IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0552 (LC)
Case No: LP/5/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – prohibition of more than one house on plot – planning permission for second house – whether covenant obsolete – held that it was not – application under grounds (a) and (c) refused – whether covenant secured practical benefits of substantial value or advantage - held that it did not – application under ground (aa) granted, subject to payment of compensation of £5,000 and £2,500 to immediately adjoining objectors – condition attached to modification to prevent removal of screening hedges

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

BY

RICHARD and AVRIL RAE

Re: 12 Park View
Skipton BD23 1UN

Before: His Honour Judge John Behrens and Peter D McCrea FRICS

Sitting at: Leeds Combined Court Centre, Oxford Row, Leeds LS1 3BG
on
22 and 23 November 2016

Oliver Radley-Gardner instructed by DWF LLP for the Applicants
Richard Sykes represented himself as a litigant in person
Written representations were received from the other objectors

The following cases are referred to in this Decision:

Birdlip v Hunter [2016] EWCA Civ 603
Shephard & Ors v Turner & Anor [2006] EWCA Civ 8

Introduction

1. This is an application under grounds (a), (aa) and (c) of s84(1) of the Law of Property Act 1925 by Richard and Avril Rae to modify restrictive covenants which affect their property, 12 Park View, Skipton, BD23 1UN ("the application land")[1]. The covenants were imposed by a conveyance dated 22 May 1978, between Mostyntithe Ltd ("Mostyntithe") (as vendor), and William and Diane Hodgkinson (as purchasers). The most relevant covenant restricts Mr and Mrs Rae from erecting more than one dwelling house and outbuildings on the application land. As one dwelling house has been built the covenant prevents the construction of any more. Mr and Mrs Rae have secured planning permission for the erection of a second dwelling house, which would be situated mostly on the front garden of 12 Park View, but partly on adjoining land to the south ("the additional land"), which is unaffected by the covenants.

2. Implementation of the planning permission is opposed by the owners of five of the neighbouring properties: Mr Richard Sykes (who owns 10 Park View); Mr Timothy Denton (who owns 11 Park View) and Mrs Janet Denton; Mr Brian and Mrs Ann Postlethwaite (who own 12 Park Wood Crescent); Mr Richard and Mrs Susan Stuttard (who own 9 Park Wood Drive); and Ms Deborah Band (who owns 40 Rockwood Drive with Mrs Stuttard).

3. A variety of objections were raised. They included: an interruption to the view; that the covenants were put in place for a good reason which should not be altered; the development would be "the thin end of the wedge and set a precedent for future breaches of the covenant" and would adversely affect the quality of the estate. There was one suggestion (from Mr and Mrs Rae's immediate neighbours – Mr and Mrs Denton) that if the covenants are to be modified they should receive £50,000 in compensation.

4. Mr Oliver Radley-Gardner of counsel represented Mr and Mrs Rae. He called Mrs Rae to give evidence, together with Mr Philip Kelly MRICS, a director of Eddisons, who gave expert evidence.

5. The only objector to attend the hearing, and to give evidence Mr Sykes. Written representations were received from the other objectors. Mr and Mrs Denton supplied a detailed statement of case settled by Mr John Collins of counsel. Ms Band and Mr and Mrs Stuttart provided a number of written comments. However, other than Mr Sykes, none of the objectors filed any written evidence in accordance with the directions of the Tribunal. Thus there was no evidence to support the assertions of Mr and Mrs Denton's submissions in relation to the view.

[1] The application was originally to both modify and discharge the covenants, under grounds (a), (aa), (b) and (c), but Mr Radley-Gardner withdrew the application to discharge, and no longer relied upon ground (b) for modification.

6. On the morning of the second day of the hearing, the Tribunal attended the site for a view, which was attended by Mr and Mrs Rae (at No 12), Mrs Denton (at No 11), Mr Sykes (at no 10 and 12) and Mr Kelly (at all three properties).

Facts

7. From the evidence and our view of the application land and adjoining properties, we find the following facts.

8. The application land is situated at the western end of Park View, which is a cul-de-sac close to the entrance of the Rockwood Estate, approximately two miles west of Skipton town centre. Park View runs in an approximately east-west direction, with the entrance from Rockwood Drive being to the east, and the application land being at the western end. There are twelve houses on Park View, with numbers 1 – 11, running east to west on the northern side of the road, and the application land, number 12, on the western end of the cul-de-sac. Numbers 2 – 11 Park View are of broadly comparable size. Number 1, being a corner plot on the eastern end, is slightly larger, but number 12 is significantly larger, not only in width, but also because it has a depth equivalent to the standard plot depth, plus the width of the road itself, as the entrance from Park View is on its eastern boundary.

9. On the southern boundary of the cul-de-sac is a wooded site, which slopes down from Park View to the A65 Gargrave Road. This wooded site tapers in shape, narrowing from east to west, and the additional land, owned by Mr and Mrs Rae, consists of the portion of the wooded site which immediately adjoins the southern boundary of 12 Park View (there is no boundary fence between the two). It is generally triangular in shape, forming the western extremity of the taper.

10. Accordingly, the combined application land and additional land form a plot which is substantially larger than those of 1-11 Park View. The total area of the two plots of land is approximately 0.166 Ha.

11. The houses on Park View are elevated from the road, especially those at the western end. In respect of the application land, the garden of 12 Park View slopes down to the south, and the additional land then slopes down further, to the Gargrave Road.

12. To the west of the application land, there is a large area of green belt land. Other establishments in the vicinity of the Rockwood Estate include the headquarters of the Skipton Building Society, Aireville High School and Aireville Park

13. Mr and Mrs Rae have made a number of applications for planning permission for a second dwelling house. The first application was made in 2004. Mr Sykes has opposed them all. It is to be noted that in his lengthy letters of objection Mr Sykes did not raise the question of his view.

14. On 1 July 2008, Craven District Council granted planning permission under code 63/2008/8618, for the development of a detached dwelling house occupying the southern part of the garden of the application land, and the additional land. According to the Architect's drawings the proposed dwelling house would be constructed of stone-faced walls along with some areas of sustainable timber cladding under a shallow pitched roof finished in interlocking recycled slates.

15. The new dwelling-house would be at a lower level than that of either 10 or 11 Park View, with the top of its pitched roof being at a level just below the first floor level of those properties. The view from the ground level of 10 and 11 to the site of the new dwelling house is currently partly obstructed by two conifer hedges. They are described in the Arboricultural Method Statement prepared by JCA Ltd dated 25 November 2010 as hedges H9 and H10, and are situated either side of the entrance drive to number 12, and parallel with it. Hedge H9 is situated to the left of the entrance drive, starting at the front corner of the drive and ending approximately one third up the drive. Hedge H10 is on the right hand side of the drive, starting two thirds of the way up the drive, and wrapping round to form the boundary between numbers 11 and 12 Park View. The proposed scheme permits the removal of H9, and the removal of 7m of H10, in both cases "to facilitate development". Mrs Rae said the hedges would only be removed so far as necessary for the development, and that both she and Mr Rae would be keen to keep them.

16. The site area of the proposed development plot is approximately 0.10 Ha, of which 0.049 Ha or 44.5% is within the unrestricted land. However, both Mr and Mrs Rae accepted that practically all of the building will be on the land affected by the covenant.

17. Mostyntithe sold off the plots in Park View in 1977 and 1978. It is believed that all of the transfers contain similar covenants. The remainder of the estate was sold to and developed by Fairclough Building Limited ("Fairclough") in the 1980s. The covenants in the transfers from Fairclough are not in the same form as those in the Park View transfers from Mostyntithe. Mostyntithe was dissolved in 1990.

The covenants

18. As already noted the covenants affecting the application land (but not the additional land) derive from a Transfer dated 22 May 1978 between Mostyntithe and Mr and Mrs Hodgkinson.

19. The Transfer of 12 Park View was made:

> TOGETHER ALSO with the benefit of all covenants made with the Company by any other person who is the registered proprietor of any land comprised in the estate.

20. The covenants are contained in clause 4 which provides:

> THE Transferee to the intent and so as to bind the plot into whosoever hands the same may come hereby covenants with the Company and also (subject to the right of waiver and modification hereinafter reserved to the Company) as a separate covenant with every other person who is the registered proprietor of any land comprised in the Estate for the benefit of the Estate and each and every part thereof that:

21. There are seven covenants introduced by this clause. Only four are relevant to this application:

> There shall not be erected on the Plot any building other than one dwellinghouse with a garage and other necessary outbuildings and such dwellinghouse and other building shall conform in all respects to the requirements of the local planning authority.
>
> No dwellinghouse or bungalow or any other building of any kind shall be erected on the Plot which shall not be in accordance with the plans elevations and specifications which shall first have been submitted to and approved in writing by the Company.
>
> No building of any description other than a boundary wall or bay windows or porches of a normal size shall be erected on or over any part of the Plot lying between the building line and the road on the Southern side of the Plot.
>
> No trade or business shall be carried on upon the Plot or any part thereof and no act or thing shall be done or suffered thereon which shall be or become a nuisance or annoyance to the owners and occupiers of any part of the Estate

22. Under Clause 5(a), the Company reserved to itself a right

> "at any time hereafter to release waive or modify any of the covenants or stipulations imposed by it upon any such land or any part thereof".

Enforceability of the covenants

23. The bundle contained the official copy of the registers of the other properties in Park View. From this it is possible to work out the dates when the covenants were imposed on the Park View Properties. The first plot (3 Park View) was sold off on 16 December 1977; Mr

Sykes's plot (10 Park View) on 4 April 1978; Mr and Mrs Rae's plot (12 Park View) on 22 May 1978 and Mr Denton's plot (11 Park View) on 5 December 1978.

24. Even though Mr Sykes's predecessor in title acquired his plot before the sale to Mr and Mrs Hodgkinson they granted "a separate covenant with every other person who is the registered proprietor of any land comprised in the Estate for the benefit of the Estate and each and every part thereof". This is enforceable by virtue of s 56 of the Law of Property Act[2].

25. Mr Denton's predecessor in title, however acquired his plot after the sale to Mr and Mrs Hodgkinson. 11 Park View is next door to 12 Park View and is clearly capable of benefitting from the covenants.

26. Mr Radley-Gardener accepted that the covenants were annexed to the land and are thus enforceable by Mr Sykes and Mr Denton. In addition, the owners of the properties originally sold to Fairclough may also be able to enforce the covenants either as a result of annexation or a scheme of development.

27. Accordingly, Mr and Mrs Rae seek to modify the covenants under s84.

Statutory provisions

28. As already noted this application is brought under ss84(1)(a), (c) and (aa) which, as far as relevant to this application, provide:

> (1) The Upper 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 which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes . . . or, as the case may be, would unless modified so impede such user;
>
> …or

[2]See Megarry & Wade – Law of Real Property – paragraph 32-075

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

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

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

a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

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

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

(b) is contrary to the public interest;

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

29. Under s 84(1B) the Upper Tribunal is required take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

30. As an adjunct to the power to modify any restriction the Upper Tribunal has power under s 84(1C) to add such further provisions restricting the user of the building on the land affected as appear to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicant.

Submissions

Ground (a)

31. In their statement of case Mr and Mrs Rae contended that there had been changes to the character of both 12 Park View and of the neighbourhood which ought to result in the Upper Tribunal deeming the restrictions obsolete.

32. In relation to 12 Park View they relied on the purchase of the additional land which gave rise to a uniquely large plot, which was shielded from Gargrave Road and to an extent from the rest of the Estate by hedgerows and trees. In any event 12 Park View was at the margins of the Estate where density considerations are not material.

33. In relation to the neighbourhood they relied on the development of 10A Park Wood Close, to the erection of extensions and conservatories over the estate, and other developments around the estate reflecting the need for greater housing provision in the Skipton area.

34. In his report Mr Kelly agreed with Mr and Mrs Rae's contentions. He pointed out that the average plot size of the remaining Park View properties is 0.36 Ha. 12 Park View and the additional land comprise 0.166 Ha. He drew attention to the development at 10 Park Wood Close, also a relatively large plot. A new detached house had been developed within its garden.

35. He also referred to the development within the wider area off Gargrave Road. In his view the purpose of the covenant was to prevent overly dense development. In the light of the size of the plot and the demise of Mostyntithe he considered the covenant obsolete.

36. Mr Sykes made a number of points in paragraph 20 of his Statement of Case. He submitted that the additional land was intended to be used either for the widening of Gargrave Road or as wooded land. He pointed out that the screening of the site might be removed in the future. He said that there were over 100 dwellings on the estate, that the covenants had existed for over 35 years and that one example of a second dwelling did not set a precedent for a second dwelling on 12 Park View. He made the same point with regard to the extensions and to the other nearby developments.

37. Mr and Mrs Denton made similar points to Mr Sykes. They submitted that the acquisition of the additional land did not affect the covenants on 12 Park View itself. Whilst the extensions may have infringed covenant (b) they did not infringe covenant (a) and did not mean that covenant (a) was obsolete. They contended that developments in areas away from the estate were irrelevant.

38. The other objectors also contended that the covenants were not obsolete. They stopped the character and appearance of the development being changed if the rules could be broken to infill areas with more housing. Where one party was able to discharge the covenants others would follow.

Ground (aa)

Reasonableness

39. Mr and Mrs Rae submitted that the construction of a second dwelling was reasonable. They relied on a number of matters. First, they had planning permission which showed that the development was regarded as desirable by the local planning authority. There was a need for additional residential housing. The use was in keeping with the current use of the land in the area. The design was sympathetic and unobtrusive.

40. This view was supported by Mr Kelly, who made the point that the application land was in effect a double plot. The site of the proposed second house was at a lower level, downhill from the estate and would not be overlooked.

41. The objectors contended that the user was not reasonable because of the covenants which were there when Mr and Mrs Rae bought the property. They feared that the proposed development would be the thin edge of the wedge. They feared that the development would spoil the character and appearance of the estate. In paragraph 16 of his statement of case Mr Sykes added as an additional ground an allegation that the land was intended be an amenity for those on the estate and the general public as an amenity.

Restriction of user

42. It was common ground that covenant 4(a) is infringed by the proposal. It is also common ground that covenant 4(b) is now unenforceable because Mostyntithe has been dissolved. In addition, Mr Sykes contended that there would be breaches of covenants 4(c) and 4(d). It is not, however clear precisely where the building line is and what road is referred to in covenant 4(c). Mr Sykes contended that the erection of a two-metre fence around the site of the second dwelling amounted to a "nuisance or annoyance" within covenant 4(d).

Practical benefits to the objectors

43. Mr and Mrs Rae submitted that there were no practical benefits secured by the covenants. They pointed to the fact that the development was downhill from the objectors and almost completely obscured by the slope down to Gargrave Road. It would not detract from the views of 10 and 11 Park View. They pointed to trees and shrubs already in the line of sight and the fact that they could plant other trees. They pointed to the size of the plot and made the point

that the development would not lead to an increase in density. It was a unique case. It was not a thin edge of the wedge case and would not lead to other restrictions being modified.

44. Mr Kelly dealt with the view in para 13.21 of his report. He made a number of points. First he pointed out that there were no window openings on the west gable elevation of 11 Park View. The new dwelling house was lower than 10 Park View and was screened from it. Although 10 Park View had one window on its west gable elevation it is unlikely that the new dwelling house would be visible from it.

45. Mr Kelly did not consider that this was an infill plot. He pointed to the fact that the plot size was much larger than other plots on the estate and thus the development would have no impact on the density. He accordingly concluded that that the restriction did not confer any substantial practical benefit upon the neighbouring owners.

46. Mr Sykes made a number of points in paragraph 18 of his statement of case. He submitted that the site of the new dwelling is in front of the building line and can be seen from Park View and numerous windows of neighbours. He referred to the increased use of Park View as an access road. He distinguished between the erection of a dwelling house and trees or a hedge.

47. In cross-examination he maintained that he would be able to see the roof of the new dwellinghouse from a number of windows in his house and also from his garden. He pointed out that although there is a tree planting scheme, the permission permitted Mr and Mrs Rae to remove hedge H9 and part of hedge H10.

48. Mr and Mrs Denton complained about the view from 11 Park View. They suggested that the view over the valley to the hills beyond was a major attraction when they bought in 1997. They accepted that the view was to some extent obscured by trees but pointed out that it is virtually unobstructed in winter months. They also point out that if (which they accepted) the covenant in clause 4(b) is obsolete it would be open to Mr and Mrs Rae and/or the successors in title to prevent the height or dimensions of the house being increased.

49. Although Mr and Mrs Denton had asked for £50,000 compensation in their statement of case no expert evidence was been produced to justify this figure. Mr Kelly considered that there would be no diminution in value whatsoever in the objectors' properties as a result of the development.

50. Mr Sykes maintained that the covenants secured practical benefits of substantial advantage to him.

Ground (c)

51. Mr and Mrs Rae submitted that there would be no injury to the persons entitled to the benefit of the restrictions. This view was supported by Mr Kelly who repeated that this is a double size plot at the far south west extremity of the estate and that the development would be at a lower level than 12 Park View. He pointed out that there was no restriction on the construction of outbuildings or any development on the additional land.

52. The objectors did not accept these arguments. For the reasons set out above they contended that the restrictions secured real practical benefits to them.

Discussion

53. Before expressing our views on the individual heads of claim there are a number of general points with which it is convenient to deal.

54. Both Mr Sykes and Mr and Mrs Denton asserted that they can enforce the covenants by virtue of a scheme of development. In the light of our views that they can enforce the covenants by virtue of annexation or assignment it is not strictly necessary for us to decide whether there is a scheme of development. We note that in his statement of case Mr Sykes relies on an opinion from counsel to the effect that there is a scheme.

55. However, in the light of the recent decision of the Court of Appeal in *Birdlip v Hunter* [2016] EWCA Civ 603 it seems to us there must be doubt as to whether there is such a scheme. Whilst the conveyance of 22 May 1978 defines the Rockwood Estate, it does not show the area lotted out. There was no purchase from a common vendor. The covenants in the land subsequently sold to Fairclough are different and there is no indication in the Conveyance that Mr and Mrs Hodgkinson can enforce the covenants against subsequent purchasers of part of the estate. Thus it is well arguable that the necessary reciprocity is missing.

56. In the end, as Mr Radley-Gardner pointed out, it does not really matter. He referred us to the judgment of Carnwath LJ in *Shephard & Ors v Turner & Anor* [2006] EWCA Civ 8, at paragraphs [26] & [27]:

> [26] It is not in dispute that one material issue (often described as the "thin end of the wedge" point) may be the extent to which a proposed development, relatively innocuous in itself, may open the way to further developments which taken together will undermine the efficacy of the protection afforded by the covenants. In McMorris v Brown [1999] 1 AC 142, 151, the Privy Council adopted a statement by the Lands Tribunal from Re Snaith and Dolding's Application [1995] 71 P&CR 104. The applicants had been seeking modification of a covenant, to

enable them to build a second house on a single plot within a building scheme. The President (Judge Bernard Marder QC) said:

"The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it… It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach….

Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore, I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered." (p 118)

[27] In the present case, the Tribunal clearly had this point in mind. The summary of the objectors' case referred to the argument that they would lose "the assurance of the integrity of a well-maintained and successful building scheme". The Tribunal addressed the point in paragraph 25[iii]. It was thought "extremely unlikely" that the proposed modification would lead to more than the possibility of one further unit in the Close. The Tribunal evidently took the view that the larger plots of number 3 and number 4 represented a special case within Orchard Close, because of their relative size and their position away from the main part of the Close.

57. We do not think that the “thin edge of the wedge” argument carries much force in the context of this application. Even if (which we doubt) there is a valid scheme of development we consider that 12 Park View represents a special case within the estate. It was always a large plot. Together with the additional land it is more than twice the size of the other plots; it is right at the south western edge of the estate. As is clear from the above passage each case must be determined on its own facts.

Ground (a)

58. Save in respect of covenant (b) we do not think that ground (a) is made out. In our view the acquisition of the additional land is not a change in the character of the property. In order to determine whether a covenant ought to be deemed obsolete the Tribunal must determine the object for which it was entered into. If due to circumstances which have occurred after the date of the covenant that object cannot be obtained it will be deemed obsolete.

59. We accept that one of the objects of the covenant was to prevent overly dense development. It was also to protect the amenity including the view from the neighbouring properties. In our

view both of these objects are still viable. Even if the covenant is modified to permit a second dwelling house the covenant will prevent a third or fourth dwelling house. In our judgment the views from Nos 10 and 11 are protected by the restrictions. It may be that the view from inside Nos 10 and 11 is limited but there remains the view from the front of each of the properties. It is, in our view no answer to this to assert that because covenant (b) has become obsolete Mr and Mrs Rae could build an extension or construct an outbuilding which also affected the views from Nos 10 and 11.

60. We do however accept that because Mostyntithe has been dissolved covenant (b) has become obsolete.

Ground (aa)

61. This is, of course, the principal ground upon which this application is brought. We are satisfied that the construction of a dwelling house on plot 12 and the additional land in accordance with the planning permission is a reasonable user of plot 12. We are required to have regard to the planning position and in our view the grant of planning permission is a powerful factor in support of Mr and Mrs Rae. When one adds to that the size of the plot, its position, the location of the development and Mrs Rae's evidence that one of the reasons they failed to sell in 2001 was the size of the garden we have little doubt that the proposed user is reasonable within s 84(1)(aa).

62. Mr Sykes relied on the planning history between 2004 and 2007 when a number of planning applications were refused. He also referred to the trees which were the subject of Tree Preservation Orders. The fact, however, remains that planning permission has now been granted and the construction of a dwelling house in accordance with that planning permission is, in our view, a reasonable use of the land.

63. We also are satisfied that the restriction (a) would unless modified impede such user. It is possible that Mr Sykes is correct and that restrictions (c) and (d) would also impede that user.

64. The next question is whether either of the tests in s 84(1A) are satisfied. Mr Radley-Gardner did not submit that the restrictions were contrary to the public interest within s 84(1A)(b). Thus the question is whether s 84(1A)(a) is satisfied. Do the restrictions secure to the objectors "practical benefits of substantial value or advantage"?

65. We were referred to the guidance from Carnwath LJ in paragraphs 21 to 23 in *Shepherd v Turner*. He regarded the words "considerable, solid, big" as a safer guide to the meaning of "substantial" than that which had been suggested by Sir Douglas Frank QC. In the end he did not seek a substitute for the statutory language and left it to the Tribunal to apply the section in a common sense way.

66. In the course of his submissions Mr Radley-Gardner made it clear that he was not seeking a discharge from the covenants. He would be content with a modification which permitted development only in accordance with the planning permission. This would allay fears that the new dwelling house would be higher than that proposed or that there might be further development on the site.

67. The principal objection to the development was the maintenance of the integrity of the scheme. This appears in the letters of objection and appeared forcefully in Mr Sykes' evidence. For reasons we have given (and do not repeat) we do not think this is a valid objection. Even if there is a scheme 12 Park View is exceptional for the reasons we have given.

68. The other objections relate to the views from Nos 10 and 11 Park View, the increase in traffic at the cul-de-sac end of Park View and (according to Mrs Denton at the view) the very close proximity of the new dwellinghouse to her property. We are conscious that Mrs Denton did not provide a witness statement and was not cross examined at the hearing. Nonetheless we think there is some force in this point.

69. As regards the view, we found that it would be possible to see the top of the new dwellinghouse from the first floor windows of 10 and 11 Park View. However, this was only by looking to the right and downwards. In our judgment the effect was limited. The view to the front over the moors was largely unaffected. Mr Sykes and Mrs Denton were able to demonstrate at the view that there were places in their front garden from which they would be able to see roof of the new dwelling.

70. It was also apparent that Mr and Mrs Postlethwaite at 12 Park Wood Crescent would be able to see the new dwelling house. However, 12 Park View Crescent is significantly higher than the properties in Park View. Furthermore, Mr and Mrs Postlethwaite have made it clear that they were not objecting on the grounds of their view. The sole ground of their objection is the integrity of the covenants.

71. We are satisfied that the covenants do provide some practical benefits to the owners of 10 and 11 Park View. We are not satisfied that they provided any benefits to any of the other objectors. Having viewed the locations of each of the other objectors' properties we are not satisfied that the new dwellinghouse would affect them at all.

72. We are also satisfied that the loss of the practical benefits afforded to 10 and 11 Park View are not substantial. We accept that that there are small changes to the views enjoyed by 10 and 11 Park View. The main view in front of the houses is unaffected. We accept that there may be a small increase in the traffic caused by an additional house at the end of the cul-de-sac, although are mindful that the restriction is not in regard to traffic. We also accept that the proximity of the new dwellinghouse will have some effect on 11 Park View even though it will be screened off. However individually and collectively these changes are not in our view substantial within the

meaning of s 84(1A). We also consider that money will be an adequate compensation for the loss or disadvantage to be suffered by Mr Sykes and Mr Denton as a result of the modification.

73. We are accordingly satisfied that there is jurisdiction to modify the restrictions to enable the development to take place. In all the circumstances of the case we have decided to do so.

Compensation

74. When pressed by the Tribunal Mr Kelly confirmed that it was his view that there would be no diminution in value at all – not even £1 – by the erection of a further dwelling on the application land. We do not accept that. Whilst we are conscious that no expert evidence has been called on behalf of the objectors, it was common ground that as an expert Tribunal we are not obliged to accept Mr Kelly's valuation and can form our own judgment.

75. When asked by the Tribunal, Mr Kelly said that the approximate values of the houses on Park View would be in the region of £350 - £385,000. Mr Sykes subsequently agreed with that range. Mr Sykes also said that in his view, if we were minded to award compensation for the modification of the covenants, the diminution in value to Mr and Mrs Denton's house, 11 Park View would be approximately twice that to his own property. We accept that.

76. Doing the best we can, we consider that the diminution in value, is in the order of £5,000 in respect of 11 Park View, and £2,500 in respect of 10 Park View. These figures would amount to less than 2% of the likely value of the properties, even assuming the lowest of Mr Kelly's range of values. We do not consider those figures to be substantial.

Conditions

77. It is plain from s 1(1C) that we have power to add such further conditions as we consider reasonable and as may be accepted by the Applicants. We accept Mr Sykes's concern that the planning permission allows the removal of hedges H9 and part of H10. We agree that the removal of these hedges would affect the amenity of both 10 and 11 Park View, and consider it appropriate to impose a condition on the modification of the covenant that they shall not be removed, and shall be maintained to a height of 2.5 metres. There was no evidence that development could not take place if the hedges remained in place, merely that it would be facilitated by their removal. We did consider allowing their removal subject to a condition that suitable replacement hedges shall be planted following the completion of the proposed house, but do not consider this to be practical, and we are concerned that, given the relations between the parties, such a condition would only lead to further litigation.

Ground (c)

78. It will be apparent from the discussion under s 84(1)(aa) that we consider that there is some injury to 10 and 11 Park View. It follows that ground (c) is not made out. To be fair Mr Radley-Gardner did not place any reliance on ground (c) in either his opening or closing submissions.

Determination

79. The application under ground (aa) succeeds, and the following Order shall be made, subject to the prior payment of compensation of £5,000 to Mr Denton (being the sole owner of 11 Park View) and £2,500 to Mr Sykes:

80. The entry in the charges register for the application land shall be amended to include a new paragraph (h) in Clause 4 to read as follows:

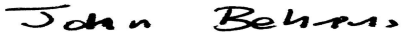
> "Notwithstanding anything in parts (a) to (g) above, a new detached dwelling may be constructed in accordance with the planning permission granted by Craven District Council on 1st July 2008 under reference 63/2008/8618 and in accordance with the accompanying plans and subject to the conditions imposed, provided always that the conifer hedges denoted as H9 and H10 in the Arboricultural Method Statement prepared by JCA Limited dated 25 November 2010 shall not be removed, and shall be maintained at a height of not less than 2.5 metres. Reference to the said planning permission shall otherwise include any other matters approved in satisfaction of the conditions attached to that planning permission.

81. An Order inserting this clause shall be made by the Tribunal provided, within three months of the date of this substantive decision, the applicant shall have paid the compensation sums referred to in paragraph 79, and have notified the Tribunal in writing of their acceptance of the terms of the proposed modification.

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

Dated: 13 December 2016

His Honour Judge John Behrens



Peter McCrea FRICS