
**LP/40/2006**

**LANDS TRIBUNAL ACT 1949**

***RESTRICTIVE COVENANT – modification – building scheme – proposed bungalow – practical benefits of substantial value or advantage – outlook – overlooking – traffic – peace and quiet – precedent – integrity of estate – application refused – Law of Property Act 1925, s 84(1)(aa)***

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

**by**

**MR MELVIN CORDWELL**
**and**
**MRS LINDA CORDWELL**

**Re: 26 Camberley Drive, Rochdale, OL11 4AZ**

**Before: Mr A J Trott FRICS**

**Sitting at Manchester Employment Tribunal,**
**Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA**
**on 5th and 6th March 2008**

*Julia Beer*, instructed by Harold Stock and Co, for the applicants
*Robert Darbyshire*, instructed by Price Mears & Co, for the objectors

The following cases are referred to in this decision:

*Re Chapman's Application* (1981) 42 P&CR 114
*Re Gaffney's Application* (1978) 35 P&CR 440
*Re Banks' Application* (1977) 33 P&CR 138
*Re Carter's Application* (1973) 25 P&CR 542
*Re Wards Construction (Medway) Limited's Application* (1973) 25 P&CR 223
*Re Collins' Application* (1974) 30 P&CR 527
*Re Purnell's Application* (1987) 55 P&CR 133
*Re Snaith and Dolding's Application* (1995) 71 P&CR 104
*Re Lee's Application* (1996) 72 P&CR 439
*Re North's Application* (1997) 75 P&CR 117
*Re Fairclough Homes' Application* (2004) Lands Tribunal LP/30/2001 (unreported)
*Re Bass Limited's Application* (1973) 26 P&CR 156
*Re Martin's Application* (1988) 57 P&CR 119
*Lawntown v Camenzuli* [2008] 1 All ER 446
*Dobbin v Redpath and Another* [2007] EWCA Civ 570

## DECISION

### Introduction

1. This is an application by Mr Melvin Cordwell and Mrs Linda Cordwell (the applicants) under section 84 of the Law of Property Act 1925 (the Act) seeking the modification of a restrictive covenant affecting freehold land comprising a bungalow and garden at 26 Camberley Drive, Rochdale, Lancashire OL11 4AZ (the application land). If successful the application will allow the construction of a new bungalow and double garage in the rear garden of the application land.

2. The restriction in question is contained in clause 5 of the Second Schedule of a conveyance of the application land dated 13 May 1964. The purchaser covenanted that:

> "5. Not more than one bungalow or dwellinghouse shall be erected on the said plot of land hereby conveyed."

3. The applicants purchased the application land in March 2001. On 22 March 2005 they obtained detailed planning permission from Rochdale Metropolitan Borough Council (reference 04/D44725) for the erection of one detached dwelling (a bungalow with first floor accommodation) and the partial demolition of No.26 Camberley Drive. There were nine conditions attached to the planning permission.

4. By an application dated 2 June 2006 the applicants sought the modification of restriction 5 under section 84(1)(aa) of the Act. There were 42 objections to the application from residents of the estate. Two of these were withdrawn before the hearing.

5. Miss Julia Beer of counsel appeared on behalf of the applicants. She called Mrs Linda Cordwell as a witness of fact and Mr Barry Dean FRICS, Managing Director of Morris Dean Limited, Chartered Surveyors, as an expert witness.

6. Mr Robert Darbyshire of counsel appeared on behalf of the objectors. There were a total of 69 witness statements from objectors and the following were called to give evidence at the request of the applicants:

(i) Mr Richard Christopher Guthrie, 19 Camberley Drive

(ii) Mr Steven Charles Price, 22 Camberley Drive

(iii) Mr David Ralph Goldsborough, 24 Camberley Drive

(iv) Mr Simon Wareing, 39 Camberley Drive

Mr Jack Kershaw of 29 Camberley Drive had also been asked to give evidence but was excused on medical grounds. Mr Darbyshire called Mr Christopher Robert Morgan FRICS, a partner in Roger Hannah and Company, Chartered Surveyors, as an expert witness.

7. I made an accompanied site inspection of the application land and 22 and 24 Camberley Drive on 4 March 2008. I also walked around the Meadowcroft Estate.

**Facts**

8. Camberley Drive is a circular cul-de-sac to the south of Bury Road, approximately 3 kilometres south west of Rochdale town centre in the district of Bamford. It comprises 70 dwellings that together form the Meadowcroft Estate, a building scheme by Milbury Estates Ltd dating from the early 1960s. There are a variety of houses and bungalows, some of which have been extended and all of which are open plan.

9. The application land is located at the south western corner of the estate. It is approximately triangular in shape and is the largest plot on the estate with an area of 1,820 square metres. However, it has a narrower than average frontage. The average plot size on the estate is approximately 600 square metres. The existing bungalow on the application land has a net internal area of 123.2 square metres. The applicants chamfered the corner of the bungalow adjoining 28 Camberley Drive to allow a driveway to be constructed leading to a new detached garage in the back garden. This driveway is 3 metres wide at its narrowest point.

10. The 2005 planning permission provides for vehicular access to the new bungalow from a new driveway to be constructed adjoining 24 Camberley Road. This would involve the demolition of a 2 metre wide section of the existing bungalow and its making good with a new gable wall. The new driveway, which is to be 3 metres wide, will run immediately next to the boundary with No.24 for a total length of approximately 50 metres.

11. The grounds of the application land are mainly laid to lawn and slope towards the rear (south) of the property. At the end of the back garden is a steep, tree covered cutting which runs along the rear of the Camberley Drive properties towards Bury Road. The outlook from the rear of these properties is of mature trees.

12. The proposed dwelling is shown on the approved plans as comprising a dining/living room, kitchen, four bedrooms (one en suite) and a bathroom at ground floor level. There is an attached double garage to the north west. There are two further bedrooms at first floor level, each of which has a window to the side elevation and is served by Velux roof lights to the rear. It is a condition of the planning permission that the first floor window overlooking 24 Camberley Drive shall be permanently fitted with obscure glazing.

13. The net internal floor area of the proposed bungalow is 128.8 square metres on the ground floor and 62.2 square metres on the first floor. The garage is approximately 38 square metres. This footprint is comparable with many of the larger properties on the estate (although sizes vary). The ridge height of the new property is 6.2 metres and the gable end is 6.9 metres from the boundary with No.24. The double garage also has a pitched roof and measures 3.7 metres to the ridge. The gable end of the garage is 1.5 metres from the boundary. There is a 1.8 metre high wooden panel and concrete post fence between the application land and No.24.

**The case for the applicants**

14. Mrs Cordwell explained that the applicants wanted to build the new bungalow for two reasons. Firstly, they were approaching retirement and needed to top up a failing pension fund with the equity that the new property would release and, secondly, they intended to sell 26 Camberley Drive to their daughter and move in to the new property themselves. Mr Cordwell had mobility difficulties and the new property was better designed for his requirements. It would enable him to gain easy access to the loft (first floor) by means of a chair lift for his hobby of making models. It was not intended to use the first floor accommodation as bedrooms despite what appeared on the planning application drawings. She denied that the new accommodation would be vastly in excess of the applicants' needs saying that she needed to provide for four grand children when they came to visit. The applicants were not motivated solely by money.

15. She accepted that the closer properties were together the less visual amenity they enjoyed and she acknowledged that the new bungalow would only be 21 metres from No.26 and 23 metres from No.24. But she felt that the local planning authority would not have granted planning permission if the properties had been too close. She also said that No.24 would be at an angle to the new development and would therefore not be affected as much. She considered that there would be adequate room for off-street parking and that there would be no need for residents or visitors to park on Camberley Drive.

16. Mrs Cordwell agreed that the new bungalow would be clearly visible from No.24 but thought that the change in outlook from inside the property would be limited to that from a side bedroom. She also acknowledged that whilst the application land was the largest plot on the estate, it was not the only plot that could accommodate this form of tandem development, the experts having identified Nos.24, 28, 44, 54 and 56 Camberley Drive as other possibilities. She said that the character of the estate had changed since the 1960s because many of the houses had been extended. For instance, 42 Camberley Drive had been doubled in size. But she accepted that every plot still contained just one family home and that the low density of development on the estate had been preserved. However, the applicants considered that the development of a second bungalow on their plot would not increase the overall density compared to the rest of the estate.

17. Mr Dean said that the proposed development would not have a substantial impact either on adjacent properties or the estate as a whole. He considered that any impact could be mitigated by three further measures. Firstly, the proposed gable window at first floor level facing No.24 could be removed and replaced by either a dormer window or additional roof lights to the rear elevation. Secondly, as the ground sloped away to the back of the plot the bungalow could be constructed one metre lower than shown on the plans. Thirdly, the present screen fence between the application land and 24 Camberley Drive could be raised from 1.8 to 2.1 metres without the need for planning permission. The applicants had accepted all three measures provided step free access to the new property could be maintained.

18. The new bungalow would not result in any loss of openness or general amenity to adjacent dwellings although there would be a minor impact from the gable end facing No.24. However, this impact would be minimised by the distance of that wall from the boundary. In cross-examination Mr Dean acknowledged that the new bungalow would be visible from the rear garden of No.24 if one was looking from there to the south and that it would reduce the spaciousness of the outlook from that property to some degree.

19. 28 Camberley Drive had no aspect over the screen fence onto the rear garden of No.26 and would suffer no loss of value. There would be no permanent loss of market value to No.24 but Mr Dean said that there could be a temporary impact during the construction works, which he thought would last between 7 to 9 months. He considered that an appropriate figure of compensation for such temporary loss was £5,000. He did not think that the proposed development would have any effect upon a new purchaser who was fresh on the scene.

20. Mr Dean did not consider that the proposed bungalow would be the thin end of the wedge for other tandem developments on the estate and he did not foresee two or three properties being knocked down to make way for apartments. He felt that this would not be economically viable. He conceded that the restriction was the only way in which individual residents could control development on the estate, although he considered that their interests were protected primarily by the planning system. He did not accept that the new bungalow was properly described as a six bedroom property despite what was shown on the plans. He argued that it would be a generous family home but one that was no bigger than others in Camberley Drive. It would be occupied by a large family and would generate traffic accordingly. There was enough room to park at least four vehicles on the site of the new bungalow and there would be no problem of congestion and no permanent effect on the street scene as the new bungalow was well set back to the rear of the existing property. There were other examples on the estate where new driveways had been created. Development over garages that had taken place in Camberley Drive had a greater aesthetic impact than the proposal would have. The new 3 metre wide driveway was adequate and would not lead to a somewhat cramped development.

21. Miss Beer submitted that the proposed user was reasonable. The bungalow had a similar footprint to existing properties on the Meadowcroft Estate and occupied approximately half of the plot of No.26, ie some 900 square metres. This was greater than the average plot size of the estate (600 square metres), the proportionate density of which would not be increased by the

proposal. The new bungalow was similar in design to the existing properties and would not alter the character of the estate, a feature of which was that dwellings overlooked each other. Planning permission had been granted for the new bungalow and the applicants had satisfied the local planning authority about design, the distance between dwellings, access and car parking.

22. The restriction impeded the proposed user but in so doing did not secure to the objectors any practical benefits of substantial value or advantage. One of the practical benefits claimed by the objectors was that the restriction prevented the proposal from becoming the thin end of the wedge for other development on the estate. They had expressed fears about the possibility of high rise flats being constructed. But the modification being sought was solely to allow the implementation of the planning permission that had been granted in 2005. It would not set a precedent for the development of flats. There were only five other plots on the estate that were large enough to accommodate a similar tandem development and none of these was the subject of an outstanding application. None of them had a plot as large as the application land. There were specific family reasons for this application and it was unlikely that others would want to partially demolish an existing dwelling to allow the development to proceed. The experts were agreed that total demolition and redevelopment would not be economically viable. Mr Dean had said that planning control was the biggest check on any further development and each case would have to be considered on its merits. The thin end of the wedge argument was not applicable. Miss Beer relied upon *Re Chapman's Application* (1981) 42 P&CR 114 in which the Tribunal held that possible future applications should not be prejudged or tried vicariously.

23. Mr Goldsborough of 24 Camberley Drive had asserted that his view over No.26 was of substantial value to him. But the visual impact of the new bungalow was limited. Mr Goldsborough's bedroom window was in the side elevation and directly faced the existing bungalow at No.26. The new building would only be visible by standing close to the window and looking sideways. The impact upon his view from downstairs was limited and No.24 did not have the benefit of open views across No.26 from here. There was a bench in the middle of a garden path that faced No.26 but this afforded a view of the 1.8 metre high fence. There was no amenity to the view from there. There was an open view towards trees looking down the garden of No.24 and such a view was not restricted to that across the application land towards the new bungalow. Mr Dean had said that there would be some impact from the development but that this would not be substantial.

24. Any noise from the new development would be the normal residential noise associated with a property on a housing estate. The new access would be 2 metres from No.24. Mr Goldsborough had said that his was the only property on the estate that would have cars passing his back garden but in fact the houses near the entrance to Camberley Drive had cars in Bury Road running past the backs of their gardens.

25. There would be no impact upon the privacy of 22 Camberley Drive. Neighbours already overlooked that property. The obscure glazing to be put into the first floor side elevation of the new building would ensure that it did not overlook Mr Price's property. There was only a minimal view of No.26 from No.22 and it was insignificant from the ground floor even though Mr Price had opened up the screen of trees and shrubs that used to run along his boundary with

No.24. Mr Price had referred to the visual impact of a marquee that had been erected on the application land the previous summer but it would be highly inappropriate to give any weight to this. There was no evidence of its size or positioning and it was completely different to the proposed building. Mrs Cordwell had not been asked to comment upon it.

26. Miss Beer submitted that the other benefits said to be enjoyed by the objectors, such as the preservation of the existing street scene, the character of the estate and the status quo generally were adequately protected by the local planning authority. The high number of objections was due to an orchestrated campaign by Mr Price to elicit support. These objections were not genuine concerns on the part of other objectors on the estate. Miss Beer urged the Tribunal to consider the quality rather than the quantity of those objections, most of which had used a generic format. She also noted that 32 residents on the estate had not objected (or had withdrawn their objection) to the application.

27. The fact that the application involved a building scheme did not mean that there was a greater presumption that the restriction would be upheld. It increased the burden that the applicants had to satisfy and, on the evidence, they had done so. Miss Beer referred to *Re Gaffney's Application* (1978) 35 P&CR 440 in which the facts were very similar to those in the present application and which also involved a building scheme. The Tribunal allowed the application saying that the proposed modification would in no sense alter the character of the estate and noting that the size of the new plot would not be dissimilar from those of the existing houses. The character of the proposed house was said to conform to the general pattern. The real concern of the objector in that case was said to be the future development of further houses. Miss Beer submitted that the same considerations applied in the subject application. She also referred to *Re Banks' Application* (1977) 33 P&CR 138 in which the Tribunal granted an application to modify a restriction subject to a condition limiting the height of the development.

28. Mr Dean had made suggestions about how the impact of the proposed development could be mitigated and the applicants had agreed to adopt these if the Tribunal thought it necessary, including the lowering of the development by a metre. She referred to *Re Carter's Application* (1973) 25 P&CR 542 in which the Tribunal allowed the application for the modification of a restriction to allow the development of a semi-bungalow and garage (with a ridge height of 6.55 metres), provided this was lowered by 0.76 metres. This application involved a building scheme and the proposed development was held to be in keeping with the other houses on the estate.

29. Miss Beer submitted that the key point was that the application land was located on a housing estate and the proposed bungalow was in keeping with the existing development. It was an executive home and would not materially alter the character of the estate. The applicants could in any event extend their existing home without being in breach of the restriction. The restriction did not secure any practical benefits of substantial value or advantage to the objectors. Mr Dean considered that a payment of £5,000 to the owner of 24 Camberley Drive was appropriate in respect of the effect of the building works but said that the effect on other properties, both temporary and permanent, would be minimal.

30. Mr Darbyshire had relied upon authorities that mainly concerned the development of flats. In this application the Tribunal was concerned with a single dwelling that was wholly in keeping with the character of the estate and which was to be developed on a uniquely large plot. Miss Beer urged the Tribunal to modify the restriction to allow this development to take place, either in accordance with the 2005 planning permission or subject to the additional mitigation measures suggested by Mr Dean and accepted by the applicants.

**The case for the objectors**

31. Mr Goldsborough said that he had lived in 24 Camberley Drive, the neighbouring property to the application land, since 1975. A major influence in the purchase of the property had been the fact that his rear garden, and that of No.26, consisted of mature woodland and was not overlooked. He now enjoyed open views over the rear garden of No.26 following the removal of the trees there. Those views were enjoyed mainly from his lounge and an upstairs double bedroom. He enjoyed the same aspect from his garden where he regularly sat on a bench or chairs. His garden was not level and consequently the 1.8 metre high fence separating his property from No.26 was effectively just over half that height at one point. His rear garden was a peaceful haven that was away from moving traffic.

32. He felt that the restriction had preserved the integrity of the building scheme and considered that the character of the estate had remained largely unchanged. He thought that if the application was allowed it would act as the thin end of the wedge.

33. The proposal meant that a new 3 metre wide driveway would be constructed immediately next to the boundary fence and only a few feet away from his house. The sidewall of No.26, facing his house, would need to be demolished and rebuilt 2 metres back. There would be an increase in vehicular movements on the application land and a likely increase in on-street parking. The accompanying noise and pollution would be intolerable bearing in mind how peaceful his garden was at present. His would be the only house to endure such a situation and was not what he had bought into. The bungalow itself would eradicate his existing views by day and stand out when lit up at night. The building works would constitute a nuisance.

34. Mr Goldsborough denied that he was aggrieved that the applicants would make money from the proposed development. His concerns were two-fold. Firstly, as a resident of the estate he wished to see its character preserved and, secondly, he wished to avoid the intrusion and noise that would be caused by the new bungalow. Money did not enter into it and his loss could not be quantified in monetary terms.

35. Mr Price said that he lived at 22 Camberley Drive which is next door but one to the application land. He purchased the property in 1988. At that time the view across the curtilages of Nos.24 and 26 was of natural woodland. His garden was not then overlooked by No.26. He planted a cypress hedge along the boundary with No.24 to give more privacy and to clothe the fence with greenery. He had cut down two large Leylandii trees about three years ago because of fears that their roots might damage the foundations of the house. The

remainder of the hedge, which became unslightly and denuded as a result of a drought, was removed in late 2006 because it was an eyesore. Mr Price denied that the hedge had been deliberately cut down to make the boundary seem more exposed for the purposes of the hearing. He accepted that in taking down the trees and the hedge he had recovered the previous view across Nos.24 and 26. The applicants cut down numerous mature trees that were in their back garden in or around 2002 but the view from No.22, whilst more open, remained attractive and rural.

36. The proposed bungalow was very large and would change the nature and character of the views from his dining room, lounge and garden. It would make the area unattractive and over developed. A first floor bedroom window would overlook No.22. Although there was a planning condition that the glass in this window should be obscure he would have to rely upon the local planning authority to enforce it. He accepted that a modification of the restriction by proviso with respect to this planning permission would still enable the objector to retain control over the type of glass that was used but Mr Price said that he did not want the bother of having to proceed in this way.

37. Mr Price acknowledged that the application land was the largest plot on the estate and agreed that the proposed bungalow would probably be in character with the existing properties. He said that the new building would double the density of development on the plot. The grant of planning permission meant that the application had satisfied the planning authority's parking and access policies but the present application was being considered on a different basis. It was probable that the development would result in more on street parking outside his home and the increased traffic would permanently increase the risk of road traffic accidents. He doubted whether the applicants intended to reside in the new property for any length of time following their retirement given its size and he felt that it would be unfair for the applicants' financial interests to be placed ahead of his rights under the restriction.

38. The proposal would irrevocably damage the street scene at this corner of Camberley Drive due to the combination of the new building, the partial demolition of the existing building and the construction of a narrow driveway next to No.24. It would be unattractive and out of keeping with the estate generally. Mr Price said that money could not compensate him and his wife for the loss of the amenity they currently enjoyed regardless of a temporary or permanent diminution in the market value of their property. They were not objecting in order to obtain compensation.

39. Mr Price said that the erection of a marquee on the application land in June 2007 had demonstrated how obtrusive the new development would be. He said that it was smaller and lower than the proposed bungalow but he admitted in cross examination that he had no details about its dimensions and acknowledged that it had not been located on the same site as the new building would be.

40. He denied having orchestrated the objections to the application. He had assisted objectors but they had come to him; he had not sought them out and he had not driven a campaign of opposition. People on the estate knew that he was a solicitor and came to him of their volition. He had produced a blank pro forma for residents to use when objecting but there was nothing improper in that.

41. Two other objectors gave evidence. Mr Wareing (39 Camberley Drive) said that the modification would set a precedent for further development. He thought Mr Dean had been talking about individual plots when he argued that demolition of existing properties would not be economically feasible. It would be possible to combine plots, demolish the existing houses and construct a block of flats as had happened elsewhere in Bamford. The local planning authority would not necessarily safeguard the status quo. His best protection against change was the restriction and not planning policy. He had not been aware of the applicants' planning application for the new bungalow. He thought the new building would be visible from the drive or at least the access driveway would indicate its presence. The nature and character of the estate would be lost.

42. Mr Guthrie (19 Camberley Drive) said that it was Mrs Guthrie who had approached Mr Price and not the other way around. Mr Price had not told him what to say but had offered general advice. Mr Guthrie had added comments of his own. He considered the application to be the thin end of the wedge and that the new bungalow would change the character and nature of the estate. It was unattractive, over-development and spoiled the amenity of the estate. He did not believe that the applicants intended to reside in the new bungalow and that they wished to capitalise upon it.

43. The remaining 36 objections contained a number of similar themes: purchase with the benefit of the covenant; satisfaction with the status quo on the estate; the inadequacy of money to compensate for the loss of the integrity of the estate; enjoyment of the spaciousness provided by the estate at present; concern about the thin end of the wedge and the prospect of developers moving in; and scepticism about the applicants' real motives for making the application.

44. Mr Morgan believed that the proposed development would result in a permanent loss of market value to 24 Camberley Drive. He considered that there would be an impact of between 5% to 10%, being not less than £20,000. He also thought that the new bungalow would impinge upon the open aspect enjoyed by 22 Camberley Drive and would diminish its value by £10,000. In assessing the compensation Mr Morgan said that he had considered two elements; the effect of the proposed development upon the market value of Nos.22 and 24 and also the value to the occupiers given that they did not wish to sell. He had doubts about Mr Dean's figure of £5,000 for temporary disturbance and considered that the nuisance caused by the works could be much greater than Mr Dean had supposed. However, he agreed that the works would take between 7 to 9 months if done efficiently.

45. He did not consider the proposal to be in keeping with the estate comprised as it was of a tandem development with a difficult access requiring partial demolition of the existing bungalow. The amenity benefits to Nos.24 and 22 that were secured by the restriction were of

substantial value or advantage to the objectors. The loss of such amenity in terms of the open aspect and the peaceful ambience could not be satisfied by monetary compensation. The restriction also benefited the remainder of the estate by maintaining its character and preventing the combination of plots to create development opportunities. This could not be achieved by relying on the local planning authority to protect the status quo, as was seen by the grant of planning permission on the application land.

46. He conceded that the new bungalow was in character with the estate in general and with the properties in this corner of it in particular. But he said that it was not a sensitive design and was a very large building which was unusual in tandem form such as this. He thought it would adversely affect the street scene due to the new driveway and its visibility (primarily the new garage). It also involved the partial demolition of the existing building. It would generate additional traffic. He agreed with Mr Dean that although there were five further plots on the estate that might accommodate tandem development, it was not economically viable to completely demolish and rebuild the existing buildings on site in order to achieve this. Mr Morgan did not consider that the application would act as a precedent for the development of flats.

47. Mr Morgan agreed that it would be possible to park two or three cars in front of the new garage or in the hammerhead turning and that there was extra land that could be used for this purpose if required. The proposal would generate more traffic next to No.24 but he thought that visitors may park on the street rather than outside the new bungalow because it was not immediately apparent that the new driveway led to it. He did not consider that there would be any adverse impact on the privacy of Nos.22 or 24 from any of the windows in the new bungalow. He acknowledged, however, that it would be difficult to enforce compliance with the condition requiring obscure glazing to be fitted in the first floor window. It was a very minor issue from the local planning authority's viewpoint and they were unlikely to take action without strong complaints. He accepted that it was a common feature on the estate for houses to overlook each other and that it was unusual for there to be an open outlook.

48. Mr Morgan considered that the impact of the new bungalow on the outlook of No.22 would be limited rather than substantial. However, he thought that the bungalow would be clearly visible from No.24. If the building were lowered by a metre as suggested by Mr Dean then it would materially reduce the view of it from No.22. It would also reduce the impact of it on No.24 by 15%. However, the new building would remain clearly evident and its effect on No.24 would be substantial. There would still be a building in the foreground. Raising the fence between Nos.24 and 26 would only have a slight effect and the new bungalow would still be visible from No.24.

49. Mr Darbyshire submitted that the key issue was whether or not the restriction secured to the objectors practical benefits of substantial value or advantage. The plain and uncontentious fact was that Mr Goldsborough at No.24 presently enjoyed an open aspect onto woodland when he looked across the application land. That would change if a 6 metre tall bungalow was built in the back garden of No.26.

50. Mr Dean said in his report that the new bungalow would have no impact upon neighbouring properties. In cross-examination he had conceded that there would be some impact. Mr Darbyshire said that this was an enormous concession. Mr Morgan on the other hand had been consistent; there would be a significant visual impact on No.24 and some impact on No.22. The photograph of the marquee in the garden of No.26 showed that there would be a significant impact on the visual amenity of both properties. The applicants had not provided the dimensions of the marquee despite having been asked to do so. But it was clear that it was some 4 metres high compared with the 6 metre height of the new bungalow. At the very least the proposed dwelling would have the same impact as the marquee and probably significantly more.

51. The existing garage and sheds on the application land could be seen above the fence from Mr Goldsborough's garden bench and so the roof of the new bungalow would also be visible. It was a reasonable and sensible conclusion. The restriction protected the existing amenity and this was only contradicted by Mr Dean who was very shaky on the point.

52. A six-bedroom property would double the traffic generation from the application land. Visiting cars would park on street or they would go down the new driveway next to No.24. Either way there would be a substantial impact. If Mr Dean was correct there might be as many as five or six vehicles using the driveway. Nobody else on the estate apart from Mr Goldsborough had suffered this degree of vehicular movement from a neighbouring property and he should not be singled out.

53. The Meadowcroft Estate had remained unaltered for 40 years. If the modification was allowed then others would find support from the Tribunal's decision and there would be incremental encroachment by new development. There was enormous pressure from planning policy to develop sites. The system of local law enshrined in this building scheme afforded protection against change. This was a powerful point for the only persons who wanted the new development were the persons who would benefit financially.

54. Mr Darbyshire said that the Tribunal had considered the issues of the loss of amenity and threats to the character of estates many times and he cited several cases in support of this submission. *Re Wards Construction (Medway) Limited's Application* (1973) 25 P&CR 223 was an example of an application being refused where the construction of a block of flats would have interfered with the substantial benefits of space, quiet and light enjoyed by the objectors. *Re Collins' Application* (1974) 30 P&CR 527 was an example of the Tribunal refusing an application on amenity grounds even though the proposed housing development did not reduce the market value of the objectors' properties. In *Re Purnell's Application* (1987) 55 P&CR 133 the Tribunal held that residents on an estate subject to a building scheme would be injured were an application allowed to construct a second house on a plot which had a restriction limiting development to one house only. The application was refused in order to protect the unique character of the estate which enjoyed unusually large plots and had remained unchanged since the early 1920s. The thin end of the wedge argument was upheld in *Re Snaith and Dolding's Application* (1995) 71 P&CR 104 where the applicant wanted to construct a second house on a plot in a building scheme where the restriction limited

development to a single house only. The assurance of the integrity of the building scheme was held to be a substantial practical benefit to the objectors.

55. In *Re Lee's Application* (1996) 72 P&CR 439 the Tribunal refused an application to discharge a restriction to enable the erection of a detached house on a plot on a 1960s building scheme. The restriction secured to the objector the substantial benefits of preventing an increase in traffic and protecting her view. It also enabled her, together with all the owners on the estate, to preserve the status quo of the building scheme. *Re North's Application* (1997) 75 P&CR 117 was another example (although not of a building scheme) where the Tribunal refused an application on the grounds that the restriction secured substantial practical benefits in terms of the view from the objectors' house and their enjoyment of their garden. In *Re Fairclough Homes' Application* (2004) Lands Tribunal LP/30/2001 (unreported) the President refused an application for the replacement of a large derelict house by two blocks of ten flats on the grounds that the proposal would give rise to a greater number of occupants, more traffic and greater disturbance. It would also create an adverse precedent on the estate.

56. Mr Darbyshire submitted that the applicants were simplistic to argue that the proposed development would not increase the density of development on the estate and that the new bungalow would have a plot size that was greater than the average. That approach did not address the question of whether the restriction secured to the objectors practical benefits of substantial advantage. Instead it was a planning point. The only relevance that the grant of planning permission had in this case was that it went to demonstrate that the proposed user was reasonable. The planners were not concerned about the restriction. They had applied the council's planning policy mechanistically and their decision did not address the particular concerns of the objectors. Those concerns were properly addressed to the Tribunal.

57. The applicants had offered to lower the new bungalow by one metre in order to reduce its impact. But there was no evidence that this would satisfy the planners. Mr Dean did not know what approvals might be required; building regulations and/or planning permission. There could be no confidence that such approvals would be forthcoming, because there would be problems of support and of drainage.

58. The experts disagreed about whether the proposals would cause a loss in value to neighbouring properties. But more significant than any direct financial loss was the opinion of the objectors that the restriction was incapable of valuation in money terms. The key point was that the restriction prevented the new building from disturbing the existing view of neighbouring residents, especially that of Mr Goldsborough at No.24. The estate was subject to a system of local law which should be protected. There was an absence of desire for change among the residents and given the cumulative effect of the practical benefits that they enjoyed the application should be refused.

**Conclusions**

59. The applicants rely solely upon ground 84(1)(aa). It is usual to consider this ground by reference to the questions adopted by the Tribunal in *Re Bass Limited's Application* (1973) 26 P&CR 156:

1. Is the proposed user reasonable?
2. Does the restriction impede the proposed user?
3. Does impeding the user secure to the objector practical benefits?
4. Are those benefits of substantial value or advantage?
5. Is impeding the proposed user contrary to the public interest?
6. Will money be adequate compensation?

60. The objectors accepted that the proposed user is reasonable and the applicants (at the hearing) conceded that impeding the proposed user is not contrary to the public interest. I think that the parties were correct to make those concessions. There is no dispute between the parties that the covenant impedes the proposed user. That leaves questions 3, 4 and 6.

61. The objectors in this case can be divided into two groups. Firstly, Mr Goldsborough (No.24) and Mr and Mrs Price (No.22) have objected primarily on specific grounds relating to the loss of amenity to their dwellings and gardens. Secondly, the remaining 38 objectors relied upon the shared benefits afforded by the building scheme in terms of maintaining the character and status quo of the estate.

62. The applicants rely heavily upon the grant of planning permission for the proposed bungalow and argue that it is for the local planning authority to protect the community's amenity through the application of planning policy. In this case the planning authority decided that all relevant policies were satisfied. In essence, if it was good enough for the planning authority it should be good enough for the objectors. I do not accept that argument.

63. Restrictive covenants and planning are distinct and separate systems of control. As Fox LJ said in *Re Martin's Application* (1988) 57 P&CR 119 at 124-125:

> "When a restrictive covenant is entered into between owners of adjoining, or otherwise affected, lands the fact that the owner for the time being of the burdened land subsequently obtains planning permission to develop that land in a manner which is prohibited by the covenant does not entitle him to ignore the covenant. The benefit of the covenant is an interest in land and it is not extinguished by the acts of a planning authority....

> The granting of planning permission is, it seems to me, merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by section 84. It is for the Tribunal to make up its own mind whether the requirements of section 84 are satisfied."

64. More recently the Court of Appeal considered this issue in *Lawntown v Camenzuli* [2008] 1 All ER 446 in the context of an application under section 610 of the Housing Act 1985. Richards LJ said in paragraph 41:

> "Most importantly, it is for the Court to make its own assessment of the relevant factors and the weight to be accorded to them. It must not leave matters out of account, or give them no weight in the overall balancing exercise, merely because the local planning authority in granting planning permission has already considered them. The Court's task under Section 610, although triggered by the grant of planning permission, is separate from the planning process and requires an independent exercise of judgment. That does not mean that the Court has to second-guess the authority's planning judgments or to reach a view on the correctness of the grant of planning permission. It is simply that the authority's factual assessment is not determinative, however, careful it may have been, and the Court has to examine the facts for itself and to carry out its own balancing exercise."

65. The fact that the local planning authority granted planning permission for the new bungalow is not determinative of the issues concerning amenity that fall to be considered in the context of this application. They must be examined by reference to the restriction and whether or not it secures to the objectors practical benefits of substantial value or advantage. In considering this question I have focussed upon Mr Goldsborough's objection. If he does not have such benefits then Mr and Mrs Price, who live further away at No.22, cannot have them.

66. Number 24 Camberley Drive adjoins the application land. The new bungalow will be visible from a first floor bedroom window (albeit obliquely), the ground floor living room and the conservatory at the rear of the property. It will be seen from the garden of No.24 from which it is separated by a 1.8 metre high fence. The garden is undulating rather than level and at one point rises up near the boundary of No.26, reducing the effective height of the fence. The new bungalow has a ridge height of 6.2 metres and will be 6.9 metres from the boundary fence. The garage that adjoins the bungalow has a ridge height of 3.7 metres and will only be 1.5 metres from the fence. In my opinion both the bungalow and the garage will be visible from No.24 from both the garden and inside the house even if the new building was to be lowered by a metre and the fence was to be raised as suggested by Mr Dean. The new development is situated to the south of No.24 which is the aspect from which sunlight is enjoyed. There is an open view towards mature trees from No.24 towards the application land. Mr Goldsborough has placed a bench facing No.26 from which he enjoys those views. The construction of the bungalow and the garage would have a detrimental effect upon the amenity that he currently enjoys in this respect, from both the garden and within the dwelling.

67. Apart from the adverse impact that the proposed development would have upon the visual amenity of No.24 the bungalow, being a substantial building with (potentially) six bedrooms, will lead to a material increase in residential activity on the application land including increased car movements. I consider that this would adversely affect Mr Goldsborough's enjoyment of his property, not least because the new 3-metre driveway would immediately adjoin his boundary for a total length of some 50 metres.

68. In my opinion by impeding the development of the new bungalow the restriction secures practical benefits of substantial value and advantage to Mr Goldsborough in terms of outlook, freedom from traffic, freedom from the disturbance of further residential activity and peace and quiet. I would refuse the application on these grounds alone. However, a number of other arguments have been raised that I shall deal with briefly.

69. The impact upon Mr and Mrs Price at 22 Camberley Drive would be significantly less than upon No.24. I believe that the bungalow would be visible from No.22 but in my opinion the impact upon the outlook from, and the overlooking of, that property was overstated by the objectors.

70. The existence of a building scheme is a material factor to which the Tribunal should attach weight. As Lawrence Collins LJ said in *Dobbin v Redpath and Another* [2007] EWCA Civ 570:

> "23. .... Where there is no building scheme there may be a diminishing relationship as between the weight to be attributed to the source of the complaint and the physical distance of the objector's land interest. By contrast, where there is a building scheme so long as the objector has an interest inside the physical compass of the building scheme, the location of the objector outside his or her land interest but inside the building scheme does not affect the matter ....
>
> 24. .... It would be better for the Lands Tribunal to consider the matter in terms of the weight to be attached to objections in the light of the special interest of the beneficiaries of the covenants of the building scheme."

71. The integrity of Camberley Drive as a building scheme has remained intact since its creation in the early 1960s. There have been extensions to properties but no new housing development. The result is that the original character of the estate has been preserved and it remains a peaceful, low-density development. The residents value the status quo, and 40 of them objected to the application. It is true, as Miss Beer argued, that many of the houses are overlooked, particularly those in the middle of the ring formed by Camberley Drive. But the outlook to the rear of the properties around the perimeter of the estate along its western side is an attractive one towards mature woodland. I consider that the maintenance of the integrity of this building scheme is a substantial practical benefit of value to the objectors. The experts identified five other plots on the estate where a similar tandem form of development to that proposed could take place. In my opinion to allow the application would deprive the objectors of the continued assurance of the integrity of the building scheme.

72. Many of the objectors feel that the proposed development would lead to the cramped appearance of the application land. Miss Beer argued that the new bungalow would occupy a larger than average plot. Nevertheless, the overall density of the estate, which is fixed in extent, will increase, albeit marginally, given that there will be 71 dwellings instead of 70. The density of development on the application land will double, a factor of particular relevance to the amenity of No.24. But as the President of the Tribunal (Douglas Frank QC) said in *Re Collins'* at 529:

> "However, it is not merely the arithmetic of the density which matters, but the general effect on the amenity of the area."

I have already described the likely effect upon No.24 but, more generally, the proposal would involve the demolition of a 2 metre wide section of the gable end wall of No.26 to allow the construction of the new driveway. Not only would that mean significant temporary disruption to No.24 it would also give No.26 a cramped appearance. The applicants have already constructed a similar 3 metre wide driveway at the other end of No.26 which involved the chamfering and reconstruction of the existing building. The present bungalow effectively forms the entrance to a funnel shaped site and the creation of a second driveway would make this corner of the estate appear cramped and out of character.

73. The fact that the applicants can extend their existing bungalow without being in breach of the restriction does not alter my conclusion. In *Fairclough Homes* the President said:

> "29. ….How the character of the area and the amenities would be affected by the modification of the restriction is not in my view to be judged by envisaging the worst that could be done without breaching the restriction and comparing it with what the proposed modification is intended to permit….
>
> 30. ….In such a case as this, the provision, it seems to me, operates in this way. By preventing development that would have an adverse effect on the persons entitled to its benefit the restriction may be said to secure practical benefits to them. But if other development having adverse effects could be carried out without breaching the covenant, these practical benefits may not be of substantial value or advantage. Whether they are of substantial value or advantage is likely to depend on the degree of probability of such other development being carried out and how bad, in comparison to the applicant's scheme, the effects of that development would be."

No evidence was adduced about how any such extension to No.26 would have been designed, located and constructed, nor, indeed, whether it was likely to be undertaken at all (bearing in mind Mrs Cordwell's evidence that she and her husband needed to raise capital from the development of the new bungalow and that they intended to live in a separate dwelling to their daughter who would live in the present No.26).

74. The cumulative effect of the objections is to support my decision in respect of No.24 and to refuse the application. In reaching this decision I have had regard to the development plan and the other requirements of section 84(1B). I accept that the proposal is in conformity with relevant planning policies but this does not outweigh my assessment of the adverse effects that

this proposal will have upon the amenities of No.24 in particular and upon the integrity of the building scheme as a whole. In the light of my conclusions the question of compensation does not arise.

75. The applicants have not succeeded in establishing the ground relied upon and the application is therefore refused. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is decided. The attention of the parties is drawn to paragraph 22.4 of the Lands Tribunal Practice Directions of 11 May 2006.

Dated 7 May 2008

A J Trott FRICS