LP/56/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification – proposed detached house at entrance to exclusive cul-de-sac – practical benefits of substantial value or advantage – outlook – effect upon amenities – precedent – integrity of system of covenants – application refused – Law of Property Act 1925, ss 84(1)(aa) and (c)

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

BY

PETER TILLOTSON
and
JEAN ELIZABETH TILLOTSON

Re: 2 Middleton Drive, Higherford, Nelson, Lancashire BB9 6BA

Before: A J Trott FRICS

Sitting at Burnley Combined Court Centre, Hammerton Street, Burnley, Lancashire BB11 1XD
On 18 and 19 March 2008

Richard Moore, instructed by Smith Sutcliffe, for the applicants
Richard Oughton, instructed by Southerns, for the objectors

The following cases are referred to in this decision:

Shephard v Turner [2006] 2 EGLR 73
Gilbert v Spoor [1983] Ch 27
Re Solarfilms (Sales) Limited's Application (1994) 67 P & CR 110
Re Mitman-Kearey's Application (2007) Lands Tribunal LP/86/2006 (unreported)
Re Hunt's Application (1997) 73 P & CR 126
Re Lee's Application (1996) 72 P & CR 439
Re Dobbin's Application (2006) Lands Tribunal LP/59/2004 (unreported)
Stannard v Issa [1987] 1 AC 175
Re Felton Homes Limited's Application (2004) Lands Tribunal LP/3/2003 (unreported)
McMorris v Brown [1999] AC 142
Re Bass Limited's Application (1973) 26 P & CR 156

The following case was referred to in argument:

Re Tarhale Limited's Application (1990) 60 P&CR 368

DECISION

Introduction

1. This is an application by Peter Tillotson and Jean Elizabeth Tillotson (the applicants) under section 84 of the Law of Property Act 1925 seeking the modification of two restrictive covenants affecting freehold land at 2 Middleton Drive, Higherford, Nelson, Lancashire BB9 6BA (the application land). The first restriction was imposed under a conveyance of the application land and other land dated 16 July 1935 (the 1935 restriction). It states that:

> "The Purchaser shall not erect on the plot of land edged red on the said plan any building other than one detached dwellinghouse with outbuildings stables or garage and of an annual value of not less than £30."

2. The second restriction was imposed under a conveyance of the application land and other land dated 17 September 1971 (the 1971 restriction). It states that:

> "The Purchasers ... will not at any time hereafter erect more than one detached dwellinghouse with outbuildings and garages on the land shown as plot number one on the said plan and not more than two dwellinghouses with outbuildings and garages on the land shown as plot number two on the said plan..."

3. The application land includes the whole of the land edged red in the 1935 conveyance (the red land) except for a small salient of land to the north that was retained by the owner of 6 Middleton Drive when he sold the red land and other land in 1971. A garage has been constructed on this salient and forms part of No.6. The application land also includes the whole of plot one as shown on the 1971 conveyance plan (which itself includes the majority of the red land) together with a 10 metre wide strip of the adjoining plot two as shown on that plan. Part of the proposed house is located on the red land with the majority of the remainder being located on plot one of the 1971 conveyance. Some of the proposed garage is located on plot two of the 1971 conveyance.

4. The proposed modification would enable the applicants to construct a second detached house on the application land immediately to the south of the existing house known as 2 Middleton Drive. Planning permission to construct the new house was granted on appeal on 30 July 2005. The applicants rely upon paragraphs 84(1)(aa) and (c) of the 1925 Act.

5. There were four objections to the application in respect of the 1935 restriction and one objection to the application in respect of the 1971 restriction.

6. Mr Richard Moore of counsel appeared on behalf of the applicants and called Mr Peter Tillotson, Mrs Jean Elizabeth Tillotson and Mr Geoffrey John Hook as witnesses of fact. He called Mr Roy Wightman MRICS, Head of the Survey and Valuation Department of Messrs John W Dinsdale, Chartered Surveyors, as an expert witness.

7. Mr Richard Oughton of counsel appeared on behalf of the objectors. He called Mr Philip John Kelly FRICS, a partner in H W Petty and Co, Chartered Surveyors, as an expert witness and Mr David John Atkinson Taylor and Mr Andrew Macpherson Buchanan as witnesses of fact. He also called three of the four objectors against the application in respect of the 1935 restriction, namely Mr Jack Alexander Walne (3 Middleton Drive), Mr Geoffrey Brian Wessell (5 Middleton Drive) and Mr Frederick Charles Green (7 Middleton Drive). (The fourth objectors, Mr Colin Birchall and Mrs Christine Birchall, of Middleton Laithe Farm, were unable to attend the hearing.) Finally, he called the objectors against the application in respect of the 1971 restriction, Mr Steven William Blackadder and Mrs Gillian Mary Blackadder (6 Middleton Drive).

Facts

8. Middleton Drive is a quiet and exclusive residential cul-de-sac located at the edge of Higherford towards Blacko with access on to the A682 Gisburn Road. It comprises 9 residential properties including three large bungalows (Nos.3, 10 and 12), four detached houses (Nos.2, 6, 8 and Middleton Laithe Farm) and a pair of semi-detached houses (Nos. 5 and 7). The latter lie parallel with, rather than perpendicular to, Middleton Drive and each has its own driveway. There is no property known as Nos.1 or 4 Middleton Drive. The dwellings in Middleton Drive are generally set in large, well maintained grounds. The drive slopes upwards from Gisburn Road and many of the properties enjoy distant views of Pendle Hill and other high ground to the west and south. It is a prestigious location and the expert witnesses agreed that Middleton Drive commands premium values.

9. The experts agreed the following values of the objectors' properties in Middleton Drive:

No.3:	£450,000
No.5:	£375,000
No.6:	£662,500
No.7:	£375,000
Middleton Laithe Farm:	£775,000

10. The application land lies to the east of the entrance of Middleton Drive at its junction with Gisburn Road. 2 Middleton Drive was built in the early 1970s and is a substantial split level four bedroom detached house of brick construction under a pitched tile roof. There is a separate double garage to the west. The existing house is set back from Middleton Drive in the centre of a mature plot surrounded by well established trees, hedges and shrubs. At the south of the application land, adjoining Gisburn Road, is an area of grass which has been enclosed with a chain and post fence. The applicants hold a possessory title of this land. The same area of land (amounting to 850 square yards) was dedicated by the then freeholders, James and Emily Walton, to Lancashire County Council on 31 January 1934 with the intention that it form part of a widened Gisburn Road.

11. The proposed new detached house is a two storey, three bedroom building with an attached double garage to the east. It has natural stone walls and window surrounds under a blue slate pitched roof (including the garage). There is a separate driveway that runs from the existing driveway of 2 Middleton Drive around the south of the new house to the entrance of the garage. The front of the house faces west towards Middleton Drive. At its closest point the new house would be some 3 metres from the existing dwelling at No.2. The boundary between the two buildings, which at this point is in the form of a retaining wall, is 1 metre from the side (southern) elevation of the existing dwelling. That elevation would overlook the new garage which is 5 metres distant. The kitchen and bedroom three of the new house would overlook the driveway and garage of No.2. The new house would occupy the entire plot of No.2 to the south of the existing building including the land for which the applicants hold a possessory title.

12. The land which now forms Middleton Drive was originally in the single ownership of Mr Arthur Stowe. After he died his personal representatives (and their successors in title, James and Emily Walton) sold off the land in individual plots starting (for present purposes) on 22 March 1929 with the sale of what is now known as 8 Middleton Drive. The parties agreed that the sale of these plots did not constitute a building agreement. Mr and Mrs Walton sold the land that is subject to the 1935 restriction on 16 July 1935. The applicants accepted that the objectors, ie the owners of 5 and 7 Middleton Drive and Middleton Laithe Farm, enjoyed the benefit of the 1935 restriction. (At the end of the hearing Mr Oughton acknowledged that the owner of 3 Middleton Drive, Mr Walne, did not have the benefit of this restriction.)

13. The personal representatives of Mr Stowe sold 6 Middleton Drive on 13 July 1929. The conveyance contained a covenant by the vendors that they and their successors in title would not erect more than one detached dwelling on the adjoining plot to the south, ie. the red land. On 31 August 1964 the application land and other land was sold to Mr Robert Reed. Mr Reed had already purchased the plot of 6 Middleton Drive on 18 December 1951. The unification of these two titles meant that the 1929 restriction was extinguished as between the red land and 6 Middleton Drive.

14. On 17 September 1971 Mr Reed sold the application land and other land to the south to Mr David Taylor. The land was divided into four areas, one of which was subdivided into two plots. Plot one included the majority of the application land and was subject to a restriction not to erect more than one detached dwellinghouse. There was a separate restriction not to erect more than two detached dwellinghouses on plot 2. Mr Taylor sold the majority of plot two in 1972 (except for the 10 metre wide strip referred to in paragraph 3 above) and imposed a new restriction on the land sold against the erection of more than one detached dwellinghouse. The 10 metre wide strip, which forms part of the application land, remains subject to the 1971 restriction imposed on plot 2. Mr Taylor proceeded to construct the dwellinghouse now known as 2 Middleton Drive on the application land and sold it to the applicants on 13 June 1988.

15. The applicants accept that the owner of 6 Middleton Drive has the benefit of the 1971 restriction.

The case for the applicants

Evidence

16. Mr Tillotson said that he and his wife found it increasingly difficult to maintain the large grounds at the application land. They wanted to sell the existing house and build the new house for their occupation as a retirement home. The new property would not affect the large gardens to the east of the existing house and would be built on what was currently its front garden. That meant the new house would enjoy the benefit of the existing tree and shrub screen along Gisburn Road from which it would be set back by some 15 metres. The house was designed to a high specification and with high quality materials.

17. Middleton Drive was characterised by houses of different types, ages and design. The new house would be located at the interface between the low density development of Middleton Drive and the high density development along Gisburn Road to the east. Immediately opposite the application land to the south was a new development known as The Orchard which had smaller plots than that proposed for the new house. 6 and 8 Middleton Drive were closer to the drive than the new house and the proposed dwelling would not be obtrusive or noticeably different to the existing properties. It would be the same height as the neighbouring house at 220 Gisburn Road and would not adversely affect the character of the area. He agreed, however, that the new house was further forward than the de facto building line between 210 and 230 Gisburn Road.

18. In addition to the application land the applicants occupied a strip of land between their boundary and the back edge of the pavement along Gisburn Road. They obtained possessory title to this land in 2004 and Mr Tillotson said that the applicants intended to continue to occupy it as part of the gardens of the new house.

19. Mr Tillotson said that the sale of the application land and other land in 1971 was on the basis that there would be one detached dwelling built on plot one and two detached dwellings built on plot two. In fact, due to the imposition of a further restriction on the sale of part of plot two in 1972, only two houses had been built; 2 Middleton Drive on plot one and 220 Gisburn Road on plot two. The proposed dwelling would be the third house. This was foreseen when the 1971 restriction was imposed.

20. The application land was on lower ground than the other properties in Middleton Drive and the objectors either had no view or a limited view of the proposed development and would not be injured by it. At its nearest point the new house would be 33 metres from the house at 6 Middleton Drive and it was further away from the other objectors' property. There would be no material impact upon any of them. The new house would not be visible every time someone entered or exited Middleton Drive because of the existing and proposed shrub and tree screen. The view of the new development from the rear garden of 6 Middleton Drive was obstructed by the new garage that Mr and Mrs Blackadder had built. The new house had two windows that would overlook the front garden of No.6, the view being between the existing garage and No.2.

21. There would be no material increase in traffic as a result of the proposals and, in any event, traffic would not pass any of the objectors' properties. Ample off-street parking was provided.

22. Mrs Tillotson explained the background to the discussions that she had with Mrs Blackadder about the application. She also gave details of her objection to the planning application for the development of The Orchard on the other side of Gisburn Road. She said that these were based upon the loss of trees and wildlife and had nothing to do with a loss of view from No.2, the new development being screened from that property by the existing trees along her boundary.

23. Mr Hook described the planning history of the proposed development and outlined the changes to the plans that had been made at the request of the local planning authority. He considered that the new house conformed with relevant planning policy and that it was infill development within the settlement boundary of Barrowford rather than excessive curtilage development. His comments about building lines reflected the situation on the ground and had not been made by reference to the title documents.

24. Mr and Mrs Alam owned 220 Gisburn Road, the property that was constructed on that part of plot two that was subject to the restriction imposed by Mr Taylor in the 1972 conveyance and which adjoined the application land. They submitted a witness statement that confirmed that they had no objection to the proposed development. They did not give evidence.

25. Mr Wightman gave expert evidence. He said the demand for houses in Higherford was generally strong and that Middleton Drive was an exclusive location and one of the most sought after in the area. He accepted that the new house would be visible form parts of No.6 but thought that the elevated position of No.6, the existence of a mature shrub and tree screen between the two properties and the distance between them would reduce the impact of the new development. He considered that the presence of the new house would not affect the value of No.6. Mr Kelly had argued that No.6 would be reduced in value by 10 to 15% which meant that it would then be worth less than the new houses in The Orchard. Mr Wightman thought that this was unrealistic.

26. He estimated that the value of the existing house at No.2 would be reduced by 20% due to the loss of privacy and the reduction in plot size resulting from the construction of the new house. He did not accept that No.6 would lose privacy as a result of the proposed development. He acknowledged that the new house would have the lowest value of any of the detached properties in Middleton Drive and would also be on the smallest plot (if one excluded the land to which the applicants held a possessory title).

27. Mr Wightman considered that it would take two to three months to build the new house and he accepted that it would cause some temporary disturbance to the occupiers of No.6. He had not considered the question of compensation arising from any such temporary disruption.

28. There would be no diminution in the value of other objectors' properties. The proposed development would not be visible from any of them and would not be affected by any traffic generated by it. The new house would not adversely affect the character or exclusivity of Middleton Drive. It would be visible as the objectors drove down the drive but as most people exited to the left drivers would be focussed on the traffic coming from their right at the junction with Gisburn Road and therefore they would be looking away from the new house in any event.

Submissions

29. Mr Moore submitted that the proposed user was reasonable. It was for an extra house in a purely residential area and had received planning permission. It would be the third house on an area of land (plots one and two under the 1971 conveyance) where it had been envisaged that three houses would be built. The new building would be a large detached house that was in keeping with the existing houses in Middleton Drive. It was not out of character to have houses in close proximity to each other in the drive; indeed Nos.5 and 7 were semi-detached houses.

30. There was no dispute that the restrictions impeded the proposed user and so the next question to be determined was whether the restrictions secured to the objectors practical benefits of substantial value or advantage. Mr Moore submitted that this question required consideration of four broad issues.

31. Firstly, the objectors argued that the view at the entrance to Middleton Drive would be spoilt by the new house. The junction of Middleton Drive and Gisburn Road lay forward of the new development and Mr Wessell admitted that there would only be a fleeting glimpse of the new house as one drove into the cul-de-sac. Some objectors said that they walked down the drive and that they would see the new house as they did so. But all the properties in Middleton Drive were visible from the road and the fact that the new house would be as well did not make it out of character. The proposed development was an architect-designed house that used local stone and was therefore more in keeping with the surrounding properties than was No.2 or the new houses in The Orchard. The objectors had conceded that there would be no breach of the 17 ft 6 ins building line shown on the 1935 conveyancing plan. There was no such building line covenant on Gisburn Road. Although the new house would be a little further forward than other properties in Gisburn Road it was very different from them in that it was screened by mature trees and shrubs and was far less open to the road. The visual impact of the new development would not be material. There was nothing about the new house that would spoil the approach to Middleton Drive or that would affect the aesthetic sight lines from the objectors' properties.

32. The objectors referred to the elegance of the entrance to Middleton Drive. The mature screening that helped create that impression had not always been there. Prior to the construction of No.2 the land was used for rough grazing and for storing cars. The screening was not a covenant matter and was not secured by the restriction. It was maintained by the applicants' own efforts. The appearance of the entrance was not a practical benefit secured by the restriction but was simply an adjunct to the applicants' occupation.

33. Secondly, it was necessary to consider the views from the objectors' houses. The view from No.3 would not be significantly impaired. Mr Moore noted that it had been accepted at the hearing by Mr Oughton that No.3 did not have the benefit of the 1935 restriction. Nos.5 and 7 enjoyed similar views. Neither house could see any material part of the site from either the ground floor or the front garden. It was possible to see the site from the upper windows, but the view from there was of the open countryside and hills to the south and not the application land. The impact of the new house on the views from these houses was marginal and afforded them no practical benefit. It was impossible to see the application land from Middleton Laithe Farm.

34. The view of the new house form No.6 was very limited due to the large amount of screening vegetation between the two plots. The only windows affected were upstairs windows and even then one would consciously have to look for the new house; if one stood back from the windows and looked out normally then it could not be seen. The same was true of the view from the front path. One would deliberately have to look for the new development in order to see it. It could not be seen from the back garden of No.6. This contrasted with the fact that No.8 overlooked the garden of No.6. The new property would not overlook No.6 because it was at a significantly lower level and a long way away from it. The new house would not obstruct any view from No.6.

35. Thirdly, Mr Moore considered the density and plot size of the new development which he said was consistent with that of surrounding properties. Planning permission had been granted on appeal on the basis that the new house laid at the cusp of an area of higher and lower densities. There was a progressive density change as one moved up Middleton Drive. Nos.3, 6 and 8 are relatively small plots and Nos.5 and 7 formed a semi-detached pair. Further to the north Nos.10 and 12 and Middleton Laithe Farm occupied the largest plots. The new house would have a much larger size plot than the properties in The Orchard and one that was comparable to those at the bottom end of Middleton Drive. No.2 would still have a very large rear garden.

36. Finally, Mr Moore considered whether the proposed development would constitute the thin end of the wedge in so far as it might open the way for further development in Middleton Drive that would undermine the efficacy of the covenants. This was not a true building scheme where the integrity of the covenant system was at stake. It could not be said that there would be a large number of applications for modification or discharge if this application succeeded. Many of the plots were too small. Mr Green was concerned about the precedential effect of the proposal upon the development of open land behind his house. But whilst there was a restriction that would keep a 45 ft wide strip free from development it would be possible to build beyond that without breaching any covenants. Whether any such development was likely was purely a planning question and had nothing to do with the thin end of the wedge argument and the current application. The objectors had not presented planning evidence about the prospect of obtaining planning permission on the 45 ft wide strip that was subject to a restriction.

37. Mr Wightman's evidence about the loss of value was to be preferred to that of Mr Kelly. Mr Wightman had provided cogent reasons for his assessment including consideration of the visibility of the new house from different vantage points, the distances between properties and the general effect of the proposal upon marketing. He concluded that Mr and Mrs Blackadder at No.6 would not be affected but acknowledged that the value of the existing property at No.2 would be reduced due to the proximity of the new house, the consequent loss of privacy and the loss of some of its garden. But these were not reasons why No.6 would lose value. Mr Oughton suggested to Mr Wightman during cross-examination that loss of privacy accounted for half of the 20% reduction in value of No.2. This was not conceded but in any event the loss of privacy to No.6 resulting from the proposed development was negligible. Mr Kelly had argued that No.6 would suffer a 10% to 15% reduction in value if the application were allowed. This figure was not based upon detailed reasoning and Mr Kelly's comparables had only served to demonstrate that there was a premium attributable to Middleton Drive. That was not disputed. Mr Kelly did not specify any loss in value to No.3, 5 and 7 Middleton Drive nor to Middleton Laithe Farm. Instead he said that any diminution in their value would not be great but that the proposal might have some effect. There was no evidence to support this assertion and Mr Wightman had said that there would be no effect at all.

38. Mr Moore said that any compensation should be based upon section 84(1)(i) of the Act, namely for any loss or disadvantage suffered due to the modification of the restriction. The true impact of the proposal would be, at most, a loss of amenity that could be readily compensated. In the case of all the objectors such a loss of amenity was minimal. There might be some short term disruption due to the construction of the new house but this was unlikely to be significant and was not, in any event, something that of itself should warrant refusal of the application, as per Carnwath LJ in *Shephard v Turner* [2006] 2 EGLR 73 at 79.

39. Mr Moore accepted that it would be difficult to succeed on ground (c) if ground (aa) was unsuccessful. But the main concern of the objectors was a loss of view and the proposal would only have a small impact in this regard. These were frivolous and vexatious objections to a reasonable and properly designed proposal.

The case for the objectors

Evidence

40. Mrs Blackadder (6 Middleton Drive) described the history of the planning application and the application to modify the 1971 restriction. Having been approached initially by Mrs Tillotson, Mr and Mrs Blackadder sought advice from Mr Buchanan, a solicitor, who lived at No.8. They decided to object to the proposal and Mrs Blackadder denied that she had expressed agreement to the proposals to Mrs Tillotson. Mr Tillotson had told Mr and Mrs Blackadder that they intended to live in the new house for three years. He offered to pay for Mr and Mrs Blackadder's legal fees if they agreed to the application but they declined. Mrs Blackadder accepted that the horse chestnut and cherry trees that were in the garden at No.2 opposite the front entrance to No.6 would effectively block the view from there to the new house. She also acknowledged that she could screen the new house more effectively by filling the gap in her hedge along the boundary with No.2. However, the new house would still stand

proud of the hedge and Mr and Mrs Blackadder would have more than a fleeting view of it when entering or leaving their house. She accepted that she would not overlook the new house at all from her rear garden.

41. Both Mr Blackadder and Mr Taylor gave evidence about the history of the 1971 restriction that was imposed when Mr Taylor purchased the application land and other land from Mr Reed. Mr Taylor said that the central reason why development on plot one was limited to one dwellinghouse and that on plot two was limited to two dwellinghouses was to preserve the view and outlook from No.6. Mr Taylor designed and built No.2, the grounds of which included the whole of plot one and a strip of plot two. The remainder of plot two was sold in 1972 subject to a restriction limiting any future development to one dwellinghouse (which subsequently became 220 Gisburn Road). He had occupied the strip of land adjoining Gisburn Road by licence of the local authority. He considered that the new house, unlike No.2 would be clearly visible from No.6 and he was horrified at the prospect of its construction. The 1971 restriction protected the design and setting of No.2 and went to the heart of what he had agreed with Mr Reed and passed on to Mr Tillotson. Mr Blackadder said that part of plot one upon which it was proposed to build the new house was clearly visible from No.6 and would greatly alter the present spacious and elegant environment that he enjoyed when entering and leaving Middleton Drive. He said that the new house would be prominent at the entrance to his driveway and that, unlike Mr Wessell, he would have more than a fleeting glimpse of it as he went to and from his house.

42. Mr Wessell (No.5), Mr Green (No.7) and Mr Walne (No.3) all claimed the benefit of the 1935 restriction. They thought that the new house would be very close to 2 Middleton Drive and that it would be completely out of character with the other dwellings in the drive in terms of its position. Its plot size would be out of keeping and the new building would breach the existing building line. They said that allowing the application would set an adverse precedent that might lead to further development. Mr Wessell considered that the new development would be visible from his house, particularly from the upstairs rooms. He would see it every time he entered and left Middleton Drive, although he acknowledged that the view of the new house when entering the drive would be a fleeting one. The “thin end of the wedge” argument was of particular concern to Mr Green because of the large undeveloped plot that lay behind his house.

43. Mr Buchanan (No.8) did not claim the benefit of either the 1935 or 1971 restrictions but nevertheless gave evidence supporting the statement submitted by Mr and Mrs Blackadder. He expressed his personal opposition to the application. Mr and Mrs Birchall (Middleton Laithe Farm) submitted witness statements but were unable to attend the hearing to be cross-examined. They adopted the same arguments as Mr Wessell, Mr Green and Mr Walne except that they accepted the new house would not be visible from their house. Mrs Green, Mrs Walne, Mrs Birchall and Mrs Buchanan all submitted witness statement in support of those of their husbands but were not called to give evidence.

44. Mr Kelly gave expert evidence. He said that he had a good personal knowledge of the area having lived in nearby Ribblesdale Place for 10 years until moving out in 2002. He described 6 Middleton Drive and concluded that the 1971 restriction secured substantial practical benefits for Mr and Mrs Blackadder. It prevented the construction of the new house which would prejudice the open and spacious character of Middleton Drive close to the junction with Gisburn Road. The new house would cheapen the entrance to the drive and threaten its exclusivity. Middleton Drive was unique and the houses enjoyed large and secluded plots. It formed a distinct area and could not be compared with properties in Gisburn Road or The Orchard. The new house was on a cramped plot and would be out of character with the existing properties. It would have the same effect upon Middleton Drive as The Orchard had had on the houses in Ribblesdale Place; it would diminish the cachet of the properties located there and would affect the future marketability and desirability of No.6.

45. Mr Kelly said that the new house would reduce the value of No.6 by 10 to 15%, but he had no direct comparables upon which to base this conclusion. Instead he cited a number of transactions of both semi-detached and detached houses in Gisburn Road and compared these with values in Middleton Drive. He concluded that Middleton Drive enjoyed a premium value which, whilst he did not accept that it could be quantified at 40%, represented a distinct differential. In cross-examination he said that "the whole cul-de-sac speaks quality". He acknowledged that the proposal would have no effect on the plot size of No.6 and accepted that the elegance and exclusivity of the cul-de-sac also depended upon the quality of the architecture of the buildings. But he felt that the loss of spaciousness would be important. The natural outlook from No.6 would in future include views of the new house. This would dominate the view from some of the windows. Mr Kelly estimated that the new house would take between 6 to 12 months to build and that the works would be a nuisance to Mr and Mrs Blackadder. He accepted that the new house would be much closer to No.2 than No.6, that it was on the same level and shared the same drive as No.2 and that it had a bigger plot than any of the houses in The Orchard. He also agreed that it would be somewhat obscured by summer foliage. But the overall effect would be to cheapen the entrance to, and alter the whole feel of, Middleton Drive.

46. Mr Kelly said that the 1935 restriction secured to the objectors practical benefits of substantial advantage, namely the protection of the entrance to Middleton Drive from over development and maintaining the impression of space and privacy. He did not specify any figure for the reduction in the value of any of the objectors' properties other than No.6. He said that "it may well be that the diminution in value is not great but the development could have an effect." Whilst that effect was difficult to quantify he thought that it would be felt by all of the objectors no matter how far away they were from the application land. He also felt that to allow the application would create a precedent and lead to the future subdivision of other plots in the cul-de-sac.

Submissions

47. Mr Oughton put the applicants to proof that the proposed user was reasonable but he accepted that the restrictions impeded it. He argued that the restrictions secured to the objectors practical benefits of substantial value or advantage. These benefits did not have to be

financial and should be considered widely (see *Gilbert v Spoor* [1983] Ch 27). In the case of No.6 the benefits comprised the protection of the amenity afforded by an open view across the application land and freedom from overlooking. The new house would be clearly visible from a number of rooms in No.6; the games room (side window), both bay windows at ground and first floor levels, from the front door, the front path and the driveway. The natural tendency was to look downhill towards the application land.

48. Mr Oughton said that Mr Walne (3 Middleton Drive) could not rely upon the 1935 restriction, but Mr Wessell and Mr Green (Nos.5 and 7) could. The new house would clearly be visible from the front bedrooms of both properties. The owner of 228 Gisburn Road had recently cut down some trees which had opened up the view. The planning permission for the construction of the new house contained conditions relating to a landscaping scheme, including the retention of existing trees and shrubs. The objectors did not impugn the good faith of the applicants in complying with these conditions but there was no guarantee that any particular tree would remain in future. A subsequent purchaser might not be committed to maintaining the tree and shrub screen. The planning control of planting was very difficult to enforce and the objectors should not be obliged to take the risk that the tree and shrub screen would be removed. That was partly why the restriction existed. The new house itself was a relatively tall structure that would be fairly visible. The objectors' concerns about this were not fanciful; indeed they were shared by the local planning authority who had refused the planning application.

49. Several of the conveyancing plans of properties fronting Gisburn Road showed a 30 ft building line taken from the edge of the improvement line of that road. Although there were no covenants in respect of that line it had been placed there for a purpose by the original owner (Arthur Stowe). It represented good practice. The semi-detached houses at 216 and 218 Gisburn Road respected it, as did No. 220, but the proposed house on the application land did not. The building line ensured good visibility and a pleasant aspect and the new house did not offer the set back, elegant appearance that Mr Stowe and his successors had wanted. (The 17 ft 6 ins building line in Middleton Drive had been respected by all the properties including the proposed new house.) The plan produced in Mr Wightman's evidence showed what was described as de facto building lines along both Middleton Drive and Gisburn Road. The new house stood proud of both of these. More recent developments in Middleton Drive (Nos.3, 10 and 12) were set much further back. The result of a break in the de facto building lines would be the loss of a sense of spaciousness.

50. The owners of the houses in Middleton Drive had collectively improved the appearance of the road in recent years, paying for it to be surfaced. The new house would be visible every time any such owner entered or exited the drive by car or on foot. It sat at the entrance to the drive on a site that currently preserved the amenity and value of all the properties. Mr Oughton referred to the decision of Waller LJ in *Gilbert v Spoor* at 36A-D in which he found that the protection of the approach to an estate could properly be said to be a benefit of substantial value or advantage to an objector. He also referred to *Re Solarfilms (Sales) Limited's Application* (1994) 67 P & CR 110, a case involving a residential estate of 90 properties with only one exit onto the main road by which stood the bungalow that was the subject of an application for use as a children's day care nursery. The application was refused on the

grounds that the objectors were entitled to maintain the estate as a compact and strictly residential estate, and the location of the application land at its entrance was a factor that was taken into account.

51. The proposed house was highly undesirable and objectionable. It stood forward of all the other nearby properties. It was the only house in Middleton Drive that had a shared driveway. Only Nos.5 and 7, the two semi-detached houses, would be worth less. The site was small, especially if the land in the possessory title were left out of account. This land had been dedicated as a highway and the general public had a right to walk on it. Planning and other considerations required it to be kept open so as to maintain adequate visibility at the road junction. It was not a garden in the traditional sense. The footprint of the new house resulted in a very cramped form of development, more so than any other house in Middleton Drive. The prevention of such a cramped appearance was a substantial practical benefit to the objectors. The new house would lead to a substantial diminution in the value of No.2 which Mr Wightman estimated at 20% or some £120,000.

52. Mr Oughton considered a number of other authorities in support of his submission that the application should be refused. In *Re Mitman-Kearey's Application* (2007) Lands Tribunal LP/86/2006 (unreported), the Tribunal, P R Francis FRICS, held that a proposed single storey kitchen extension would lead to a feeling of overcrowding and would adversely affect the objectors' outlook and their attractive environment. In *Re Hunt's Application* (1997) 73 P & CR 126 the President, His Honour Judge Bernard Marder QC, held that a building scheme had the primary intention of securing a relatively low-density residential development. The proposed new dwellinghouse in that case was on a plot that was too small and would constitute an obtrusive and discordant departure. The President also accepted the thin end of the wedge argument. Mr Oughton drew further support from *Re Lee's Application* (1996) 72 P & CR 439 and from *Re Dobbin's Application* (2006) Lands Tribunal LP/59/2004 (unreported) where an application to construct an additional house on a small building scheme was refused on the grounds of density and the adverse effect upon the pleasant and peaceful environment. The approach generally taken by the Lands Tribunal followed the decision of the Privy Council in *Stannard v Issa* [1987] 1 AC 175 in which Lord Oliver of Aylmerton said at 188E:

> "It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit, just as, for instance, was the ability in *Gilbert v Spoor* ... to preserve a view by restricting building."

53. Mr Oughton relied strongly on *Re Felton Homes Limited's Application* (2004) Lands Tribunal LP/3/2003 (unreported), a case that did not involve a building scheme. There was a restriction against more than one dwelling on the application land and a scheme of similar covenants applied to the large Caldy Manor Estate. However, because this was not a building scheme the benefit of the covenants was not enjoyed by everyone on the estate. The application land was one of the last plots to be sold and so only relatively few people were entitled to object. None of those that did lived in the immediate vicinity of the application land. Indeed the lead objector live about a mile away. However, the three objectors who gave evidence made it clear that their concern was that if the application succeeded it would set a

precedent that could lead to the collapse of the general system of covenants in Caldy. The member, N J Rose FRICS, agreed and said in refusing the application:

> "... The scheme of covenants in these areas will in my judgment continue to contribute to the charm of Caldy, to the benefit of all its inhabitants, including the objectors." (paragraph 51).

54. The thin end of the wedge was a misleading phrase that suggested that a relatively unobjectionable application should be refused to prevent future applications. Mr Oughton stressed that the current application was highly objectionable for the reasons he had given. He cited the Privy Council case of *McMorris v Brown* [1999] AC 142 as an authority that had endorsed the approach of the Tribunal towards the question of the thin end of the wedge, namely that any application under section 84 had to be determined upon the facts and merits of the particular case and that the Tribunal could not bind itself to a particular course of action in the future in a case that was not before it. The current application should fail on its own merits. He accepted that Middleton Drive was not a building scheme but nor were the 1935 and 1971 restrictions isolated covenants. There was a fairly consistent history in Middleton Drive of restrictive covenants being imposed restricting each plot to one dwellinghouse. There were exceptions but this was the general pattern. The result of the observance of these restrictions was that Middleton Drive had been developed spaciously.

55. The drive had been laid out by a common vendor with common covenants and *Re Felton Homes Limited's Application* had shown the importance of preserving such schemes of common covenants. The experts agreed that Middleton Drive enjoyed premium values compared with Gisburn Road. The only dispute was whether this premium would be reduced by the new house. Mr Wightman's view, that there would be no effect upon the premium, was not credible. He had conceded that the development would reduce the value of No.2 by 20%. The new house might not destroy Middleton Drive's reputation for exclusivity but it could lead to other developments that would. Mr Kelly's evidence was far more plausible. He said that the development of The Orchard had adversely affected the values in nearby Ribblesdale Place and the new development would have the same effect on Middleton Drive. The applicants had wrongly argued that the new house was a Gisburn Road property. It was aligned with Middleton Drive, had access to it, would have a Middleton Drive address and would be marketed as a Middleton Drive property.

56. The 1971 restriction had foreseen three properties on plots one and two; one on plot one and two on plot two. The proposal did not conform to this restriction notwithstanding that some of the new garage might be located on plot two. That did not detract from the fact that a second house would be built on plot one.

57. *Shephard v Turner* was very different to the facts of this application. In that case it was proposed to build a new dwelling behind rather than in front of an existing dwelling. It was at the head of a close and not at the entrance and was a bungalow not a two-storey house. The objectors in this application were not relying upon the restrictions to protect them against temporary disturbance. The Court of Appeal in *Shephard* accepted that, as a guide, substantial

benefits meant "considerable, solid, big." Mr Oughton submitted that the benefits secured to the objectors in this case fell within that description.

58. The objectors were not motivated by money and they would opt for refusal of the application rather than the receipt of compensation. A monetary sum would not be adequate compensation for the loss of amenity and was difficult to assess. Mr Kelly said that there was both a loss of value and amenity to the objectors' properties. Whilst he had estimated the loss in value to No.6 as between 10 to 15% he had not given evidence of the effect on value of the other objectors' houses, although 10 to 15% would not be appropriate for them. Mr Oughton invited the Tribunal to use its experience and judgment in assessing any compensation for loss of amenity.

59. Mr Oughton argued that the application should be dismissed under ground (aa). That being so it was difficult to envisage how it might then succeed under ground (c). He submitted that the application should be dismissed under this ground also. If the Tribunal considered that one or either of these two grounds was established it should nevertheless exercise its discretion to refuse the application in order to preserve the character of Middleton Drive and to reflect the precarious nature of the possessory title to the land adjoining Gisburn Road. Without that land the plot would become even more cramped.

Conclusions

60. I consider ground 84(1)(aa) 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. Do the restrictions impede the proposed user?
3. Does impeding the user secure to the objectors 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?

61. The objectors put the applicants to the burden of proof to show that the user is reasonable. The proposed new house has received planning permission and is located in a purely residential area. Since *Bass* this Tribunal has consistently expressed the view that the existence of planning permission for a proposed development is very persuasive in determining the reasonableness of the user for the purposes of section 84(1)(aa) of the Act. The reasonableness of the user is considered on the assumption that the restriction does not exist and in relation to the applicants' land; I am not concerned about whether it is reasonable from the point of view of the objectors (the effect of the proposed user on them being considered under question 3 and 4 above). I note that planning permission was granted on appeal, against the decision of the local planning authority that the proposal was contrary to Policy 1 of the Pendle Local Plan. The planning inspector found that there was no conflict between the

proposal and Policy 1. Mr Hook for the applicants described the relevant planning policies, including Local Plan policy 20 that sets out criteria for new housing development. In my opinion the applicants have discharged the burden of proof to show that the proposed user is reasonable.

62. It is not disputed that the restrictions impede the proposed user and the applicants do not argue that impeding that user is contrary to the public interest. The next question to be answered therefore is whether by impeding the user, the restrictions secure to the persons entitled to the benefit of them any practical benefits.

63. At the hearing Mr Oughton accepted that Mr Walne of 3 Middleton Drive did not have the benefit of the 1935 restriction. The applicants did not challenge his objection at the time it was made and they accepted him prior to the hearing as an objector. However, Mr Oughton said that the applicants could resile from that position and Mr Moore relied upon that concession in his closing submissions. I have proceeded on the basis that Mr Walne was not entitled to the benefit of the 1935 restriction and I have therefore not placed weight upon his evidence. Nor do I place weight upon the evidence of Mr Buchanan (No.8) who, by his own admission, was not entitled to the benefit of either restriction. I have only placed weight upon Mr Taylor's evidence insofar as it deals with the factual background to the 1971 restriction; I place no weight upon his opinion about the effect of the new house on the setting of No.2 since he is neither an objector nor an expert.

64. I accept Mr Oughton's submission that the expression "practical benefits" should be interpreted widely. In *Gilbert v Spoor* Eveleigh LJ said at 32E:

> "The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase "any practical benefits of substantial value or advantage to them" is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression "any practical benefits" is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis."

65. The practical benefits claimed by the objectors may be summarised as: interference with the views from the objectors' properties; the loss of an attractive entrance to an exclusive cul-de-sac; loss of spaciousness; prevention of a new house that would be out of character with the other properties in Middleton Drive due to a cramped appearance, a small plot size and the breach of existing building lines; and the avoidance of a precedent for further development in the drive (the thin end of the wedge argument). In the light of the guidance given in *Gilbert v Spoor* I consider that all of the above are legitimately considered to be practical benefits in the context of the restrictions.

66. In considering whether these practical benefits are of substantial value or advantage to the persons entitled to enforce the restrictions I distinguish between the 1935 and 1971 restrictions. Two of the objectors against the 1935 restriction (Messrs Wessell and Green) argued that the new house would be visible from the upper floor of their houses. If it is then it is only marginally so and in my opinion it will not detract in any way from the view from those windows, which is predominantly of the distant fells to the south. Both properties will be approximately 120 metres from the new house and both stand on higher ground. I do not consider that the 1935 restriction, by impeding the proposed user, secures the protection of any view from 5 and 7 Middleton Drive that is of substantial value or advantage to the objectors.

67. Mr and Mrs Blackadder of 6 Middleton Drive are the only objectors with the benefit of the 1971 restriction. Their property adjoins the application land and, at the closest point, would be approximately 31.5 metres from the new house. That house would be visible from a number of rooms within No.6 both downstairs and upstairs. It would also be visible from the front porch and front garden. It would not be visible from the rear garden. The visual impact of the new house upon No.6 would be mitigated by three factors. Firstly, the main outlook from the front windows of No.6 is to the west rather than to the south (although there are a number of smaller windows that face the application land). The new house can be seen from the bay windows but that is not the primary view. Secondly, No.6 stands on higher ground than the new house. The ground floor of the proposed dwelling would be 5 metres lower than the nearest point of the boundary between the two properties. The ridge height of the new house would be approximately 8.2 metres. Thirdly, there is already a significant tree and shrub screen as well as No.2's double garage between No.6 and the new house. This would mitigate the impact of the new building and reduce any overlooking of No.6 from the proposed house. There are only two windows in the northern elevation of the new house that might overlook No.6; the kitchen at ground floor level and bedroom 3 on the first floor. In my opinion the new house would not interfere with the outlook from No.6, nor will it overlook it, to an extent the prevention of which, in itself, would secure to Mr and Mrs Blackadder practical benefits of substantial value or advantage.

68. The experts agreed that Middleton Drive is a prestigious address that commands premium values. It contains (generally) large houses in large grounds. It is exclusive, well maintained and spacious. I agree with the objectors that the construction of the new house would be out of character, particularly as it is located on a sensitive site at the entrance to the drive. It would be constructed very close to No.2, being 3 metres away at its closest point and only 5 metres away from the new garage along the whole width (6.5 metres) of its rear elevation. None of the existing houses in the cul-de-sac, including the semi detached pair at Nos.5 and 7, share a driveway. The new house would do so with No.2. The plot size of the new house appears to be smaller than it is due to the pronounced physical demarcation, by means of a mature tree and shrub screen as well as a post and rail fence, between the application land and the land over which the applicants hold a possessory title. The latter appears to be functionally distinct from the existing garden at No.2, even though it is connected to it near the road junction. The new house looks cramped. That was the view of the local planning authority. Mr Wightman acknowledges the impact of the new house upon No.2 in his estimate of the diminution of the latter's value by 20%. That is a significant amount and reflects the close proximity of the two houses.

69. The planning inspector disagreed with the local planning authority and in doing so emphasised the relationship of the new development with properties in Gisburn Road. He compared the plot size of the new house to those in Gisburn Road, he considered the effect on the building line in Gisburn Road and he reviewed the impact of the slightly elevated position of the new house above Gisburn Road. He concluded that whilst the new house would change the appearance of this part of Gisburn Road he did not consider it would be so obtrusive or noticeably different as to unacceptably affect the character of the area.

70. The analysis that I am required to undertake is different. I must consider the effect of the proposal upon the practical benefits that are secured by the restrictions in favour of the persons in Middleton Drive who are entitled to them. The new house would have an entrance onto Middleton Drive and would be marketed as a Middleton Drive address. It faces the drive and is to be deliberately screened from Gisburn Road. It is, without doubt, designed to form a part of the existing cul-de-sac. As such I consider that it would be out of character with the other properties in the drive and would adversely affect the exclusivity of the existing houses for the reasons put forward by the objectors. Its construction would detract from the spaciousness and appearance of the entrance to the drive. It would be built slightly forward of the de facto building lines both in the drive and Gisburn Road. It would be partially screened but would still be visible to users of the drive.

71. There is no building scheme in Middleton Drive but there is a system of covenants that was imposed from the late 1920s until the early 1970s which has achieved and maintained the exclusivity of the drive. In my judgment the 1935 and 1971 restrictions have contributed significantly to this process and by impeding the proposed user they secure for the benefit of the objectors practical benefits of substantial value or advantage. This conclusion is strengthened by consideration of the effect of the proposal on the views from, and privacy of, No.6, which although they are not sufficient in my view to constitute substantial practical benefits, nevertheless form part of a cumulative amenity that is substantial.

72. I do not think that there is a significant risk of the application being the thin end of the wedge for further development in the drive, with the possible exception of the 45 ft strip of land behind Nos.5 and 7. However, there was no evidence to suggest that this was under threat of redevelopment.

73. In reaching my decision I have had regard to the requirements of section 84(1B) of the Act including the development plan and other planning matters. There are no other material circumstances that I consider to be relevant.

74. I find that the applicants have failed to satisfy the requirements of ground (aa) and having determined that the restriction secures practical benefits of substantial value or advantage to the objectors it follows that they would be injured by the proposed modification. The application therefore fails under ground (c) also. In the light of my conclusions it is not necessary to consider the question of compensation.

75. The applicants have failed to establish either of the grounds 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 6 June 2008

A J Trott FRICS