IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 8 (LC)
Case No: LP/3/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – garden land with planning consent for additional residential dwelling – restriction preventing construction of more than one house per plot – building scheme – whether covenant secures practical benefits of substantial value or advantage – held it did not – exercise of discretion - application under ground (aa) allowed – Law of Property Act 1925 s.84(1)(aa)

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

BETWEEN:

ALAN DRUMMOND (1)
DIANE DRUMMOND (2) **Applicants**

- and -

JAMES & SALLY ANN BASTOW (1)
BRIAN & ELISABETH GRIFFIN (2)
MARGARET OWEN (3)
JOHN & JOYCE MAYHALL (4) **Objectors**

Re: 1 Cedar Lawn, Romsey, Hants SO51 7US

- -

Before: Paul Francis FRICS
Sitting at Southampton Combined Court Centre, London Road, Southampton SO15 2XQ
on 7 November 2017

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William Webster instructed by Andrew Simpson, Solicitor, for the applicants
Amy Proferes instructed by Dutton Gregory, Solicitors, for the 4th objectors

The following cases are referred to in this decision:
Re Bass Limited's Application (1973) 26 P&CR 156
Re Zaineeb al-Saeed's Application (2002) LP/41/1999
Re Zopats Developments' Application [1966] 18 P&CR 156
Re Shephard v Turner [2006] 2 P&CR 28
Re Snaith and Dolding's Application (1996) 71 P&CR 104

The following cases were also referred to in argument:
Dobbin v Redpath [2007] EWCA Civ 570
Re Martin's Application (1989) 57 P&CR 119 at p125

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DECISION

Introduction

1. This is a decision on an application made on 11 February 2017 under ground (aa) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act") by Mr Alan Drummond and Mrs Diane Mabel Drummond ("the applicants") for the modification of a restrictive covenant currently burdening land at 1 Cedar Lawn, Romsey, Hants SO51 7US (registered at the Land Registry under Title No. HP640199) ("the application land"). Such modification, if granted, will allow a property developer to whom the applicants have agreed to sell part of the garden to the west of their house to construct a detached, 4 bedroom, two storey dwelling and attached garage in accordance with conditional planning permission which was granted by Test Valley Borough Council on 4 October 2016 under reference 16/0149/FULLS.

2. The restriction, the subject of the application, is contained within the Fourth Schedule of a conveyance dated 13 May 1981 between Macstone Company (Development) Ltd and Alan John McKendrick and Christine Joan McKendrick and reads:

> *"(iv) Not more than one detached dwellinghouse with integral garage and usual offices shall be erected on the property hereby conveyed."*

It is agreed that the application land is subject to a building scheme of mutually enforceable covenants encompassing the 11 properties that now form the greater part of the Cedar Lawn cul-de-sac. The remaining building in the road, known as Cedar Lawn Nursing Home, does not form part of the scheme.

3. The objectors are:

(1) James Nicholas Bastow and Sally Ann Bastow, 7 Cedar Lawn, Romsey SO51 7US

(2) Brian Griffin and Elisabeth Griffin, 8 Cedar Lawn, Romsey SO51 7US

(3) Margaret Owen, 16 Cedar Lawn, Romsey SO51 7US

(4) John Mayhall and Joyce Mayhall, 17 Cedar Lawn, Romsey SO51 7US

An objection from Peter and Vivien Lelyveld of 15 Cedar Lawn has been withdrawn.

4. Mr William Webster of counsel appeared for the applicants and called Mr Alan Drummond who gave evidence of fact. Expert evidence was called from Mr Peter Williams MRICS IRRV of Lambert Smith Hampton, Southampton.

5. Miss Amy Proferes of counsel appeared for the 4th objectors, and called Mr John Mayhall who gave evidence of fact. She also called Mr Michael Donaldson FRICS MCIArb MAE of

Marquis & Co, Twickenham who was appointed by the Mayhalls and gave expert evidence on their behalf and for the other objectors. Evidence of fact was also received from Mr Bastow, and a notice of objection was received from Mr & Mrs Griffin but neither appeared.

6. I made an accompanied internal and external inspection of the application land and No. 17 Cedar Lawn on 6 November 2017 together with external inspections of all the other properties in Cedar Lawn and the area in general.

Facts

7. From the evidence (which included brief joint statements of agreed facts and issues from the experts) and from my inspection, I find the following facts. Cedar Lawn is an attractive residential cul-de-sac on the north-eastern outskirts of Romsey, accessed off Braishfield Road close to its junction with the A3090 Winchester Road. The development, which was built in the early 1980s, comprises 11 detached two storey traditionally designed and constructed houses occupying various sized plots. On entering Cedar Lawn, the application land (No.1) is the first house on the right hand, southern side and No.17 (Mr & Mrs Mayhall) is first on the left, directly opposite. Both of these houses are located to the eastern end of their respective plots, thus having the majority of their gardens adjacent to the junction with Braishfield Road. The application land also backs directly onto Winchester Road. Proceeding along the close, Nos. 2, 3, 4 and 5 follow No.1 on the right-hand side and all back onto Winchester Road. The development then turns northwards with Nos. 6, 7 (Mr & Mrs Bastow) and 8 (Mr & Mrs Griffin) (off the hammerhead end to the close) backing on to houses fronting School Road. Then, continuing anti-clockwise, also off the head of the cul-de-sac is the large detached period building known as Cedar Lawn Nursing Home. Beyond this, proceeding back towards Braishfield Road and accessed from the entrance to the care home, is No. 15 (Mr & Mrs Lelyveld). Nos.16 (Mrs Owen) and No.17 are the last two, fronting directly on to Cedar Lawn. The development as a whole is relatively level, although there is a very small incline south to north which means that Nos.16 & 17 sit marginally higher than the application land.

8. The experts helpfully agreed the sizes of each of the plots (the significance of which will become evident) and these are summarised thus:

House No.	**Hectares**	**Square metres**	**Acres**	**Square feet**
1	0.1618*	1,618	0.3998	17,416
2	0.0870	870	0.2149	9,364
3	0.0701	701	0.1732	7,545
4	0.0661	661	0.1633	7,115
5	0.0914	914	0.2258	9,838

6	0.1011	1,011	0.2498	10,882
7	0.0966	966	0.2387	10,397
8	0.1599	1,599	0.3511	17,211
15	0.1114	1,114	0.2752	11,991
16	0.0921	921	0.2275	9,913
17	0.1309	1309	0.3234	14,090

* The area of No.1 was incorrectly stated to be 0.1680 ha in the experts' agreed table.

If the proposed development on the application land were to proceed, the experts agree that the new dwelling would have a plot size extending to approximately half of the existing overall plot size on No. 1, i.e. around 800 sq. m or 0.2 acre.

9. It is agreed that in addition to the application land, the plots occupied by Nos. 8, 15, 16 and 17 are physically capable of being divided to provide an additional unit within their grounds, although due to their plot layouts and the placement of the houses/garages thereon, some reconfiguration of the existing buildings would be required. For example, the recently constructed detached double garage adjacent to No. 8 would need to be demolished to give access to the relevant part of the property's garden land to the north. The new garage was constructed when the previous double garage, attached to the house, was demolished to make way for a two-storey extension. Most of the Cedar Lawn properties have been extended, some to a significant degree.

10. The planning permission granted by Test Valley Borough Council on 4 October 2016 was subject to conditions including (04) a requirement, before the development rises above damp proof course level, to submit and have approved details of hard and soft landscaping works (to enhance the appearance of the site and enhance the character of the development); (05) to obtain approval for a landscape maintenance and management plan; (06) to obtain approval for details of the layout and manoeuvring on site of contractors' and delivery vehicles for the duration of the construction process (in the interests of highway safety); (08) to ensure that the first 4.5 metres of the site access track from the roadside edge is surfaced with a suitable non-migratory material and (09) a requirement that any gates to the construction site are set back at least 4.5 metres from the roadside edge, and that there shall be vision splays at an angle of 45 degrees (both in the interests of highway safety). There are also conditions (10 and 11) requiring that the development must be undertaken in accordance with the Professional Tree Services Ltd Arboricultural Impact Appraisal and Method Statement obtained in June 2016, and that suitable barriers for the protection of trees shall be installed and retained for the duration of the works.

11. There is also a requirement for S&B Construction to enter into a section 106 Agreement under the provisions of the Town and Country Planning Act 1990 by which the sum of £1,300 will be paid towards measures to mitigate the impact of the proposed new dwelling on the New Forest Protection Area, and to pay a Community Infrastructure Levy of £32,900.

12. The original 11 houses forming the Cedar Lawn development are subject to a building scheme whereby all the plots were laid out and sold by a common vendor and whose conveyances contained covenants intended to be mutually enforceable by and against each of the said covenantors. The experts agree that the present day open market value of No. 17 is £610,000.

13. It is agreed that, in connection with an application under ground (aa), it is appropriate to consider the questions in *Re Bass Limited's Application* (1973) 26 P&CR 156.

Issues

14. The applicants rely solely upon ground (aa) of section 84(1) of the 1925 Act in arguing that the proposed development will have no detrimental effect upon the value, enjoyment or amenity of any of the objectors' properties (or indeed any of the houses on the development whether belonging to objectors or not). Ground (aa) is therefore, in their view, entirely satisfied.

15. The objectors (and particularly Mr & Mrs Mayhall) contend that the restrictions secure to them practical benefits of substantial value or advantage and that money would not be sufficient to compensate them for the loss of privacy and amenity caused by the proposed modification. Further, they would suffer the inconvenience of extra traffic and modification would also constitute the "thin end of the wedge", being a catalyst for potential further such applications on the Cedar Lawn estate.

Statutory provision

LAW OF PROPERTY ACT 1925 Section 84:

> "84(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied-
>
> (a) …

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

(b) …

(c) …

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

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

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

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

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

(b) is contrary to the public interest;

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

(1B) In determining whether a case falling within section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify the restriction without some such addition."

Evidence for the applicants

16. **Mr Alan Drummond** said that he and his wife purchased 1 Cedar Lawn in September 2013, moving from a large house with 8 acres of land in nearby Lockerley. The upkeep of that property was becoming difficult, and the Cedar Lawn house was a more manageable size. Whilst it also has a large garden, they felt that its overall plot size of 0.4 acre would be easier to maintain and the house was a more appropriate size for them as they approached retirement age. Mr Drummond said that whilst they were aware that planning consent for a similar house to what was now being proposed had been obtained in 2003 (that consent having now expired), they had no intention when they bought the property of trying to renew it and carry out any development. When he met Mr Mayhall of No. 17 soon after moving in, Mr Drummond said he was told that one of No1's previous owners had tried to build another house on the site and that "it had gone to court". He said he advised Mr Mayhall that he had no intention of developing. In a later conversation with a Mr Hillman from whom he had bought the property, he asked about the alleged court proceedings. Mr Hillman said he was not aware of any. He had bought the property with the 2003 planning permission in place, and had intended to carry out the development, but subsequent divorce proceedings meant that the property had to be sold and he had not therefore made any attempts to get the restrictive covenant modified.

17. With reference to a large oak tree that was said to have previously been on the plot of No1 to the west of the then proposed house (as depicted on a site plan of the proposed Cedar Lawn development dated March 1980 at p.30 of the application bundle), Mr Hillman had advised that it blew down in the great storm of 1987. That was confirmed in an email dated 13 September 2017 from a Mr Kowalczyk of Professional Tree Services Ltd, Winchester, to Mr Drummond's expert, Mr Williams. Mr Kowalczyk had dealt with the tree which narrowly missed the corner of the house when it fell, and he had buried the root-plate and stump in a hole about 2.5 to 3.0 metres deep.

18. Mr Drummond went on to say that in early 2016 a long-term family friend, Mr Spencer Dovey of S&B Construction (South) Ltd, paid them a social visit and after he had been shown around the house and garden, Mr Dovey expressed an interest in the part of the garden on which the earlier planning permission had been obtained. He said he would like to obtain a new planning consent for a four-bedroom detached house and garage and if successful, would be prepared to buy the land for which he would offer £300,000. Although Mr Drummond's immediate reaction was to advise Mr Dovey that they did not want to sell, he said the price was extremely tempting as such a significant amount would play a major part in his and his wife's retirement planning. At the age of 65 Mr Drummond said, he was approaching retirement and, further, the reality was that the garden was becoming a burden to them as they were getting older. Also, he had recently recovered from prostate cancer, which had made him realise he had to make the most of life.

19. In deciding therefore to accept Mr Dovey's offer, Mr Drummond said that he appreciated the decision was inconsistent with what he had told Mr Mayhall a few years earlier, but the change in their circumstances had been the reason for their change of intentions. Knowing that he and his wife wished to retain No.1 as their final home, Mr Drummond said he was keen to

retain good relationships with their neighbours and so it was initially decided not to approach them over the question of the restrictive covenant until planning permission had been obtained. Thus, Mr Dovey's architects, Genesis Design Studio of Romsey, prepared detailed plans and produced a Design and Access Statement. An application was submitted to the Council on 17 June 2016 and permission was granted on 4 October 2016, despite five of the Cedar Lawn residents having objected. The price offered by S&B Construction was subsequently reduced to £250,000 to reflect the s.106 liability of £34,200 that would have to be paid.

20. With the permission in place, the Drummonds wrote a detailed letter on 31 October 2016 to all the residents who had the benefit of the restriction requesting their consent to a modification, and inviting them all to a meeting at their house on 17 November. The letter set out their position, and the relevant part of the 1925 Act upon which they would be relying should it become necessary to make an application to the Tribunal. They also offered each household the sum of £750 as compensation for the disturbance that it was acknowledged would inevitably occur during the construction process, on the proviso that all those with the benefit agreed to the modification. Only the owners of No. 3 attended, and they said they had no objection. The owners of Nos. 2 & 4 had previously indicated that they also had no objections. Mr & Mrs Tomes of No. 5 advised that they would not be attending, and that they would object to an application. However, they did say that if everyone else agreed, they would, in the spirit of good neighbourliness, withdraw their objection. They did not subsequently object to the application. There was no response from the owners of 6, 7, 8 or 16 although the last three are active objectors to this application. Mr & Mrs Lelyveld at No.15 advised that they would not attend the meeting and that they would be objecting. They did so, but have subsequently withdrawn their objection. Finally, the solicitors acting for Mr & Mrs Mayhall at No.17 wrote on 2 November inviting the Drummonds to make the necessary application to the Tribunal and that the right was reserved to oppose said application, as the Mayhalls feel strongly that this is a matter which should be determined by the relevant Tribunal. They also advised that if building works were to be commenced before the application had been determined, their clients reserved the right to commence injunctive proceedings.

21. Mr Drummond said that in his and his wife's view, the proposed dwelling if constructed would be entirely in keeping with, and not dissimilar to, the existing properties, and would blend in very quickly once finished – to the extent that it would seem as though it had always been there. It would only be directly visible from No.17 behind the high hedge along the front boundary, and perhaps too from No.16 but only from an acute angle. It was also their view that the contribution the developer was required to make to the New Forest Protection Area showed that the development would be in the public interest.

22. **Mr Peter Williams** of Lambert Smith Hampton, Southampton is a Chartered Surveyor and has 29 years' experience in residential and commercial property valuation matters along the south coast. He said he had been instructed to provide expert advice on the various matters that are required to be considered in determining whether the restrictive covenant ought to be discharged or modified, and particularly with regard to the 5 questions to be answered in accordance with the decision in *Re Bass.* Additional issues to consider were: whether the proposed development would be in keeping with the street scene, whether there is a pattern of planning permissions in the immediate area, whether the plot will be of sufficient size, whether

the existing plot of No.1 is significantly larger than most of the others on Cedar Lawn and whether it might have been the original developer's intention for a property to be built on the proposed plot, but was prevented from doing so by the oak tree that was subsequently felled in the 1987 storm. He was also asked to give his opinion on the Mayhalls' concerns about overlooking and whether the proposed house would make the Cedar Lawn development appear cramped.

23. It is Mr Williams' view that of the four objectors, it is the Mayhalls at No.17 who might be the most affected as their house is directly opposite and overlooks the application land. Any effect upon the other objectors' properties or for that matter, any of the other houses on Cedar Lawn would be negligible. Looking firstly at the five questions in *Re Bass*, he said that it is common ground that the proposed user is reasonable (question 1) and that the development is impeded by the restriction (question 2). Whether impeding the proposed user secures practical benefits to the objectors (question 3) is, he said, the key consideration in this case. As to the effect upon the outlook from No.17, it is acknowledged that the new house will be clearly visible as its front elevation faces towards the application land, although the view will be shielded to a large extent (as the existing house at No.1 is) by the oak tree in the front garden of No.17, the hedges along the front boundaries of both Nos. 1 and 17 and the False Acer in the front garden of No.1. There is also a backdrop of trees along the southern boundary of No.1 onto Winchester Road and it is a condition of the planning permission that the boundaries and other trees on the application land are maintained, although it is accepted that there will be a break in the front hedge of No.1 to allow construction and the provision of the access drive. In the light of this, Mr Williams thought that the outlook from No.17 when the new house is built will be no worse than the current aspects from the front of most of the houses on the development over other properties. None of the properties on Cedar Lawn can be considered to have a rural outlook and the close is better described as an estate development. There has been no material change in the outlook, amenity or surroundings of Cedar Lawn since the covenant was imposed in 1981.

24. As to any arguments about loss of privacy, Mr Williams pointed out that No.17 is seriously overlooked at the rear by No.15, and in his opinion it is much more likely that a purchaser would value privacy to the rear of the house and garden than he would at the front. No.15 is also much closer to No. 17 than the new property would be. The new house will be some 70 ft. beyond the front hedge of No.17, and there will therefore be no issues in terms of loss of light or overshadowing. Any effects upon peace and quiet would, he said, be minimal. The additional traffic generated by the new house would only add one twelfth to the existing comings and goings of traffic serving the existing 11 properties. Further, any vehicles using the new house will only be using the first few yards of the close so that other than No.17, there will be no additional traffic past any of the other properties apart from the occasions when vehicles use the hammerhead to turn around. On-street parking should also be no more of a problem than it currently is as there will be adequate on-site parking provided. In Mr Williams' view, it is traffic using the Nursing Home that is likely to create the greatest problems as he believed it housed some 30 residents so staff movements and numbers of visitors are considerable.

25. Regarding the objectors' concerns about the prevention of further overlooking and the effect of the additional property in its particular location at the currently fairly open entrance to

Cedar Lawn leading to a sense of cramping and loss of its open ambience, Mr Williams said it was a fact that (as the agreed table showed) there is already a considerable variance in plot sizes. No. 4 was the smallest at 0.16 acre, and the existing No.1 the largest at 0.4 acre. If the application were to succeed, No. 1 and the new plot would each be in the region of 0.2 acre, still larger than Nos. 3 & 4 and similar to Nos. 2 & 5. The plan indicating the specific siting of the proposed new house (bundle p.45) shows it to be no more cramped on its plot than many of the other houses. Indeed, the flank separation between the existing No.1 and the new house would be greater than the situation that exists on a number of the other plots, specifically Nos. 2, 3, 4, 5, 6, 7 and 8. He did accept, in cross-examination, that with both Nos. 1 and 17 being sited towards the eastern side of their plots, the initial impression when entering the close is of a green and leafy environment and that the addition of another house on the application land will make it appear more crowded, but in his view only to a minimal degree. The fact remains that the proposed plot will not, as he had explained, be any more cramped than any of the others and would be totally in keeping.

26. Turning to the thin end of the wedge concerns voiced by all the objectors, whilst he has agreed with Mr Donaldson that it would be *physically* possible to construct additional houses on several of the other plots on Cedar Lawn, no development could occur without some partial demolition and reconfiguration being required to the existing houses; almost all would effectively be back-land development which would be most unlikely to be acceptable to the planning authority, and all would be extremely cramped. There would also be a question over how access might be obtained to an additional house on No.15's plot off the existing private entrance to the nursing home. Mr Williams pointed out in any event that this is an application for modification rather than discharge of the restrictive covenant, and therefore any future application would have to be considered on its particular merits, and this modification would not therefore result in a creeping intensification of development across the building scheme.

27. Although following *Re Bass* Mr Williams did not say specifically in his report whether or not impeding the proposed user secures practical benefits to the objectors, and if so (question 4) whether they are of substantial value or advantage, he did say that in his professional opinion there would be no diminution in open market value to any of the houses (including No.17 which would still enjoy a broadly similar outlook) and stressed that apart from some inconvenience caused to all occupiers through the development process (a period unlikely to be more than about 6 months) there would be no other effect at all upon the properties of objectors 1, 2 and 3. Mr Williams said that, in his experience, there is usually far more concern and worry about an intended development than is justified once it has taken place. He is of the view that the new property will fit in well on the only plot that is realistically capable of accommodating another house, and that after a while its existence will go virtually unnoticed. On the question of disturbance during the development process, it is only to be expected that there will be some inconvenience, but he pointed out that the planning conditions take this into account, and there are stringent requirements that must be adhered to.

28. Finally, in connection with the question of whether or not the original developer of Cedar Lawn had intended to build another property on the site that the applicants now wish to develop, but was prevented from so doing by the oak tree referred to, Mr Williams said that could only be speculation. However, he said that a more pertinent question would be why

would he *not* have put two properties on the plot as his aims would have surely been to make the greatest possible profit from the development.

Evidence for the objectors

29. **Mr Mayhall** said that he and his wife (who are 88 and 91 years old respectively) bought No. 17 Cedar Lawn new from the builders, Macstone Company (Development) Ltd, in September 1981. They were aware that the development, which was undertaken on land that had formerly been part of what is now the Nursing Home (known then as Woodley Court) was only to be 11 properties and that all of the new houses would be subject to the same restriction preventing sub-division of the respective plots. The house that they chose, Mr Mayhall said, was "just what we were looking for" – a corner plot with a large garden that was not overlooked "front and back". Its open outlook to the front, over green and open space and not overlooking another house, was just one of the factors that attracted them to it. The open nature of the entrance of Cedar Lawn (with the first two houses being located towards the eastern end or their plots) is a real asset, the ambience of which, he said, is appreciated by all the residents, visitors and the local community.

30. The proposed development on the application land, if it should proceed, will, in Mr Mayhall's view, be in a highly prominent position that will detrimentally affect the symmetry of Cedar Lawn and will also set an undesirable precedent. Not only will it seriously affect the outlook that they currently enjoy, it will have an impact on all the other residents in terms of loss of amenity, increased traffic, parking and general ambience. There are already serious traffic problems particularly from use of the nursing home, and anything that serves to increase the use of Cedar Lawn by vehicles will only exacerbate the inconvenience that already exists. As it is, the residents are concerned by the number of vehicles that park in the close outside the applicants' property, and it is their view that matters will only get worse, not only from this one additional house but from others if the precedent that would be set results in further applications being made for additional houses.

31. Mr Mayhall said that he had been told by Mr Drummond when he and his wife moved in that they were not intending to pursue the prospect of development, and that they bought the house with a large garden so that their grandchildren could play outside. However, they have subsequently decided to proceed with getting the site developed despite having already built a large single storey extension to the rear of their existing house, and having built a tree house in the part of the garden that will now form part of the new building plot.

32. Finally, Mr Mayhall said that the suggestion that the original developer might have intended to build a twelfth house on the application land but for the Tree Preservation Order on the now fallen oak tree was pure speculation, and with that Company no longer existing, the applicants would be hard put to prove that that were the case.

33. **Mr Bastow** (No. 7) said that he was the first purchaser on the development and vehemently disagreed with the applicants regarding their claim that the modification of the

restriction would not materially impact on the amenity or value of any of the other properties. The entrance of Cedar Lawn currently has what he described as "the wow factor", and its open aspect and appearance is a shop window for all the other houses, especially those at the far end where he and his wife live. Indeed, referring to the selling agent's site plan from when the development was first sold (p. 248 of the bundle), he said that he understood the areas of land immediately to each side of the entrance to Cedar Lawn were to be designated as public open space – that being an indication of the importance of that part of the site having an open appearance. However, the site manager had told him that he did not like the idea of public open spaces, and somehow therefore those areas were divested into the ownership of Nos. 1 and 17. He accepted that this was hearsay evidence and was not aware of the actual planning situation regarding that issue.

34. Mr Bastow was also concerned that the applicants were claiming that there was ample provision being provided for off-street parking. That provision, that exists on the Drummonds' own house, does not stop the road and pavement "often being littered with vehicles associated with them." Further, the driveway to the new house, if built, will be only 15 metres from the entrance off Braishfield Road, whereas those serving Nos. 1 and 17 are 54 metres and 42 metres respectively. He also disagreed with the claim that No. 1's plot is significantly larger than any others on Cedar Lawn. It is virtually identical to No. 8's plot and only, according to his calculations, 27% larger than No. 17.

35. In their notice of objection, **Mr & Mrs Griffin** (No. 8) pointed out that the applicants had purchased No. 1 Cedar Lawn in the full knowledge that the restrictive covenant had been inserted in the conveyances of all 11 properties for the purposes of protecting against further development. The Drummonds had not, as they had admitted, consulted any of the residents before making their planning application in 2016 and had only made contact once the consent had been received, advising that the purpose of adding another house on their plot was to enhance their retirement fund. Mr & Mrs Griffin said that they failed to understand how the applicants could possibly contend that the addition of the new house would not alter the ambience and prestigious nature of the development, or that if the restriction were to be modified, a precedent for further development would not be set. Knowing the ingenuity of developers, they feared that there would be pressure on house owners in Cedar Lawn to further develop their plots. In the light of all these concerns, they opposed the modification.

36. **Mrs Owen** (No.16) said that she objected to the application because the proposed development, if it proceeded, would alter the appearance of the close.

37. **Mr Donaldson** is a Chartered Surveyor and has been practising in the property profession since 1969. He set up Marquis & Co, Consultant Surveyors, in Twickenham in 1975, and in addition to his agency and valuation roles has been acting as an expert witness before courts and tribunals and as an arbitrator and mediator ever since. He said he had been instructed by the Mayhalls' solicitors to act for them and for the other objectors.

38. Dealing firstly with the Mayhalls' house, Mr Donaldson said that there is currently an open outlook across their front garden over the garden to the west of No. 1 which contains mature hedging, trees and a significant tree screen along the its boundary on to the Winchester Road. That aspect is a practical and valuable benefit that will be irretrievably lost if the development proceeds. The hedge will be partly removed for the provision of the access drive, and from their front rooms the Mayhalls will be looking directly onto a large, two-storey detached house that at 203 m^2 (2,185 sq. ft.) is over 25% larger than their home. The new house will not, in his view, be in keeping with the rest of the development in that at first floor the plans show it to be part timber clad. However, he accepted in cross-examination that the cladding was on the rear and part of the east elevation and that the design and access statement said, "the front of the house facing the road and public areas will have a traditional brickwork façade to match others in Cedar Lawn, with smaller individual door and window openings."

39. Mr Donaldson, when reminded that No. 17 was seriously overlooked to the rear and did not enjoy an open aspect from that elevation, said that Mr & Mrs Mayhall were aware of that when they bought their house, and had stressed that one of the principal reasons for their choosing No. 17 had been the open outlook to the front. Being on slightly higher ground than No. 1, he said that it to some extent looks down over the potential plot, which will exacerbate the loss of view and make it look even more prominent.

40. The objectors' concerns about the loss of the current open ambience at the entrance to the estate, Mr Donaldson said, were genuine, as were their fears that the modification, if granted, would be the "thin end of the wedge", potentially leading to attempts for further applications from Nos. 8, 15, 16 and even 17. He admitted that there would be difficulties in building additional houses on these plots due to their configuration and the need to carry out some demolition to parts of the existing houses or garages to create the required accesses which, in the case of a development on No. 15's plot, might mean coming in off Braishfield Road. Regarding arguments that the plot sizes in Cedar Lawn gave the estate an open ambience and that appearance would be lost, Mr Donaldson accepted that if a new house is built in the garden of No. 1, the plot sizes of all those from Nos. 1 to 6 will be broadly similar and indeed, Nos. 3 & 4's plots will be smaller than either of the two plots formed by the division of No.1. However, he insisted that the symmetry of the overall estate will be detrimentally affected.

41. The additional traffic generation is of concern to all the objectors as is the likelihood of further parking on the street despite the proposed new house having a double garage and further provision for the parking of 4 cars within its plot.

42. As to the questions raised in *Re Bass*, Mr Donaldson said it is agreed that the proposed user is reasonable, and that the restriction impedes that user. The open outlook that the Mayhalls enjoy, the overall ambience of the estate as currently configured, the thin end of the wedge argument and the fact that Cedar Lawn is also a building scheme create, in his view, practical benefits of substantial value and advantage to the extent that money would not be adequate compensation. However, if, despite what he argued, the Tribunal were to modify the restrictive covenant, Mr Donaldson said that whilst he was aware that historically in terms of awards, such compensation tended to be modest, his view is that the damage to No. 17 in

particular will be so great as to warrant a figure of 10% of the value of that house (agreed at £610,000) to which should be added 2.5% for the temporary disturbance that will be suffered during the construction period which, he said, would be nearer to 9 months than the 6 months that Mr Williams had suggested. The total compensation sought for No. 17 if the modification is granted is therefore £76,250. In respect of the other objectors, it is his opinion that compensation should be assessed at 5% of the value of each of their properties – 2.5% for loss of amenity and the other matters referred to, and 2.5% for construction disturbance.

43. Mr Donaldson admitted that his figures do not represent alleged diminution of value, but are his assessment of a compensatory sum to reflect how deeply affected they will be. He acknowledged that such a large sum, which is not based upon any comparable evidence (in terms of previous restrictive covenant cases), departed from, as Mr Webster pointed out, the normal small compensation allowances that are made where impact is not considered substantial.

Submissions

44. For the Mayhalls, Miss Proferes pointed out that the burden of proof is on the applicants to satisfy the requirements of section 84(1)(aa) (see *Re Zaineeb al-Saeed's Application* (2002) LP/41/1999 at paras 51-52) and that the weight to be attached to objections is generally greater where, as here, the application is made in the context of a building scheme (see *Dobbin v Redpath* [2007] EWCA Civ 570 at paras 22 – 25). She submitted that the Mayhalls are of the view that through the scheme of identical covenants, a low housing density is maintained resulting in a sense of spaciousness and open character (particularly in respect of the views from the front of their property) which constitutes a practical benefit of considerable value. The estate's character has remained substantially unchanged and there have been no previous discharges or modifications. Thus, if this application were to be successful, it would be the 'thin end of the wedge' meaning future applications for additional plots would be more likely to succeed in an area within which, from the number of extensions (not subject to the restriction) that have been made to houses on Cedar Lawn, there is a clear appetite for development. As was demonstrated in *Re Zaineeb al-Saeed's Application*, the benefit of the preservation of the integrity of a building scheme which maintains the character of an estate does not have to be measured by market values, but may be based solely upon the objectors' personal convictions and wishes.

45. The applicants' suggestion that it had been the original intention of the developer to include another plot within the curtilage of Plot 1 was, it was submitted, wholly irrelevant and based solely on hearsay evidence. Whatever the developer might have wished to do does not negate the substantial practical benefits of the existing lower density use. The estate was laid out in its existing form and configuration and the building scheme was put in place to maintain it as such. In any event, it appears from the 1980 site layout plan (page 30 of the bundle) that there would have been room for an additional plot on the site of that proposed even with the oak tree in existence.

46. It was submitted that it was the damage to the outlook from the front of No. 17 that was of the greatest concern to the Mayhalls. The arguments that when the new house was constructed the view would be "no worse" than the views from any of the other houses on the development, and that to be able to see other properties on a development of this type was only to be expected, was simply unsustainable. No. 17 would be going from having the best view on the estate to one that was no better than any of the others. Mr & Mrs Mayhall had confirmed that the outlook was one of the principal reasons they bought that particular house and they would thus be losing a very substantial benefit. Whilst a financial inducement would not be sufficient for the loss of that benefit, Miss Proferes said that if the Tribunal found in favour of the applicants, then the amount to be awarded should be the sum recommended by Mr Donaldson.

47. As to the provisions of section 84(1B), it was pointed out that the Tribunal must take into account the development plan and local planning considerations. Whilst planning permission has been granted and it is agreed that the proposed use is reasonable, that is only the first step in the process and should not be taken as evidence of satisfaction of the section 84(1) criteria – see *Re Martin's Application* (1989) 57 P&CR 119 at p125. The assertion in the applicants' statement of case that that the proposed development was in the public interest due to the small amount of compensation that would be payable to mitigate the effect on the New Forest Protection Area should be rejected on the grounds that the fact such mitigation is deemed necessary suggests the development will, in reality, be contrary to the public interest. The fact that Test Valley Borough Council might be under pressure to provide for housing needs with the result that plot sizes tend to be diminished, as pointed out by Mr Webster, should, it was submitted, weigh in favour of the retention of the integrity of the building scheme rather than being a reason for destroying it.

48. Mr Webster, for the applicants, pointed out that from the 10 properties on the estate that have the benefit of the restriction, there are only four objectors and only two spoke before the Tribunal. The matter, he said, needed to be kept in context and whilst it was acknowledged that the proposed development will be visible from No's. 16 and 17 and their concerns were not without foundation, it will not be seen from within the curtilage of the other objectors' properties – Nos. 7 and 8 Cedar Lawn, nor from any of the others. He thought that the comments of Erskine Simes QC in *Re Zopats Developments' Application* [1966] 18 P&CR 156 were apposite where he said:

> ".it is, I am satisfied, a case where the prospect terrifies while the reality will prove harmless."

49. The principal question to be considered was whether the restriction secures practical benefits to the objectors (particularly No. 17), and if so, are they of substantial value or advantage. This case cannot, it was submitted, sensibly be said to involve benefits or advantages in relation to the preservation of a high-quality view such as a distant vista over open countryside, the preservation of light, privacy or peace and quiet, the preservation of house values – there was certainly no evidence provided to support any suggestion of diminution in value, any material increase in traffic or associated problems therefrom or the prevention of ugly structures or eyesores. If there were benefits under any of these heads, they

would need to be of substantial value or advantage. As Carnwath LJ said in *Re Shephard v Turner* [2006] 2 P&CR 28, 'substantial' means something "considerable, solid, big" which should be left to the Tribunal to determine in a common-sense way. Mr Webster went on to say that the term 'advantage' refers to amenity as opposed to value and is accordingly wider in scope.

50. There would, it was submitted, be no adverse impact on the outlook from the occupiers of Nos.16 and 17 over No. 1's garden over and above what anyone might normally expect living in an estate location such as this in contrast to the view currently enjoyed. Indeed, whilst it was accepted that the outlook from the front of No. 17 in particular is currently not directly towards another property, there is, and will remain, significant screening by the existing hedges to the front gardens of both No. 17 and No. 1 together with the False Acer in the garden of No.1 and, importantly, the large oak tree in the front garden of No. 17. From the ground floor living room and study of No. 17 it will only be the first floor and roof of the new house that will be partly visible over the hedges.

51. Mr Webster said that it stands to reason that, as to any effect on privacy from overlooking by the new house, there would be no effect upon No. 16 and little to No. 17. In any event, he would have thought that it was the privacy to the rear garden that most people would find important, and in respect of No.17 their garden and conservatory is very seriously overlooked by No.15. Most of the other houses that were built at the same time overlook each other in some way, or over the nursing home.

52. As to the objectors' concerns regarding the opening of flood gates for further development on existing plots if the restriction is modified on No. 1, Mr Webster reiterated the barriers to such development that both experts agreed exist. Any such applications would, as here, be considered on their merits by the Tribunal, and those barriers were such that any success either in practical or planning terms would be extremely unlikely. The integrity of the building scheme is not, therefore, at risk. The proposal for the development at No. 1 is neither radical nor out of keeping with the established street scene, and the overall plot sizes will remain broadly similar.

53. In Mr Webster's submission, the suggestions for compensation advanced by Mr Donaldson for the objectors were misconceived and not justified on the evidence. His opinion that the modification, if made, would result in a radical change to the appearance of the estate and inevitably lead to the subdivision of a number of other plots is "simply unsustainable on the evidence." It was accepted that there would inevitably be some disturbance during the construction process, but if the Tribunal were minded to award some compensation for this, it should, as is normal in such cases, be modest and certainly not the same for each house.

Discussion

54. This application relies solely upon ground (aa), the principal tests for which are contained within section 84(1A) of the 1925 Act. It is the questions raised in *Re Bass* that fall to be answered in determining the issues under this ground, and it was to those that counsel directed their submissions. It is common ground that the proposed user is reasonable and that the existence of the restriction impedes such user. The key questions that will be determinative in this matter are whether the restriction secures any practical benefits, and if so whether they are of substantial value or advantage. Regarding practical benefits, the agreed existence of a building scheme is a relevant factor for consideration to which the Tribunal will give weight.

55. Apart from No.17 where the principal concerns are clearly the potential loss of the current open aspect to the front over the presently undeveloped western part of No.1's garden (to which I shall return), the anxieties expressed by the other objectors are mainly the fear that the current impression gained on entering Cedar Lawn at its junction with Braishfield Road of a green and leafy road containing properties with large plots will be lost. They say that the houses on the estate will appear cramped and that part of the development will lose its current ambience. That will, they say, result in the loss of an important practical benefit. Whilst I agree that the construction of an additional house will, to a very limited degree, impinge upon that relatively open appearance at the entrance to the close, the points raised by Mr Williams about plot sizes (summarised in paragraph 25 above) are, in my view, well made. The new house, if it is built, will occupy a plot of approximately 0.2 acre which is larger than those occupied by Nos. 3 & 4, and very similar to a number of the others. It is also designed to be sympathetic with the appearance and of not materially dissimilar size or proportions to the existing properties. Whilst Mr Donaldson expressed concern that it is quite large, at around 2,200 sq. ft. and will be 28.7% larger than No.17, it will, it appears, still be smaller than some of the properties that have been substantially extended. Indeed, it is agreed that No.17 is one of the few properties that has not been extended (other than by the provision of a sun room at the rear).

56. I note that in its report to Council recommending that permission be granted subject to conditions, the planning officer said regarding the character of the area:

> "The character of the wider area is residential with a mix of smaller and larger dwellings within good sized plots. Cedar lawn however exhibits a uniform character of large detached dwellings within good sized plots, bounded by trees and hedging. The proposed house mirrors the design of the existing houses both in terms of size and design, and retains the existing level of tree cover save for one elm tree, which has reduced life expectancy… The plot size is also very similar. Therefore the leafy, low density character of the area will be preserved…"

57. Those views accord with my own formed from my inspection and consideration of the evidence. I am satisfied that the proposal will not be out of keeping with the existing street scene and will not adversely affect the symmetry of the development as it currently exists.

58. In accordance with paragraph (1B) of section 84 requiring the Tribunal to take into account the development plan, I note that the planning officer's report continued:

> "Policy E1 and E2 of the Revised Local Plan call for high quality development that integrates with existing development, makes efficient use of land whilst respecting the character of the surrounding area, and development which does not result in the loss of important landscape features. The proposal is considered to accord with these policies."

59. As to the fears that modification would amount to the 'thin end of the wedge' leading to a raft of similar applications from other residents of Cedar Lawn, and the concerns that were expressed that the integrity of the building scheme will thus be lost once and for all, I subscribe fully to the comment in *Re Zopats*, referred to by Mr Webster, that "it is…a case where the prospect terrifies while the reality will prove harmless." From my inspection of the application land, the development as a whole, and the plans of the estate and surrounding roads (the one in the bundle at p. 223 being particularly helpful) I am satisfied that the likelihood of any application being made for planning permission to add an additional property on any of the other Cedar Lawn houses is virtually nil. Whilst the experts agree that it may be *physically* possible to build an additional house within the curtilage of each of Nos.1, 8, 15, 16 and 17, Mr Williams pointed out in the joint statement that the application land is the only plot where there is clear potential for another house to be built without in some way materially interfering with the existing property. I agree.

60. It was suggested that it was most likely that No.8 could accommodate an additional plot. But, as was pointed out, that would mean the complete removal of the new garage that has been built to allow the construction of a very substantial two-storey extension on the footprint of the garage's former location attached to the house. Even if that were to occur, there would then be nowhere left for a further replacement garage or even a sufficient parking area for the existing house. The local planning authority would be most likely, in my view, to consider an application on Plot 8 to constitute back land development which they would resist, as they would on No.5. Regarding No.15 there was a suggestion that access could be off Braishfield Road, but this would, in my judgment, be most unlikely to receive highways approval, and it would again constitute back land development. As to No.16, not only would the existing property be left with virtually no garden whatsoever, but it seems to me that provision for access would have to be negotiated with the owners of the nursing home – and that would doubtless involve a significant cash incentive.

61. That just leaves No.17. Whilst there is undoubtedly room for a very small detached house to be squeezed in between the west flank wall of the existing house, and the Braishfield Road boundary, the access drive would, as was pointed out, have to be even closer to the Braishfield Road junction than the proposed drive into the application land (which has received approval), and I think that would be objected to on highways grounds. Also, there would be a very strong argument that the development of the much smaller side garden at No.17 would not be in keeping as its plot would be so much smaller than any of the others. No.17's rear garden is very small and, as has been said, seriously overlooked. An additional house on that plot would therefore mean No.17 would be left with almost no garden and would appear extremely cramped.

62. It follows, therefore, that allowing a modification in this instance will not in my judgment destroy the integrity of the building scheme and will not set a precedent for future applications. It will not 'open a breach in a carefully maintained and outstandingly successful development' (see *Re Snaith and Dolding's Application* (1996) 71 P&CR 104 at page 118). Even if there were to be such applications, each would be considered upon its own merits and as I have indicated I think that other than the application land there is no other plot on the estate where the granting of planning consent, let alone an application for modification of the restriction, would be likely to achieve any success.

63. The objectors are also concerned about increases in traffic and the likelihood of additional on-street parking, this being a problem that, they say, already exists. There would also, it was argued, be considerable disruption during the building process if the development goes ahead. I am satisfied that there are sufficient conditions included within the planning consent, compliance with which will reduce the disruption and inconvenience during construction. However, inevitably there will be some disturbance particularly during the fit-out stage when a large number of contractors' vans will converge at the same time and there will be insufficient space on site for them to park. They will therefore have to park in Cedar Lawn and this will undoubtedly cause annoyance and inconvenience to all the residents and to other users of the street. This will obviously be most noticeable to Nos. 16 & 17, but in my view all the objectors will be inconvenienced to some extent. Nevertheless, I agree that Mr Donaldson's suggestion of compensation amounting to 2.5% of the value of each of the houses is not supported by evidence.

64. I accept the argument that the additional traffic generated from the occupation of the new plot will be minimal, in terms of the overall usage of Cedar Lawn where the existence of the nursing home will be likely to create the highest volumes. The fact that the new plot will be close to the entrance will mean that under normal circumstances, vehicles using it will not be passing any of the plots other than No.17. The proposed new property is to include a double garage and parking for "at least" four vehicles within its curtilage and thus the additional risks of further on street parking are in my view minimal and not material.

65. Turning now to Mr & Mrs Mayhall's principal fears, it is unarguable that their house currently enjoys a pleasant, green and leafy aspect to the front over the undeveloped area of garden to the west of No. 1. That outlook is probably better than any of the properties on Cedar Lawn and it is understandable that that was one of the attractions to them when they brought the property new in 1981. They would have been aware at that time that identical 'one house per plot' restrictive covenants were to be imposed in the transfers of all 11 properties, and it would thus be perfectly reasonable for them to expect that the unspoilt outlook would be maintained. That the outlook is a practical benefit is clear, but the question is, is of substantial benefit or advantage to Mr & Mrs Mayhall. 'Substantial' means "considerable, solid, big" and it does not have to relate to value in pecuniary terms, but can include the personal convictions and wishes of the objectors.

66. In determining this issue, I need to consider what effect this proposed new dwelling would have in terms of damage to the existing view, potential for overlooking and loss of

privacy to No.17. I think Mr Williams was being somewhat harsh in suggesting that because none of the other houses on the development have an open view, and it is only to be expected in a location such as this that other properties will be visible, that is a reason for allowing the application. The question I must answer is whether the practical benefit secured to the owner of No.17 by the covenant is substantial. On balance, I think not for the following reasons.

67. The new house will be set reasonably well back on its plot and, as is evident from the site plan, will be angled such that all front windows will be facing more towards the side garden to the west of No. 17 than directly onto the house. The mature front hedges of both properties, the False Acer at No. 1 and the oak tree in the garden directly to the front of No.17 will also act as a substantial screen such that ground floor windows will be virtually completely obscured between the two houses. At first floor, No.17's accommodation is configured such that it is only from bedroom 4 and the landing that the new house will be seen, the remaining first floor windows being bathrooms (including the en-suite to the main bedroom) having frosted glass. Two of the four first floor bedrooms to the new house will have windows looking north, but as I have said, there will be plenty of screening and they will not look *directly* over No. 17.

68. Although the Tribunal's jurisdiction does not mirror that of the local planning authority, I agree with the comments of the planning officer under the heading 'Amenity' in the report to council in consideration of the planning application, which read:

> "…Whilst No.17 currently has an open and treed outlook, the impact of the new dwelling is not so imposing or dominating in the view from the front of No.17 as to be unacceptable [in planning terms]. Boundary hedging will be maintained and the relationship between No.17 and the new dwelling, separated by a public highway, is not an unusual one in an urban area…"

69. The development was therefore considered to be in accordance with Local Plan policies E1 and E2, and I am satisfied that it will not lead to a significant loss of visual amenity.

70. It follows that I am not persuaded that the view from the front of No.17 will be materially damaged, nor do I think that there will be any noticeable loss of privacy and the property will not be seriously overlooked. The practical benefit enjoyed is not therefore, in my judgment, of substantial value or advantage. There was no evidence produced to support an argument that there would be any diminution in value to No.17 (or any of the other objectors' properties), and Mr Donaldson's figure was undoubtedly plucked out of the air, but as No.17 will be disadvantaged to some extent, I consider that, in accordance with s.84(1)(i) it would be just for compensation to be awarded to Mr & Mrs Mayhall. I therefore determine that they shall receive from the applicants the sum of £10,000.

71. As to compensation for disturbance during the construction works, I determine that the additional sum of £2,000 shall be paid to the Mayhalls and £1,000 to Mrs Owen at No.16. Disturbance to the remaining two objectors will be negligible, and no compensation is awarded to them.

Disposal

72. I am satisfied that the application under ground (aa) succeeds and therefore allow the modification sought. An order in the terms set out below will be made by the Tribunal.

73. The entry in the Charges Register for the application land (HP640199) shall be modified to include the following at the end of the Fourth Schedule:

> *(v) Notwithstanding what is set out at (iv) above, a new detached dwelling may be constructed in accordance with the planning permission granted by Test Valley Borough Council on 4 October 2016 under reference 16/0149/FULLS and in accordance with the accompanying plans and conditions imposed. Reference to the said planning permission shall include any renewal of that permission and any other matters approved to the satisfaction of the conditions attached to that permission.*

This modification will take effect provided that, within three months from the date of this decision, the applicants shall have

> (1) signified their acceptance of the proposed modification of the restrictions set out in the Fourth Schedule of the transfer dated 13 May 1981; and
>
> (2) paid the sum of £12,000.00 to Mr & Mrs Mayhall of No.17 Cedar Lawn, Romsey; and £1,000.00 to Mrs Owen of No.16 Cedar Lawn, Romsey.

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

Dated: 16 January 2018

Paul Francis FRICS

ADDENDUM ON COSTS

75. Comprehensive submissions on costs have now been received from the applicants and from the fourth objectors, Mr & Mrs Mayhall, together with responses and counter-arguments to what each has said. Brief further submissions, and comments upon the Drummonds' and Mayhalls' arguments were received from the first and second objectors (Mr & Mrs Bastow and Mr & Mrs Griffin). In the light of the arguments, I think it will be helpful here to recite the relevant costs provisions set out in the Tribunal's Practice Directions.

> "**12.5 Applications under section 84 of the Law of Property act 1925**
>
> 1) On an application to discharge or modify a restrictive covenant affecting land, the following principles will be applied in respect of the exercise of the Tribunal's discretion regarding liability for costs.
>
> 2) Where the applicant successfully challenges an **objector's entitlement to object** to an application, the objector is normally ordered to pay the applicant's costs incurred in dealing with that challenge, but only those costs. Where an applicant unsuccessfully challenges an objector's entitlement to object to an application, the applicant is normally ordered to pay the objector's costs incurred in dealing with that challenge.
>
> 3) With regard to the **costs of the substantive proceedings**, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably."

76. The applicants seek an order that the Bastows, Griffins, and Mayhalls should pay the applicants' costs between 20 September and 20 October 2017, and that the Bastows and Griffins should also pay the applicants' costs incurred from 21 October 2017. No costs are sought from Mrs Owen.

77. For their part the Mayhalls make an application of their own that the applicant should pay their costs of the proceedings, or "such proportion of those costs as the Tribunal sees fit.".

78. In the light of the provisions for determination of costs, and the Tribunal's discretion thereon, as set out in the Practice Directions, the applicants submitted that the objectors referred to above had acted unreasonably in the conduct of the proceedings during the stated periods, and forced a hearing that could otherwise have been avoided. Thus, Practice Direction 12(5)(3) specifically applies. It was the expert evidence, provided by Mr Donaldson (without legal foundation or any evidence to support his views) that has created in the minds of the objectors an exaggerated expectation of monetary reward. Such false expectation amounted to unreasonable conduct and directly caused the applicants to unnecessarily incur significant additional costs.

79. The reason for the Mayhalls' alleged liability for the applicants' costs being restricted only until 20 October 2017 is because that was the date upon which they accepted a without prejudice offer ("the conditional settlement"). That offer followed a period of lengthy negotiations pursuant to a sealed offer ("the Calderbank offer"), a copy of which had been filed with the Tribunal on 19 September 2017, which the Mayhalls had declined to accept. The eventual settlement was (as was the Calderbank offer) conditional upon the consent of all the other objectors to withdraw their objections. Whilst Mrs Owen agreed to withdraw her objection, the Bastows and Griffins (whilst only, it was argued, being tangentially affected by the application) resolutely refused to do so. In consequence, the applicants were forced to proceed to a hearing.

80. It was submitted that this refusal to withdraw their objections was surprising as, at a meeting held on 24 July 2017 between the applicants and all the objectors, the Bastows and Griffins championed how their involvement was to support the Mayhalls. However, that commitment and community based support to "their friends" appeared to have evaporated by the time of the conditional settlement on 20 October 2017, despite having been informed in detail about the costs consequences to the Mayhalls - and the applicants if, due to their failure to withdraw, the hearing had to proceed.

81. It was acknowledged that all admitted objectors have every right to defend the property rights that restrictive covenants secure to them, and that it is for the applicants to demonstrate that they have acted unreasonably in so doing. By exaggerating their claims through the unsupported expert evidence referred to, failing to engage in reasonable dialogue with the applicants and ignoring or rejecting admissible offers that had been made to settle the matter, the Tribunal should exercise the discretion set out in paragraph 12.2 of the Practice Directions. That paragraph states: *"…The Tribunal will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; whether or not they have exaggerated their claim…"*

82. It was pointed out that each of the active objectors had received a pre-hearing offer from the applicants. The Bastows and Griffins rejected the £750 each that had been offered in the "neighbours letter" and were not awarded anything by the Tribunal. The Mayhalls did not accept the Calderbank offer of £15,250 plus their reasonable costs up to the deadline for acceptance (27 September 2017), and a commitment to plant further trees along the front boundary. That offer was considered to be "towards the top end" of what the Tribunal might be likely to award (2.5% of the property's agreed value based upon an objective analysis of previous decisions). That they did not accept was not surprising in the light of Mr Donaldson's unsubstantiated and unsupported view that 10% of the property's value would be fair.

83. The failure of the Mayhalls and their legal representatives to objectively view the Calderbank offer and to appreciate the cost consequences (their solicitors appearing to consider that the Mayhalls would recover their costs even if the restriction was modified and/or their

clients failed to beat the Calderbank offer) meant that the opportunity to avoid the hearing and its attendant extra costs, was missed. The objectors'actions were therefore unreasonable.

84. For Mr & Mrs Mayhall, it was pointed out by their solicitors, Dutton Gregory LLP, that whilst they were acting solely for them and had issued the instructions to Mr Donaldson to act as expert on their behalf, he was acting for the other objectors as well. It was submitted that the Calderbank offer to the Mayhalls was expressed to be conditional upon all the objectors consenting to the proposed modification, and if the offer was accepted the applicants would seek consent from all the remaining objectors and they would require the Mayhalls' support in this. The applicants' view that the Mayhall's co-objectors were simply doing so as a show of support for them (the applicants' costs submissions effectively confirming that view) was not shared by the Mayhalls, and the applicants' representative was advised accordingly.

85. It is, it was submitted, as a result of the applicants' insistence that the Calderbank offer (and indeed the subsequent offer) should be conditional upon the acquiescence of all the other objectors' that the Mayhalls now seek payment of all their legal costs, or such proportion thereof that the Tribunal sees fit. In considering this application, the Tribunal is asked to bear in mind how much the application and its eventual outcome has grieved the Mayhalls. Following the Calderbank offer there was, as the applicants had confirmed in their submissions, a period of intense negotiation between the applicants' representative, the Mayhalls, and their solicitors, and it was "with a heavy heart and great reluctance" that, having considered their solicitor's advice about the potential outcome of the application, they pragmatically and objectively made the decision to agree terms on 20 October 2017. That agreement was again conditional upon all the remaining objectors confirming their withdrawal. Counsel for the applicants produced a draft letter for submission to the Tribunal together with a Schedule to be signed by the applicants and all the objectors signalling their agreement to the terms agreed.

86. Whilst the Mayhalls, Mrs Owen and Mr & Mrs Lelyveld (who also advised the Tribunal directly of the withdrawal of their objection) signed up, the Bastows and Griffins refused to do so despite strenuous attempts to persuade them by both the applicants' and the Mayhalls' legal representatives. Those attempts included pointing out the costs ramifications if the matter were to proceed to a hearing. It became clear (and was pointed out to the applicants' representative in an email of 26 October 2017), that the Bastows and Griffins were not motivated by monetary compensation, had no regard for experts or their evidence and had not been swayed or tempted by Mr Donaldson's expressed professional views. The Bastows and Griffins were clearly motivated solely by the point of principle and their own deeply held personal views. As a result of not being able to achieve withdrawal by all the objectors, the Mayhalls were advised that the conditional settlement was "off the table" and the matter thus proceeded before the Tribunal.

87. The applicants' assertion at the hearing that no compensation for the Mayhalls was appropriate, other than the £750 for disturbance during construction, was said to be disingenuous bearing in mind the Calderbank offer and the figure agreed in the conditional settlement. It was, it was submitted, inherently unreasonable for the applicants to make the

settlement subject to all objectors withdrawing, and thus the Drummonds should be paying the Mayhalls' costs rather than vice versa.

88. In response to the Mayhalls' submissions, the applicants submitted that the Mayhalls are relying upon a single act by the applicants in their attempt to establish unreasonable conduct and thus justify their own claim for the whole, (or at least a proportion of) of their costs. This is an unrealistic contention as it was reasonable, and of course necessary, for the offers to be conditional. The Mayhalls were repeatedly forewarned that any agreement prior to the hearing would be subject to the confirmed withdrawal of all objections – indeed this requirement was openly discussed in the Drummonds' "neighbours' letter" of 31 October 2016. Despite the condition, the applicants stand by what they describe as the generous nature of the Calderbank offer, that view being supported by the fact that the Tribunal's award was some 20% less. The first offer also included payment of the Mayhalls' reasonable legal and professional costs and to plant more trees. As the applicants' representative pointed out to Dutton Gregory in an email of 4 October 2017, it was hoped that the offer of legal and professional fees would increase the attractiveness of the proposed settlement.

89. The Calderbank offer also factored in cost savings and the benefit of certainty, but those factors could not remain forever and there was only a limited window of opportunity as the hearing date moved nearer. It is thus surprising that it took over a month from the Calderbank offer before, apparently, the Mayhalls discussed the matter (as they had pointed out they wished to do) with the other objectors. By then the window of opportunity had significantly narrowed.

90. It is also surprising, the applicants submitted, that the Mayhalls have claimed their costs throughout the whole proceedings, rather than from 27 October 2017 when it is alleged that the applicants' conditional offer was withdrawn. This has echoes, it was said, of the overreaching displayed in Mr Donaldson's report.

91. In response to these further points, the Mayhalls argued that Mr Donaldson, who had been appointed as a single expert for all the objectors pursuant to the order of the Tribunal dated 9 May 2017, provided his expert opinion of the compensation that might be awarded if the Tribunal were to grant the application for modification. The suggestion that those views influenced the Mayhalls, Bastows and Griffins to continue with their objections by giving them financial motivation was vociferously denied. Certainly, the Mayhalls, and it is thought the other objectors, were motivated not by intransigence but by principle and belief in their inherent entitlement to prevent their property rights being diminished. There was no way that the Mayhalls could have reasonably foreseen the reaction of the Bastows and Griffins to the proposed "very reluctant" settlement, but it was a fact that, apart from procuring the expert evidence and attendance at the July meeting, all the objectors acted independently of each other.

92. Mr & Mrs Bastow pointed out that when the applicants bought No 1 Cedar Lawn they would have known about the restrictive covenant but decided after only a short time to seek its modification. They said they objected as soon as the application was made and simply

maintained those objections whatever the financial compensation potential might have been. Compensation was not their motivation as they wanted Cedar Lawn to remain as it was. That is not unreasonable and is what the application process is for. They insisted that despite what had been said, Mr Donaldson was NOT acting on their behalf (nor for the Griffins). He had been appointed by Dutton Gregory upon the Mayhalls' instructions. Mr Donaldson's views about what compensation they might receive had not been endorsed by them and whatever the amount might be, compensation was not what they were seeking. They were appearing entirely for themselves, and had no outside representation.

93. They insisted that they had done nothing more than to invoke their right to object, and the reasons for them so doing had been set out in their notice of objection and before the Tribunal. To incur what would be a substantial financial penalty by having to pay anything towards the applicants' costs would be wrong, and could be seen generally as a deterrent to making an objection. Mr & Mrs Griffin said that their motivation was the same. It was appreciated that it was the Mayhalls who would be the most affected by the applicants' proposals and that they and the Griffin's were minor players in the overall scheme of things. Other than objecting, for the reasons they had given, they had done nothing to impede the applicants' case. They said they wished to exercise their rights and supported their "friendly neighbours."

94. They said that shortly before the hearing, they were threatened by word of mouth that they would incur costs if they did not withdraw their objections. They were advised that the Mayhalls had withdrawn their objection and, later, were informed that they had agreed a deal with the Drummonds "that would not be presented at the hearing."

Decision

95. The applicants have succeeded under ground (aa). The starting point on costs therefore is that unless the objectors have behaved unreasonably, the unsuccessful objectors will not normally have to pay the applicants' costs.

96. Firstly, and what appears to have been the key driver in the arguments over costs, is the fact that the offers to the Mayhalls were conditional upon all the objectors withdrawing. Having carefully considered the chain of events summarised above, and the extensive copy documentation that was provided to me, it was, in my judgment, understandable and entirely reasonable that the applicants' offers should contain such a condition. However, I do not concur with the applicants' argument that the principal objectors' (the Mayhalls) behaviour was unreasonable. It was not their fault, or as a result of any actions of their own, that the Bastows and Griffins refused to acquiesce in the proposed settlement. Whilst I accept that it apparently came as a surprise that they continued with their objections, they were entitled so to do.

97. The applicants could have withdrawn the condition and settled the matter with the Mayhalls, and with Mrs Owen and the Lelyvelds having themselves agreed to withdraw, this might have led to a much shorter and potentially less contentious hearing with only the two remaining "tangentially affected" objectors remaining. But that would not have resolved the

issue as, unless all the objectors withdrew, the application still had to proceed. With the eventual terms of agreement incapable of being concluded unless that condition was complied with, the Mayhalls had no control over the matter and had no alternative but to continue. They could not therefore be accused, as the applicants submitted, of "missing the opportunity to avoid a hearing". It was out of their hands.

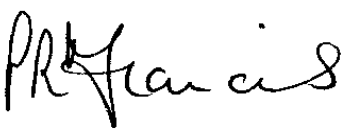
98. Further, I do not accept the applicants' submissions that the Mayhalls failed to objectively consider the offers. It is a fact that despite their genuinely felt fears as to the effect that the applicants' proposed development would have in terms of loss of amenity and the other factors described, and that they were not motivated by Mr Donaldson's optimistic views as to potential compensation, they took advice from their solicitors and counsel (which also dealt with the potential ongoing costs consequences), and decided after some limited further negotiation, to accept the applicants' conditional offer. That the condition could not be fulfilled was not of their making. If it had not been for the condition, the settlement would undoubtedly in my view have been concluded. As far as the Bastows and Griffins were concerned, there was nothing to lose knowing that the Mayhalls were continuing as "principal" objectors. Their stated objectives and reasons for continuing were clear, and I do not think that they should be penalised in terms of costs.

99. In my judgment therefore, the evidence does not support the accusations of unreasonable behaviour on the part of the objectors, and I determine that the applicants should bear their own costs.

100. As to the Mayhalls' counter argument that it is the applicants who have been unreasonable, and that they should therefore have their costs, or a proportion thereof (presumably from 27 October 2017 when the conditional offer was taken "off the table"), I do not concur with that view. As I have indicated above, making the offers conditional on all objectors withdrawing was not unreasonable. It was not the applicants' fault that the Bastows and Griffins chose not to withdraw, and it is clear that Mr Simpson on behalf of the applicants made significant efforts to get them to change their mind.

101. The evidence suggests to me no grounds for making what would be a wholly exceptional order for the successful applicants to pay the unsuccessful objectors' costs. Thus, I order that all parties shall bear their own costs in the proceedings.

Dated 9 March 2018



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