

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS - modification - land with planning permission for residential dwelling – prohibition restricting construction of more than one house - whether covenant obsolete – held that it was not – application under ground (a) refused - whether covenant secured practical benefits of substantial value or advantage – held it did not – application under ground (aa) allowed – compensation payable of £25,000 and £15,000 - Law of Property Act 1925 s.84(1)(a), (aa).

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

BY

MR BEN LYNCH

Re: Land at St Catherines Road
Ruislip

Before: P D McCrea FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
20 September 2016

Edward Denehan, instructed by David Durn & Co, for the applicant.
Alexander Bastin, instructed by Bird and Lovibond, for the objectors.

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The following cases are referred to in this decision:

Re: Truman, Hanbury Buxton & Co's Application [1956] 1 QB 261

Turner & Anor v Pryce & Ors [2008] EWHC B1 (Ch)

Re: Davies's Application (1973) 25 P&CR 115

Re: Crowe & Heaton's Application (2008) LP/34/2006

Re: Nicholls' Application [1977] 1 EGLR 144

Re: Page's Application [1996] 71 P&CR 454

Dobbin v Redpath [2007] EWCA Civ 570

Re: Cordwells' Application LP/40/2006

Re: Bass's Application (1973) 26 P&CR 156

Re: Martin's Application (1989) 57 P&CR 119

Shephard v Turner [2006] 2 P&CR 28

Introduction

1. This is an application under grounds (a) and (aa) of section 84(1) of the Law of Property Act 1925, by Mr Ben Lynch (“the applicant”) to modify a restrictive covenant in order to build a detached two-storey house for which planning permission has been granted. It concerns land to the southwest of St Catherines Road, Ruislip, Greater London (“the application land”).

2. The restriction was imposed by a conveyance dated 30 August 1911 made between the HTH Syndicate Limited (as vendor) and Mr Edward Tobutt (as purchaser) by which the purchaser covenanted with the vendors and their assigns the owners for the time being of the adjoining property on the St Catherines estate that the purchaser his heirs and assigns would at all times hereafter observe and perform stipulations imposed or to be imposed on the purchasers of the St Catherines building estate which were contained in the first schedule to the conveyance.

3. Restriction 8 of the first schedule is the subject of this application. It provides:

“No house shall except as otherwise appears in Part III of this Schedule be other than detached, and not more than one house shall be built on any one lot as numbered on the plan (except lot 79 on which not more than two houses may be built).”

4. Whilst the 1911 conveyance was not available, it is common ground that the application land is restricted by the above covenant, and that the proposed erection of the house would breach the restriction, as it would include the building of more than one house on what was one of the original lots. It is likely that at one time the application land formed part of the original 1 St Catherines Road, although a small part of the application land also falls within what was lot 79.

5. Mr Edward Denehan of counsel appeared for the applicant, whom he called to give evidence together with a neighbour, Mr Gary Coppins, and Mr Harj Banger MRICS who gave expert valuation evidence.

6. The objectors were represented by Mr Alexander Bastin of counsel, who called Mr Derek Porteous and Mr Douglas Mayes to give evidence. None of the other objectors, whose names appear in the appendix to this decision, appeared at the hearing but I have read and considered their written statements.

7. On the afternoon of 19 September 2016 I inspected the application land, and also viewed it from the properties of Mr Porteous and Mr Mayes, accompanied by the parties. I also made an unaccompanied tour of the surrounding estate.

Preliminary issues

8. The application was submitted to the Tribunal on 29 July 2015 by Messrs David Durn and Co, solicitors for the applicant. A schedule to the application enclosed a plan which showed “land believed to be the original estate and having the benefit of the covenants”. Some 26 properties on St Catherines Road, 19 on Boston Grove, 22 on Bury Avenue, 11 on Bury Street, and “Elmwood” on Old Howletts Lane, were served with notice of the application.

9. On 20 November 2015, Messrs Bird and Lovibond wrote to the Tribunal to confirm that they were instructed by objectors who lived in 32 surrounding properties who, with the exception of Mr Nagra, are listed in the appendix to this decision. On 7 January 2016, the Tribunal wrote to solicitors for the applicant, asking whether the applicant alleged that any of those objectors were not entitled to the benefit of the restriction, and if so the grounds relied upon. The Tribunal indicated that any objector whose entitlement was not so disputed would be admitted to oppose the application. On 19 January, the applicant's solicitors filed with the Tribunal a letter sent to the objectors' solicitors, disputing only Mr Nagra's entitlement. The acceptance that 31 objectors had the benefit of the covenant was, I assume, on the basis that the covenant created a building scheme.

10. Following further correspondence, in a letter to the Tribunal dated 29 March 2016, the applicant's solicitors remarked "we had never objected to any of the objectors save for... Mr Nagra". The Tribunal confirmed on 14 April that the objectors had been admitted, apart from Mr Nagra. The Tribunal directed that, in view of the number of objectors whom it is agreed are entitled to rely on the restriction, Mr Nagra's entitlement to rely upon the restriction would be considered at the hearing.

11. Mr Nagra's position was not advanced with any enthusiasm by Mr Bastin. In any event, given the distance between 39 Howletts Lane and the application land, and in view of the fact that other objectors' properties are much closer, it is perhaps unnecessary for me to decide whether or not Mr Nagra has the benefit of the restriction. For completeness, and in the absence of any strong argument to suggest that he is, I find that Mr Nagra has not established that his property was part of the St Catherines estate in 1911 and he is not entitled to rely upon the restriction.

12. The second preliminary issue concerned a late change in the applicant's stance, which became apparent only from Mr Denehan's skeleton argument, filed and served a few days before the hearing. In this, he submitted that none of the objectors had the benefit of the covenant, as there was no building scheme, or in the alternative that some of the objectors¹ did not have the benefit of the covenant. The objectors' solicitors objected to this late change of position by the applicant, and pointed to the Tribunal's confirmation of 14 April 2016 that the objectors had been admitted. For reasons of timing and cost, the objectors would not be in a position to address these new points. They submitted that if the applicant were permitted to raise these arguments, the hearing should be adjourned to enable the objectors to consider the points raised.

13. Having heard submissions from Mr Denehan and Mr Bastin on this preliminary point, I refused to permit the applicant to raise these new arguments, first because it was too late to do so, and secondly because the applicant had accepted, months beforehand, that the objectors did have the benefit of the restriction. The application therefore proceeded on the basis of grounds (a) and (aa) of s84(1) of the Act, assuming the objectors had the benefit of the restriction. It was common ground, however, that Mr De Costa, of "Elmwood", did not have the benefit of the restriction, and had not submitted an objection.

Facts

¹ They were Mr and Mrs Porteous, 1 St Catherines Road; Mr Marner and Mrs Handley, 1A St Catherines Road; Mr De Costa, Elmwood; Mr and Mrs Bardoli, 25 Howletts Lane; Mr and Mrs Lister, 31 Howletts Lane; and Mrs and Mrs Chapman, 37 Howletts Lane.

14. From the evidence and my site inspection I find the following facts.

15. The application land is a relatively flat, broadly rectangular site fronting St Catherines Road, Ruislip, close to its junction with Bury Street. At the time of my inspection it was overgrown but clear of buildings.

16. The area is wholly residential. Adjoining the left hand boundary of the application land are the back gardens of 169 Bury Street, owned by Mr Coppins (who supports the application), 167 Bury Street, owned by Mr and Mrs Mayes (who object), and a small substation site which fronts the pavement. To the rear of the application land is “Elmwood” (the owner of which is not an objector), and to the right hand boundary is 1 St Catherines Road, owned by Mr and Mrs Porteous (who object). Number 163 Bury Street² is to the south east of the application land, but not contiguous to it, and is owned by Mr Powell and Ms Calderato (who object). Immediately opposite the application land is 2A St Catherines Road, owned by Mrs Webb, who supports the application. Other objectors’ properties are further afield, and are listed in the appendix.

17. The applicant purchased the application land on 21 February 2014 for £88,000. He was aware of the restriction when purchasing. At that time there was a dilapidated single garage in the front left-hand corner of the site, which the applicant subsequently demolished. He installed large wooden hoardings, but at the time of my inspection these had been replaced with a rudimentary plastic fence.

18. Planning permission for the erection of a single house on the application land was granted on 12 June 2014 by the London Borough of Hillingdon under code 33892/APP/2013/1337. The proposed development is of a two-storey, four bedroomed, detached dwelling with associated amenity space and parking and installation of vehicular cross-over front involving demolition of existing garage and amendments to existing vehicular cross over. The planning permission was subject to conditions which included:

Condition 2 – the permitted development must be carried out in complete accordance with the details shown on the submitted plans and thereafter must be retained/maintained for as long as the development remains in place.

Condition 3 – no additional windows, doors or other openings may be constructed in the walls or roof slopes of the development facing north east or south west.

Condition 4 – the first floor windows facing “Elmwood” must be glazed with permanently obscured glass and be non-opening below a height of 1.8m taken from the internal finished floor level for so long as the development remains in existence.

Condition 5 – no garages, sheds or other outbuildings, nor extension or roof alteration to any dwelling houses, may be erected without the grant of further specific permission from the local planning authority.

² There is no 165 Bury Street, as 163 was built on a double plot.

19. The only objections to the planning application were made by Mr and Mrs Mayes and Mr and Mrs Porteous. Mr and Mrs Mayes wrote to the applicant on 31 December 2012, indicating that they had the benefit of the covenant. An application was then made to the Tribunal, as outlined above.

20. The hearing bundle contained small scale copies of some of the drawings and plans which were submitted with the planning application. At my request, the applicant's solicitors subsequently submitted a full size copy of the set of drawings which were attached to the planning application, and which are referred to in the decision notice. Two of these drawings, which showed the existing and proposed site layouts, were not included in the hearing bundle. This is regrettable, as their inclusion, even on a small scale, would have been of assistance. The existing site plan referred to a "dwelling approved under planning ref: 33892/APP/2007/1159", which appeared to show that a previous planning permission had been granted for a smaller house than that which is the subject of this application. It is regrettable that this was not referred to by the applicant or his witnesses, including Mr Banger who referred to Town Planning in his expert report.

Evidence for the applicant

Mr Ben Lynch

21. Mr Lynch accepted that the application land was the subject of the restriction but he said that the restriction was now obsolete and/or it impeded a reasonable use, being the erection of a house in accordance with the planning permission he had obtained. The application land had never had a dwelling house on it and when he bought it there was a dilapidated detached single garage which was accessed from St Catherines Road. Otherwise it was full of overgrown shrubs, trees and weeds. He demolished the garage in or around 2014.

22. Mr Lynch said that when the covenant was imposed, the application land formed part of a much larger plot. He believed that the covenant was not imposed to prevent any dwelling on this parcel of land.

23. He considered that the application land was as wide if not wider than other plots on the St Catherines estate which had been built on and that if developed, it would not present, from the street, any difference in the character of the locality. The properties on the St Catherines estate were of different sizes and appearance including detached and semi-detached houses, and bungalows. He considered that the proposed construction would not affect the density of houses on the estate.

24. The application land appeared to be larger than the plot on which 2A St Catherines Road had been built. Mr Lynch thought that 2A had been built on a plot that was originally part of No.2. There had already therefore been development on the estate which was similar to the proposed development and accordingly the covenant had become obsolete.

25. Mr Lynch accepted that the covenant had a continuing use and purpose in that it protected the locality from development from commercial use and prevented over density through the erection of flats. He stressed that the application was only for the modification of the covenant rather than for a discharge.

26. Mr Lynch considered that the proposed development would result in a reasonable use of the application land, primarily because planning permission had been granted for it, whereas the application land was currently abandoned and had been overgrown with a dilapidated garage prior to his demolition of it. This was entirely negative and was inconsistent with the standard and quality of housing in the locality. Mr Lynch considered that the covenant had already been breached on a number of instances on the estate, for instance the properties erected at 1A, 2A, 5A, 10A, 12 and 12A, and 14A St Catherines Road and 41/41A Howletts Lane.

27. Mr Lynch said that the proposed house would be entirely in keeping with the rest of the estate, and would be of a similar size and on a similar sized plot. It would be entirely in keeping with the estate's present character. The properties on the estate were not uniform in design or appearance. For instance, those on Boston Grove and Howlett's Lane were mostly bungalows, and there were mainly detached houses in St Catherines Road and Bury Avenue. The proposed house would not detract in any way from the estate's overall appearance and it would be a great improvement on the appearance of the application land as it was when he bought it.

28. Mr Lynch said that his solicitors circulated a note to the residents of the estate informing them of the nature of the application to the Tribunal. Twenty replies were received of which eighteen consented to the modification. The owners of No. 163 Bury Street had objected and the owner of 18 St Catherines Road indicated that the land was owned by the local council and was leased to them for charitable purposes – Mr Lynch thought this was in fact a Scout Hut. Mr Lynch said that the owners of 2A St Catherines Road, immediately opposite the application land and 169 Bury Street, immediately adjacent to it, had consented to the proposed development. Additionally, he noted that no objection had been made from the owners of Elmwood, immediately to the rear of the application land.

29. In essence, Mr Lynch considered that the modification of the covenant as submitted in his application allowed a reasonable use of the application land and would not set a precedent for the rest of the estate since the application land was the only piece of vacant land on which an additional property could now be built. Its erection would not deprive the owner of any other house on the estate of a practical benefit as it did not interfere with any rights to light or of a view, neither did it represent an over density compared with the rest of the estate.

Mr Gary Coppins

30. Mr Coppins said that he supported the application made by Mr Lynch because during the time he had owned 169 Bury Street, he had noticed that the application land was overgrown with weeds, trees and shrubs and had for a long time had an unused and dilapidated garage. Mr Coppins believed that it would add to the amenity value of his property and indeed all of the properties in the nearby locality if the proposed development went ahead. He considered it would be a reasonable use of the application land. He accepted in oral evidence that his view of the proposed dwelling would be obscured by a large hedge which was at the bottom of his garden.

Mrs Jean Webb

31. A witness statement had been made by Mrs Webb, in support of the application, but she did not attend due to illness and although I have read and considered her evidence it was therefore untested.

Mr Harj Banger BSc(Hons) MRICS

32. Mr Banger has been a Chartered Surveyor since 2001, and has been employed by Dunphys, based in Hounslow, since April 2008. Mr Banger was instructed to provide his expert opinion on whether the development of the application land will adversely impact on the amenity of the “properties adjoining” – these being 1 St Catherines Road, 167 and 169 Bury Street, and Elmwood.

33. In a short report, Mr Banger said that in his opinion the proposed development of the application land would have no detrimental impact on the amenity or value of these properties, taking into account the size, orientation and design of the new house, as well as the boundary screening provided by the existing and proposed fencing, walls, trees and hedging. He said that none of the adjacent houses were sufficiently close to be affected by loss of light or material impairment of outlook, and none were likely to be any more adversely affected by noise or other disturbance than might reasonably arise from the normal use of one of the other houses that they are adjacent to.

34. In his written report, he concluded that the proposed development would have no effect on the amenity or value of the houses adjoining, but that since the site was overgrown and neglected, the proposed development would in all probability have a beneficial effect on the appearance of the “road frontage immediate area”. In cross examination, he accepted that there might be some, but little, impact on the adjoining houses.

Evidence for the Objectors

Mr Derek Porteous

35. Mr Porteous said that the application land originally belonged to the same owner as his house, No.1 St Catherines Road, but some twenty years ago it was sold because the new owner of No.1 could not afford both the house and the application land. The plot was fenced off and registered separately. The boundary was not correctly registered at the Land Registry and took some time to rectify when Mr and Mrs Porteous moved into No.1. As a result of this boundary correction however the application land was retained by the vendor’s family. They then decided to sell the application land and approached the households neighbouring the plot asking if anybody wanted to buy it. Mr and Mrs Porteous responded positively and would have put the plot back into garden use with a possible addition of a garage, but this did not take place.

36. Mr Porteous said that when he and his wife bought No.1 St Catherines Road, they valued the fact that in the estate the plots are spacious and the individually designed houses provide a neighbourhood of character. If the covenant was modified it would allow attempts to be made to place denser housing in the area which would destroy the character that they valued.

37. He and his wife have seen developments locally where individual houses have been sold and several houses squeeze onto the plots with minimal gardens. This over development puts pressure on roads with more cars using the road and parking becoming a serious problem because of proximity to the Ruislip Lido.

38. Mr Porteous said that what is a very small space and having to observe the building line and maintain a minimum width from neighbouring properties means that the result in houses is cramped and fussy and out of character with the other houses. The plot has little depth and the rear garden will be very short indeed which is out of tune with the other houses.

39. Mr Porteous said that he did not think that after a century of protecting the estate from over development, the restrictive covenants should be modified purely for commercial gain. The plot was never intended as a building plot; it was an accident of finance that the previous owner of his house had been unable to fund the purchase of the plot for use as a garden.

40. Mr Porteous accepted in cross examination that the proposed house would be similar to some of the other houses on the estate and there was no particular uniform style of property.

Mr Douglas Mayes

41. Mr Mayes gave oral evidence in support of the witness statement from him and Mrs Joan Mayes. Mr Mayes' main objection was that if constructed on the application land, the proposed property would overlook his garden and would restrict light to his property. It would also not be in keeping with the rest of the properties on the estate because of the size of the property in relation to the size of the plot – he thought it would be over development of the site.

42. Mr Mayes' other concern was that any modification of the restrictive covenant would destroy the character of the estate and lay open to any other developer purchasing property on the estate and building anything they wished, with no thoughts to the impact to the surrounding properties and people. He accepted in cross examination that the proposed building would “look quite good” from the roadside and also accepted that the extent of the application land was similar to some of the plots elsewhere on the estate. He also accepted that residents in the proposed new house would not be able to overlook his garden – he clarified this to say that when he meant overlooking he was referring to the fact that he would be able to see the proposed house from his garden and patio.

Submissions and conclusions

Section 84(1)(a)

43. In order to succeed under this ground, the applicant must show that by reason of changes in the character of the property or the neighbourhood, or other circumstances of the case which may be deemed material, the restriction ought to be deemed obsolete.

44. It is first necessary to consider the original purpose of the covenant. Mr Bastin submitted that it was to restrict use to houses only and prevent development at too great a density for general amenity - in most instances one house per plot was allowed though the original site of the application land was permitted two. I accept that submission.

45. Mr Bastin referred to *Re: Truman, Hanbury Buxton & Co's Application* [1956] 1 QB 261 in which Romer LJ said this:

“It seems to me that the meaning of the term “obsolete” may very well vary according to the subject matter to which it is applied. Many things have some value, even though they are out of date in kind or in the form - for example, motor-cars or bicycles, or things of that kind - but here we are concerned with its application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them.

It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion it is in that sense that the word “obsolete” is used in section 84(1)(a).”

Mr Bastin submitted that the original purpose of the covenant could still be achieved, and relied on *Turner & Anor v Pryce & Ors* [2008] EWHC B1 (Ch) in which Stephen Smith QC, sitting as a Deputy High Court Judge, said that “a Court should only exercise the power [to rule that a covenant has ceased to be enforceable through obsolescence] in a very clear case”, and that although there had been some breaches of covenant where the density of residential units had been allowed to exceed the maximum stipulated by the developer, he could not accept that these lapses changed the character of the estate and rendered the covenants futile.

46. It is next necessary to consider whether there have been material changes in the character of the land, or of the neighbourhood, or some other material change in circumstances.

47. Mr Denehan submitted that in respect of the character of the application land itself, until 20 years ago it formed part of a single plot – that of No. 1 St Catherines Road. Whilst there was a private garage located on the property, other than that the application land was simply garden grounds. The application land wholly changed when it was enclosed as a discrete plot with a garage, and latterly it has been an overgrown, ugly, sterile plot. Mr Bastin did not dispute this, but submitted that a change in ownership is not a change in character, nor is a change in condition of the land. Relying on *Re: Davies's Application* (1973) 25 P&CR 115, he submitted that the applicant should not rely on his own neglect of the land in order to make a case for there having been a material change in its condition.

48. Mr Bastin submitted that there was no evidence from either the applicant or his expert that there has been any material change in the character of the land, and emphasised that the burden was on the applicant to show that there had been a material change, relying on *Re: Crowe & Heaton's Application* (2008) LP/34/2006

49. In respect of changes of character in the neighbourhood, Mr Denehan submitted that whilst that neighbourhood has remained residential, its character had changed because there had been subdivisions of original lots. Lot 79 had been divided and then further divided to form 1 St Catherines Road, 1A St Catherines Road and the application land. The plot upon which 2A St Catherines Road stood must also be the result of a sub-division. There had been reduction in the size of plots of dwellings since 1911, and there was no longer a uniformity of plot sizes, or of plot width.

50. Mr Bastin submitted that there was no real evidence from the applicant that there had been changed in character in the neighbourhood, no aerial photographs had been submitted, and no plans submitted. All the applicant could rely upon was that there had been some small amount of sub-division. He compared this with the substantial changes which the Tribunal found to amount to a change in character of the neighbourhood in *Re: Nicholls application* [1977] 1 EGLR 144, and, relying on *Davies's Application* where the Tribunal (Mr J R Laird FRICS) was not persuaded that "so much building had occurred already that now nothing matters".

51. Mr Denehan submitted that there were other changes in material circumstances – the fact that the application land had been removed from the curtilage of 1 St Catherines Road, the effect of which was to establish a new single plot; as burdened by the restriction this could not be used for any worthwhile purpose which ought to render the restriction obsolete. The purpose of the restriction was to ensure that one plot contained a single dwelling house save for lot 79, now that the application land itself was a single plot, similar in size to other plots in St Catherines Road, and capable of accommodating a detached dwelling house, the restriction served no purpose in its operation to the application land.

52. Mr Bastin submitted that the covenant's original purpose can still be achieved as the restriction gives a real protection. Any changes have not diluted the effect of the covenant to the extent that it ceased to have effect – the area remained one featuring low density housing. Secondly, the restriction was an advantage to those living in the vicinity, since the application land was part of a wider building scheme which continued to serve the purpose of controlling development in the area.

53. Finally, Mr Bastin submitted that the thin end of the wedge argument was relevant and ought to be given considerable weight relying on *Re: Page's Application* [1996] 71 P&CR 454, *Dobbin v Redpath* [2007] EWCA Civ 570 and *Re: Cordwells' Application* LP/40/2006. Permitting the application would risk allowing the inevitable onward march of development which would lead to a domino effect. The integrity of the scheme ought to be maintained.

54. I have accepted that the purpose of the covenant was to restrict development to single houses on single plots (with two on lot 79), to prevent over density, and to prevent for instance blocks of apartments. I also accept that there have already been some breaches – generally where a house has an address suffix A. But in my judgement these changes do not render the covenant obsolete. There have been no significant overall changes to the character of the neighbourhood, nor other material circumstances. I am not persuaded that short term considerations such as a change in ownership in the application land, nor a change in its current condition, give rise to obsolescence.

55. As Mr Bastin submitted, the onus is on the applicant to show that the covenant is obsolete, and in my judgement there is no clear case, as envisaged in *Turner v Price*, that it is. Notwithstanding some piecemeal apparent breaches, the covenant still prevents rows of houses, blocks of apartments, or other over-development from occurring. The application under this ground therefore fails.

Section 84(1)(aa)

56. Both counsel framed their submissions by reference to the questions posed in *Re: Bass's Application* (1973) 26 P&CR 156.

57. It was common ground that the proposed user was reasonable, and that the restriction impeded that proposed user. The proposed user was clearly not contrary to the public interest.

58. As regards whether impeding the proposed user secured practical benefits to the objectors, Mr Denehan accepted that a view, light, and the open character of a neighbourhood may be practical benefits, but submitted that this covenant did not secure any such practical benefits to the objectors.

59. Mr Bastin submitted that practical benefits must be assessed by their value to the objectors. For Mr Porteous and Mr Mayes, the ability to control the density of development of land adjoining their own was a real practical benefit. They also both had concerns about being overlooked. Mr Bastin stressed that there was a general amenity for the objectors that would be affected, the houses in the area were generally worth around £1million, with a sense of space around them, and occupiers in the neighbourhood would expect that to remain. Should the proposed development be permitted by a modification of the covenant, there would be a sense of cramping, which the Tribunal, upheld in *Re: Martin's Application* (1989) 57 P&CR 119, had considered a practical benefit.

60. Mr Denehan argued that in cross examination Mr Porteous had accepted that the over-development to which he referred in his witness statement was not, in fact, on the Estate. He had spoken of parking and road issues, although Mr Bastin did not rely on these as part of the objectors' case. As regards Mr Porteous's evidence regarding the impact on the street scene, and his suggestion that the proposed house was fussy and out of character, Mr Denehan said that he had not given evidence showing how this would impact on how he enjoyed the amenity of his property. There was no evidence at all from Mr Porteous as to any negative impact on his property. The reason for this, Mr Denehan submitted, was because there would not be any.

61. As regards the plot being a very small space, as Mr Porteous maintained, Mr Denehan submitted that the application land was wider than some of the others on the estate and that the depth of the plot was irrelevant when considering the impact of the development on the street scene. There was nothing in the covenant requiring a certain amount of each lot to remain as a garden. In respect of the style of the proposed property, there was no uniformity of design or character, and it was entirely in keeping with the other dwellings on the road.

62. In respect of overlooking, Mr Mayes confirmed that he meant that he would see it from his garden. Mr Denehan said that it was possible that a structure could be erected that would not be in breach of the covenant and would be equally visible. Mr Mayes was concerned about lack of light, but confirmed in cross examination that this was in respect of light to his garden – and again Mr Denehan submitted that another structure might be erected that would have a similar effect. In any event, when the sun was setting, it would already be behind 1 and 1A St Catherines Road.

63. Mr Denehan submitted that I had not heard any oral evidence from any of the other objectors in support of their witness statements, and should therefore place little weight upon them.

64. The majority of the witness statements of both Mr Porteous and Mr Mayes were not directed at factors relevant to ground (aa) and have been therefore of little assistance to me in considering it. They also both made significant concessions during cross examination. In my judgement there is nothing in the objectors' case that the proposed development would be out of keeping with the street scene. I accept that there is no uniformity of house design; the proposed house looks relatively attractive, and Mr Mayes accepted that it would "look quite good".

65. However, I am satisfied that (in respect of Mr Porteous) the ability to resist having a house "shoehorned", to use Mr Bastin's term, into the land adjacent to him is a practical benefit; and (in respect of Mr Mayes) the ability to resist a house being erected that he could see from his patio, and that would probably block some light to his garden, is also a practical benefit.

66. I now turn to whether those practical benefits are of substantial value or advantage, and in doing so I also consider the evidence as regards whether money would be an adequate compensation, as this will assist in the assessment of value.

67. I did not find Mr Banger's evidence to be of much assistance. His report was framed in a restricted way, and made no reference to s84(1) of the Act, despite his indication, in answer to a question from me, that he had carried out 10 or 12 similar valuations in the past. His written evidence was that there would be no impact on the amenity of the objectors. In cross examination he accepted that there would be some impact, but that this would be small. He accepted that his opinion might have been better informed had he inspected the application land from the objectors' properties. I have had that benefit.

68. Despite the absence of evidence from the objectors as to how the modification of the covenant should be compensated, or any evidence as to why any practical benefits would be of substantial value or advantage, as an expert Tribunal I am satisfied that I can form my own view.

69. Doing the best I can, and having inspected the application land from both properties, in my judgment there would be a small effect on the value of both Mr and Mrs Porteous and Mr and Mrs Mayes's houses. In my view this would be in the order of a 2.5% reduction on the value of 1 St Catherines Road - Mr and Mrs Porteous's house - the ground floor rooms of which will be partly overshadowed. In respect of shadowing to Mr and Mrs Mayes's garden at 167 Bury Street, in my judgement the reduction in value would be in the order of 1.5%. Mr Banger thought that the surrounding properties would have a value of something in the order of £1 million each, and I therefore find that that the reduction in value of Mr and Mrs Porteous's house would be £25,000, and that of Mr and Mrs Mayes's house, £15,000. I am not persuaded that there would be any effect on the value the houses of any of the other objectors, although I would stress that this is not because they did not attend to give evidence, but because their properties were not adjoining the application land.

70. Having regard to the effect on value of the two adjoining properties as a likely percentage of their capital values, I do not consider that the benefits secured by the covenant are of substantial value or advantage, and I am satisfied that money would be an adequate compensation.

71. I remind myself at this stage of the comments of Carnwath LJ, as he then was, in *Shephard v Turner* [2006] 2 P&CR 28:

“In my view, account must be taken of the policy behind paragraph (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights”

72. In my view, the application succeeds under ground (aa), because unless modified the covenant impedes a reasonable use of the land – namely the implementation of a planning permission which in my view is sufficiently controlled by conditions to adequately protect the amenity of the immediately neighbouring objectors.

73. As regards the thin end of the wedge argument, I accept Mr Denehan’s submission that each application to the Tribunal would be considered on its own merits, and that there is no evidence before me that there were other open plots that could be developed in the same way. However, this decision should not be considered to be a precedent for other plots on the St Catherines estate, should any come forward in the future.

Disposal

74. The application under ground (a) of s84(1) of the Act fails, but the application under ground (aa) succeeds, and the following Order shall be made, subject to the prior payment of compensation of £25,000 to Mr and Mrs Porteous, and £15,000 to Mr and Mrs Mayes:

75. The entry in the charges register for the application land shall be amended to include a new paragraph 8a in part I of the first schedule to read as follows:

“Notwithstanding anything in paragraph 8 above, a new detached dwelling may be constructed in accordance with the planning permission granted by the London Borough of Hillingdon on 12 June 2014 under reference 33892/APP/2013/1337 and in accordance with the accompanying plans and subject to the conditions imposed. Reference to the said planning permission shall include any renewal of that permission and any other matters approved in satisfaction of the conditions attached to that permission.”

76. An order inserting this clause as above shall be made by the Tribunal provided, within three months of the date of this substantive decision, the applicant shall have paid the compensation sums referred to in paragraph 74.

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

Dated: 23 November 2016

PD McCrea FRICS

APPENDIX

List of Objectors

Mr D Porteous – 1 St Catherines Road
Mr A Marner and Miss D Handley – 1A St Catherines Road
Mr Balbir Aujla – 5 St Catherines Road
Mr Clement Frances – 6 St Catherines Road
Mr Colin Frost – 7 St Catherines Road
Mr G Skipp – 7A St Catherines Road
Mr Duncan and Mrs Yvonne Riggall – 1 Bury Avenue
Mr Thomas Walker and Mrs T Walker – 9 Bury Avenue
Mr and Mrs Clark – 12 Bury Avenue
Mr and Mrs D Ford – 14 Bury Avenue
Mr Wequas Azad – 16 Bury Avenue
Mr David Hanlon – 20 Bury Avenue
Miss Catherine Joy Spanner – 22 Bury Avenue
Mr and Mrs Phrixus Prodromon – 26 Bury Avenue
Mr Peter Mowbray – 1 Boston Grove
Mrs Millicent Burton – 3 Boston Grove
Mr R H Stevens – 4 Boston Grove
Mr Robert Cluer – 18 Boston Grove
Mr Mark Kimsey – 24 Bury Avenue
Mr Alan Powell and Ms Pauline Calderato – 163 Bury Street
Mr Douglas Mayes and Mrs Joan Mayes – 167 Bury Street
Mr R Page – 173 Bury Street
Mr T Wiseman – 177 Bury Street
Mr Kevin Lewis and Mrs Susan Lewis – 179 Bury Street
Mr Justin Grant and Mrs Katie Grant - 181 Bury Street
Mr D Bardoli – 25 Howletts Lane
Mr Vance Lister and Mrs Adelaide Lister – 31 Howletts Lane
Mr William Fuller – 41 Howletts Lane
Mr S Wardlaw – 43 Howletts Lane
Mr George Higgins and Mrs Linda Higgins – 45 Howletts Lane
Mr Lazar Der Gregorian and Mrs Christina Der Gregorian – 47 Howletts Lane
Mr and Mrs Hickey – 49 Howletts Lane

(Mr Nagra, of 39 Howletts Lane, was also an original objector)