits of substantial advantage to any of them, and the application under ground (aa) is thus made out.

58. As to ground (c), mindful of the agreement to which the expert valuers came regarding the possible impact upon those properties immediately adjoining the application land, I cannot conclude that the modification of the restrictive covenant would cause no injury to any of the objectors, and thus the application fails under that ground.

59. Ground (aa) having been made out, and adopting the discretion afforded to me under the Act, I determine that the restrictive covenant should be modified so as to permit the applicant's proposed development of two additional dwellings upon the application land, in accordance with permission granted on appeal on 14 July 2005 under reference number APP/N/1730/A/051172910. The wording of the relevant restriction, which will be incorporated into an appropriate order shall be revised as follows:

"(2) Not more than three dwellinghouses (which shall be detached) shall be erected or allowed to stand or remain upon the said piece or parcel of land before described with or without suitable outbuildings and no such dwellinghouse or outbuildings shall be constructed of timber metal or asbestos provided always that a garage may be constructed of wood with a brick base or foundation and roofed with tiles of sand faced baked clay or a tool shed not more than eight feet by six feet in area and seven feet in height or an ornamental summerhouse may be constructed of wood on a brick base or foundation and roofed with tiles of baked clay Providing that no part of such shall be nearer to the road adjoining the property than the front main wall of the dwellinghouses erected or to be erected on the said property but provided that nothing herein shall prevent the full implementation of (and use under) the planning permission granted on appeal on 14 July 2005 under reference number APP/N/1730/A/051172910."

60. This decision determines the substantive issues in the application, and will become final when the question of costs is decided. A letter accompanying this decision sets out the procedure for making submissions on costs.

DATE: 2 November 2009

P R Francis FRICS

ADDENDUM ON COSTS

61. The parties have agreed the following in respect of costs:

1. The objectors will pay to the applicant the sum of £7,500 (seven thousand five hundred pounds) as a contribution to her costs by no later than 3 December 2009.

2. The objectors acknowledge that the above sum takes into account the sum of £2,500 (two thousand five hundred pounds) being the cost of the report obtained by them, and which was ordered to be paid by the applicant pursuant to the Tribunal's order of 21 October 2008

Agreement having been reached, I order as above.

Date: 24 November 2009

P R Francis FRICS