Neutral Citation Number: [2023] UKUT 286 (LC)

Case Number: LC-2022-497

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

Royal Courts of Justice

8 December 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge or modification – covenant restricting use of site to garden land in connection with the adjoining property – new house developed on site in breach of the covenant – whether covenant was obsolete or secured practical benefits of substantial value or advantage – s.84(1)(a), (aa) and (c), Law of Property Act 1925 – application refused

BETWEEN:

FOSSE URBAN PROJECTS LIMITED

Applicant

-and-

ROBERT WHYTE AND JANE CHASSELS O'RAW (1)
HELEN SARAH BELL (2)

Objectors

Re: Land to the rear of 87 and 91 Silfield Road,
Wymondham,
Norfolk,
NR18 9AX

Mr Mark Higgin FRICS
Royal Courts of Justice
21 September 2023

Ms Amanda Eilledge, instructed by Cozens-Hardy LLP, for the applicant
Mr Howard Gill for first objector
Dr Helen Bell in person

The following cases are referred to in this decision:

Ahuja Investments Ltd v Victorygame Ltd & Anor [2021] EWHC 2382 (Ch*)*
Chatsworth Estates Ltd v Fewell [1931] 1 Ch 224
Hancock v Scott [2019] UKUT 16 (LC); [2019] 1 WLUK
Millgate Developments Ltd and another v Alexander Devine Children's Cancer Trust [2020] 1 WLR 4783 (SC)
Re Bass Ltd's Application (1973) 26 P&CR 156
Re The Trustees of Green Masjid and Madrasah [2013] UKUT 0355 (LC)
Re Pearce's Application [2017] UKUT 0039 (LC)
Royal Mail Group Ltd v Efobi [2021] UKSC 33
Truman, Hanbury, Buxton & Co's Application [1956] 1 QB 261

1. This is an application filed on 5 October 2022 for the discharge of a restrictive covenant which burdens land at what is now known as 9 Buttercup Drive, Wymondham, Norfolk. On 29 July 2021 South Norfolk Council granted planning permission to build a single house on the land (the 'new house') and the building works have now been completed. The house is currently occupied by Mr Stephen Gibbons and his family. Mr Gibbons is a director of the applicant company Fosse Urban Projects Limited, who are the registered owner.

2. The objectors are Mr Robert and Mrs Jane O'Raw and Dr Helen Bell. They live at 41 and 39 Osprey Crescent, Wymondham respectively and the land upon which their houses are built was determined by an order of the Tribunal dated 18 April 2023 to have the benefit of the covenant.

3. At the hearing the applicant was represented by Ms Amanda Eilledge of counsel. Mr and Mrs O'Raw were represented by their near neighbour, Mr Howard Gill and Dr Bell represented herself. The applicant submitted an expert witness report by Ms Ciara Arundel BSc (Hons) FRICS but Ms Arundel was not present at the hearing. I am grateful to them all.

4. I inspected the new house on the morning of 19 September 2023. I was shown the interior by Mr and Mrs Gibbons and Mr Leverett of Cozens-Hardy and viewed 39 and 41 Osprey Crescent from the first floor windows that face north and east. I also inspected the garden and outdoor spaces. I then walked to Osprey Crescent and viewed the interior and exterior of both of the objectors' houses. I also took the opportunity to look at Ms Arundel's comparable properties. I did this in the company of Mr and Mrs O'Raw, Dr Bell, Mr Gill, Mr and Mrs Gibbons and Mr Leverett.

The facts

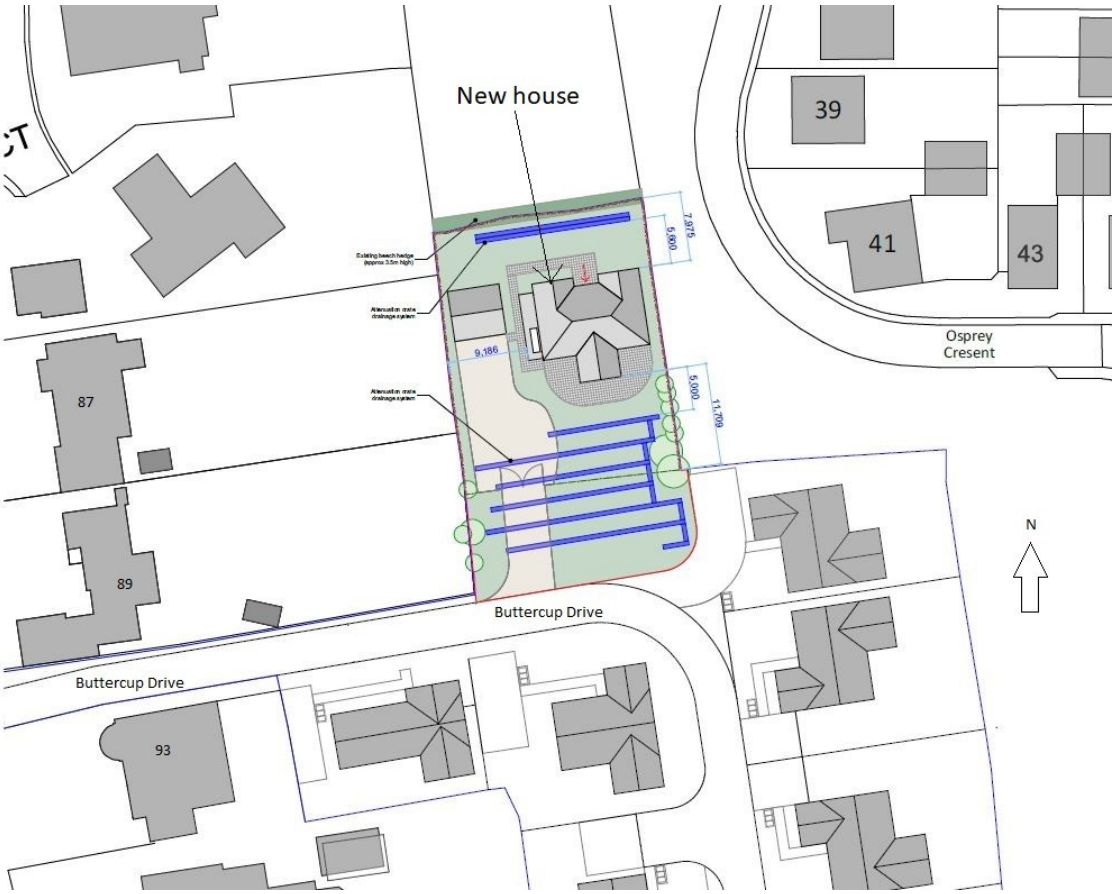
5. The application land is a broadly rectangular plot measuring approximately 44.4m x 26.25m. In topographical terms it could, more than adequately, be described as flat. It is situated to the rear of nos. 87 and 89 Silfield Road, approximately 0.9 miles south of Wymondham town centre. Silfield Road connects Wymondham to the village of Silfield which is located about 0.5 miles south of the application land. Wymondham itself is the town of some 16,000 inhabitants which lies about 10 miles southwest of Norwich. The A11 trunk road formerly passed through the centre of town but now bypasses the town on the southern side.

6. The new house is located in the rear part of the plot adjacent to the eastern boundary with a detached garage between the house and the western boundary. The distance from the rear elevation of the house (which paradoxically contains the front door) to the rear boundary is about 8 metres, whilst the front garden is about 20 metres deep. The positioning of the house was said by Ms Eilledge to have been dictated by the presence of two attenuation crate drainage systems, one in the front garden, shown on the plan below, which provides surface water drainage to the rest of Buttercup Drive and a further, smaller system for the new house itself. It was not explained why the development was not planned with the larger system at the rear which would have enable the new house to have been built much further forward of its current position.

7. I have already mentioned that the 'front' door is in the rear elevation and the house is orientated towards the north. To a casual observer it would appear to be built 'the wrong way round'. The northern elevation has full height glazing to the central hall, stairs and landing area. It also contains windows at first floor level for the two bedrooms at that end of the house. These windows are at a high level and mirror the shape of the two gables. When standing in the two rooms it is not possible to see anything through them other than the sky. This arrangement was put in place to protect the privacy of a swimming pool in an adjacent garden. A corollary of this unusual fenestration is that the planning authority required additional windows in these bedrooms as a potential means of escape in the event of fire breaking out in the house. One of these windows in the eastern elevation faces directly towards No. 41 Osprey Crescent and obliquely towards No.39. The distances between the houses were calculated by Ms Arundel and recorded in her report as follows:

New house to 39 Osprey Crescent – 29.08 metres
New house to 41 Osprey Crescent – 24.61 metres

8. The application land formed part of a larger plot formerly attached to 93 Silfield Road which was developed in 2020 and now contains 8 bungalows. The plan below shows the location of the land and its relationship to its surrounding properties including those owned by the objectors. Some of the bungalows in Buttercup Drive are visible as well.



9. Osprey Crescent forms part of the large development by Bovis Homes and Taylor Woodrow on land immediately east of the application land. The scheme is known as Birch Gate and will eventually contain 500 houses, and at the current time a substantial number have been completed and are occupied. Birch Gate is one of a number of schemes in the town by a variety of house builders which has resulted in a 25% expansion of the town's population between 2011 and 2021.

10. Mr and Mrs O'Raw's house at 41 Osprey Crescent is situated on the western edge of the development about 25m from the new house on the application land. It is detached and has five bedrooms and three bathrooms, two of which are en-suite. The ground floor contains a large kitchen/living space, a lounge, study and WC. It is aligned parallel to the new house and faces directly onto the side elevation. House builders such as Bovis Homes masterplan their developments using a combination of various stock designs, one of those with a code of P501 was used as a template for 41 Osprey Crescent. It was evident from my inspection, and later confirmed by Dr Bell in her evidence, that Bovis had used a number of variations in the basic format of P501 at Birch Gate. These included the use of rendered elevations as well as brick, different colours of roof tile and solar panels on houses that had south facing roofs.

11. 41 Osprey Crescent has rendered elevations and red clay roof tiles. It has no solar panels. Internally, on the ground floor, the lounge and study face towards the new house, the former having a six pane bay window and the latter a two pane casement window. At first floor level the rooms facing the new house are bedrooms 2, 4 and 5. Bedroom 2 is a large double room with an en-suite shower room, bedrooms 4 and 5 only have enough space for a single bed.

12. Dr Bell's house at 39 Osprey Crescent is a Type P402, a smaller house of 111.5m^2 compared to the 147.8m^2 of the adjacent P501 owned by Mr and Mrs O'Raw. It too is detached but has four bedrooms and two bathrooms. The master bedroom which has an en-suite bathroom overlooks the rear garden. The ground floor is arranged with the kitchen and a study at the front whilst the rear part contains a full width lounge/dining room.

The statutory background

13. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The applicants in this case relied on grounds (a), (aa) and (c).

14. Ground (a) of section 84(1) is satisfied where it is shown that by reason of changes in the character of the property or neighbourhood or other circumstances of the case that the Tribunal may deem material, the restriction ought to be deemed obsolete.

15. Ground (aa) is fulfilled where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures "no practical

benefits of substantial value or advantage" to the person with the benefit of the restriction, or that it is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.

16. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area, as well as "the period at which and context in which the restriction was created or imposed and any other material circumstances."

17. Ground (b) is made out where it can be demonstrated that the persons of full age and capacity entitled to the benefit of the restriction have agreed, expressly or by implication, by their acts or omissions to the modification of the restriction.

18. The condition in ground (c) is met where it can be shown that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

19. The Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it. If the applicant agrees, the Tribunal may also impose some additional restriction on the land at the same time as discharging the original restriction.

20. Should an applicant establish that the Tribunal has jurisdiction to modify the covenant, he has at that point only cleared the first hurdle; he then needs to persuade the Tribunal to exercise its discretion. This is a distinct and separate exercise although the Tribunal will not normally refuse to do so if it is satisfied that jurisdiction has been made out. I now turn to the detail of the application.

The covenant

21. The restriction is contained in the first schedule of a conveyance dated 19 September 1996 between Ian Alston and David Robert Richardson (vendors) and Douglas Neville Brandwood and Elsie Phyllis Brandwood (purchasers) and reads as follows:

> "Not to use the land hereby conveyed other than as garden land in connection with the adjoining property".

The adjoining property is agreed between the parties to be 93 Silfield Road, Wymondham.

The applicant's case

22. The application for discharge of the covenant was originally made under grounds (a) and (c) although the applicant's statement of case referred additionally to ground (aa). At the hearing it was submitted that ground (aa) had been omitted from the application form in

error. I have accepted that this was the case and have granted consent for the applicant to make submissions on the missing ground since it would have been clear to any potential objector reading the applicant's statement of case that it formed part of the application.

23. The applicant also sought permission in the alternative to modify the covenant to permit the construction and continued occupation of the new house currently on the application land. The objectors expressed concern about the prospects of further development on the land and I therefore allowed the application to be amended to seek the more limited remedy of modification.

24. In relation to ground (a) the application stated that the restriction ought to be deemed obsolete, the character of the local area having changed considerably from a small residential area with a rural aspect over farmland to an urban area. The farmland had been developed and now comprised an estate of over 800 homes.

25. As far as ground (aa) was concerned the applicants assert that no practical benefits of substantial value or advantage to the respondents are secured which would be lost if the restriction was discharged.

26. Turning to ground (c) the applicants say that the discharge will not injure the persons with the benefit of the restriction. The benefitted land is not identified in the 1996 conveyance and even assuming there is some land which is capable of benefiting from the covenant (as the Tribunal has already found in the case of the objectors' land), a discharge of the restriction will not injure the owner of any such land.

Evidence of the objectors

Mr Robert and Mrs Jane O'Raw

27. Mr and Mrs O'Raw are a retired couple in their 80s. At the hearing Mr O'Raw described how he and his wife had moved from Scotland to Norfolk to be close to their two daughters.

28. In their joint notice of objection, they explained that they had chosen their house, which occupied a corner plot, in the knowledge that the land opposite (on which the new house has been constructed) would be protected by the covenant and would remain green, open space. They went on to state that their previously clear, uninterrupted view was now blocked completely by the new house and in addition there is a window looking directly into their bedrooms, lounge and study. They further noted that the initial planning application for the new house was for a 'one and a half' storey house but the new house was very tall, obtrusive and not in keeping with the surrounding houses. It overlooks neighbouring properties and even the 'car port' is almost the height of a bungalow.

29. Mr and Mrs O'Raw observed that green space is at a premium and its benefits in terms of mental and physical health are widely recognised. They remarked that local residents thought that the application land was only to be used as garden space or allotments and applications for its development had been previously challenged. They had come to the conclusion that the applicant must have been fully aware of the covenant and that an

application for the discharge of the covenant made in October 2022 when the project was underway showed a total disregard for any decision to be made by the Tribunal and an attitude that the covenant could be ignored. Comments made by the applicant's agent, claiming that their house was already impacted by neighbouring properties, were said by Mr and Mrs O'Raw to be totally untrue and they considered that the front of their home was dominated by the new house.

30. In order to demonstrate the proximity of the new house to their own, Mr and Mrs O'Raw provided a photograph showing the outlook from the front of their house prior to construction and a contrasting image during the works. They also provided a photograph of the bungalows which formed part of the same development of the new house, taken from the front of their house, but looking south. They commented that these buildings were in keeping with the initial planning application and were situated at a greater distance than the new house.

31. Mr and Mrs O'Raw also submitted a letter from Warners, a local estate agent, which concluded that the development of the new house may diminish, by a figure in the region of £25,000, the value of 41 Osprey Crescent.

Dr Helen Bell

32. In her notice of objection Dr Bell said that she had purchased her property specifically because the land opposite (the site of the new house) was subject to a covenant restricting its use to green space which meant that the view from her property would not be obstructed, and her privacy would not be infringed. She considered that the new house had adversely impacted both attributes and she additionally objected to its size and effect on the local environment. She added that the new house had caused a decline in the value of her house, and she had suffered disturbance from the construction works.

33. At the hearing Dr Bell said that ideally, she would like to see the new house removed and the site returned to open space. She explained that when purchasing her house, the estate agents representing Bovis had used the covenant as a selling point and although she was aware that bungalows would be built on the southern portion of the site, she thought that the site of the new house would be used as allotments. She understood the purpose of the covenant was to protect the eastward outlook of properties on Silfield Road.

34. Regarding the particular attributes of her house, she said that 37 and 39 Osprey Crescent had longer gardens and driveways than No. 29 and a superior outlook. Dr Bell thought that her house was diminished in value and wished to be compensated. She had taken advice from friends who were estate agents and estimated that the diminution in value was in the range of £10,000-20,000, although she recognised that the advice might not be entirely objective.

35. She added that the construction work had caused disturbance over a considerable period and had been troublesome when she was working from home. Apart from construction noise she had also been subject to music, swearing and littering by the contractors.

Submissions for the objectors

36. On behalf of Mr and Mrs O'Raw, Mr Gill submitted that although the house they had chosen was part of a large estate, the open aspect at the front was an important factor in Mr and Mrs O'Raw's decision to buy and the agents for Bovis Homes had correctly pointed out that the application site was subject to a covenant and could not be built on. He said that the enjoyment of their home had been lost following the construction of the new house resulting in stress and anxiety. They no longer felt comfortable using the west facing bedroom and to a lesser extent, the sitting room. Ultimately, they had come to a decision to put their house on the market which meant that they would now face the costs of moving. They found comments by Ms Arundel that they 'should have bought a rural house' patronising and flippant.

37. Prior to the hearing Mr and Mrs O'Raw provided the Tribunal with sales particulars for their house which was on the market at £500,000 and at the hearing Mr Gill confirmed that they had recently received an offer of £475,000. He also confirmed that 7 Hobby Drive, which is nearby and of the same house type as 41 Osprey Crescent had sold in November 2022 at £525,000. Mr Gill pointed out that much of the planting by Bovis Homes on the western boundary of the estate, adjacent to the new house, was deciduous and would provide no screening during the winter months. Furthermore, some of it would take twenty years to reach maturity and was therefore of little comfort to Mr and Mrs O'Raw.

Expert evidence

38. The applicant submitted an 'Expert Valuation Report' compiled by Ms Ciara Arundel, a director of Savills based at their Norwich office. She has 25 years' experience of valuing residential and commercial property and development land across the eastern region. Surprisingly she was not present at the hearing which meant that the objectors and the Tribunal had no opportunity to ask her questions about her evidence.

39. Ms Arundel inspected the application land and the new house on 13 June 2023 and on the same day inspected the front elevations of 39 and 41 Osprey Crescent. She did not go inside the latter two properties. She acknowledged that the new house is described by the applicant as a '1.5 storey' building, which might infer that it is what is often known as a 'chalet bungalow'. Ms Arundel described it as 'higher than a standard unit of this type'. It was not apparent what she meant but on my inspection it appeared to me to be a conventional two storey house albeit one where the loft had been incorporated into the living space.

40. Ms Arundel noted that some planting had been undertaken by the developers of Birch Gate on the land between the new house and the objectors' properties. She had attempted to ascertain the nature of the boundary treatment on this land at the time the objectors' properties were purchased in August 2018. Using an undated Google Earth image taken after the relevant part of Birch Gate was finished, she identified a hedge on the boundary but nothing more. At the time of her report, she observed, there was a high wooden fence and a thickened hedgerow. Ms Arundel noted that sweet briar, hawthorn, plum, spindle, sycamore maple, basket willow and oak had all been planted. She set out the likely dimensions and timescales for full growth as follows:

41.

Species	Height (metres)	Width (metres)	Timescale
Sweet briar	2.5	2.5	5 years to full size
Hawthorn	5.0	4.0	20 years
Plum	8.0	5.0	10 years to full size
Spindle	9.0	Not stated	11 years to 4.5 metres
Sycamore maple	30.0	10.0	10 years to full height
Basket willow	4.5	3.0	2.5 years to full height
Oak	20-40	Not stated	10 years to 2.5 metres

she had identified the plants and arrived at the information on sizes. She did supply a plan from the planning application relating to reserved matters which appeared to depict the planting scheme on the land opposite Dr Bell's house. However, other than identifying spindle as one of the plants, the plan and Ms Arundel's list had nothing else in common. Ms Arundel's conclusion was that at the time of her inspection the ground floor of the new house was barely visible and that it was clear that the species selection had been designed to create an environmentally friendly, substantial green barrier separating Buttercup Drive and Birch Gate. However, I would have been assisted by an actual planting plan or some comfort that Ms Arundel had the expertise to identify the make-up of the hedge; in her absence, and without conclusive details of what was planted I am not inclined to place much weight on her evidence. That is not to say that that planting had not taken place, I noted its presence on my own inspection but some of it had died and other elements had thrived and were approaching 4 metres in height.

42. Ms Arundel had sought to identify whether following the development of the new house there had been a deleterious effect on the values of the objectors' houses. She had carried out this research by comparing sale prices of particular house types over a period of about 22 months from the end of August 2018 to the middle of June 2020. 39 and 41 Osprey Crescent are different house types so Ms Arundel had divided her evidence between the two as shown as in the table below.

Address	House Code	Type	Price	Date	Index to Jan-2020
			£384,995	16/11/2018	£385,995
41 Osprey Close	P501	Detached	£385,000	28/01/2020	£385,000
31 Osprey Close	P501	Detached	£365,000	31/10/2018	£361,717
5 Hobby Drive	P501	Detached	£400,000	30/05/2019	£403,278
7 Hobby Drive	P501	Detached	£411,000	21/12/2018	£411,747
7 Swift Close	P501	Detached	£440,000	06/05/2020	£433,063
9 Swift Close	P501	Detached	£435,995	19/06/2020	£424,962
Address	**House Code**	**Type**	**Price**	**Date**	**Index to Aug-2018**
39 Osprey Close	P402	Detached	£324,995	31/08/2018	£324,995
37 Osprey Close	P402	Detached	£324,995	29/08/2018	£324,995
29 Osprey Close	P402	Detached	£300,000	05/12/2018	£300,856
3 Hobby Drive	P402	Detached	£304,000	27/02/2019	£307,977
9 Hobby Drive	P402	Detached	£315,000	27/03/2019	£319,171
11 Peregrine Grove	P402	Detached	£316,995	13/12/2017	£330,571
14 Nightingale Avenue	P402	Detached	£310,000	29/06/2017	£335,827
12 Nightingale Avenue	P402	Detached	£304,995	27/01/2017	£325,595
54 Goshawk Rise	P402	Detached	£305,000	11/10/2019	£304,396
9 Quail Grove	P402	Detached	£334,995	06/12/2019	£332,438

43. To take account of any changes in value between the date of sale of the comparators and the dates on which Mr and Mrs O'Raw and Dr Bell purchased their houses Ms Arundel adjusted the values to January 2020 and August 2018 levels respectively. The indexation was achieved from means of Land Registry house price data for detached dwellings in South Norfolk.

44. Regarding 41 Osprey Crescent it can be seen that the house was originally sold in November 2018 for £384,995. It was sold again in January 2020 for just £5 more. Ms Arundel observed that only one party had purchased a house (no.31) at less than Mr and Mrs O'Raw had paid. Ms Arundel's conclusion was that these circumstances demonstrated that no premium was paid by the original purchaser (and by Mr and Mrs O'Raw) for the open outlook that their house enjoyed. Ms Arundel reasoned that if no

premium was paid then it could not be lost by the building of the new house. She reached the same conclusion in respect of both Nos. 39 and 41.

45. There are some obvious flaws in Ms Arundel's approach. Firstly, 31 Osprey Crescent is separated from No. 41 by four other houses or a distance of about 60 metres. It enjoys open views across greensward and a pond. It appears to be of identical specification except that the rear garden faces south rather than east as at No.41, and it has solar panels. It was sold two weeks before No.41 originally transacted and fetched £20,000 less. This evidence suggests that the original purchaser of No.41 did pay a premium when the sale is compared to No.31. The second flaw is that the market in 2018 was not the same as the market in 2020. In 2018 the estate was only partially complete and the original houses have now been joined by many others of similar specification. The supply and demand dynamic had different characteristics and the factors driving values in 2018 may not have been present two years later.

46. Additionally, all the examples of P501 type houses mentioned in Ms Arundel's report had open outlooks, some within the estate across landscaped areas, whilst others faced open ground. None had an outlook that is restricted in the sense that No.41 is now. In other words, there is no comparator with which to establish a value for a house without a view.

47. An examination of the sales information in relation to P402 house types shows a similar pattern. Ten examples of this type were sold between January 2017 and December 2019 in various locations in the estate. Nos. 37 and 39 Osprey Crescent (the latter being Dr Bell's house) sold within two days of each other at the end of August 2018 for £324,995. No 29 Osprey Crescent sold just over 3 months later at £300,000 and has a similar open outlook at the front, although Dr Bell commented that it looked out over a drainage culvert. That may be the case but at the time of my visit it did not, in my view, present an unattractive vista. The two 2019 transactions in Hobby Drive were at lower levels than the 2018 sales which may have been as a result of changes in supply as the estate developed and more houses came on stream. The 2017 sales in Nightingale Avenue were at lower levels than the 2018 sales elsewhere in the estate. 54 Goshawk Rise was the only house amongst Ms Arundel's examples which did not have an open outlook; it faced directly into a pair of semi-detached houses on the opposite side of the road. I was unable to identify 9 Quail Grove when I walked through the estate which was unfortunate as it would have been useful to compare it to 54 Goshawk Rise, the transactions being almost contemporaneous.

48. It appears to me that both Mr and Mrs O'Raw and Dr Bell did pay more for their properties than their near neighbours but since they all had open outlooks and some of the houses had different specifications, orientation and finishes it is difficult to be definitive about apportioning value to a particular aspect. In my judgment the question of whether the construction of the new house had caused a decline in value at Nos. 39 and 41 cannot be answered by trying to prove that the purchase price included a premium for a specific factor.

49. Ms Arundel's report also addressed the individual concerns of Mr and Mrs O'Raw and Dr Bell. With regard to Dr Bell's comments and beginning with the claim that the new house reduces her view, Ms Arundel noted that Dr Bell's house looked directly over land to the north of the new house and that the land remained open and undeveloped. Ms Arundel's

view was that Dr Bell would need to be looking out of the house at an angle of about 45 degrees to see the new house.

50. She also rejected the notion that the new house had caused environmental damage. Dr Bell's assertion that the privacy of her bedrooms at the front of the house had been impacted was described by Ms Arundel as unjustified. She thought that the only window which would afford a view towards Dr Bell's house was nearly 30m away and situated at quite an acute angle.

51. In response to Mr and Mrs O'Raw's concerns that they chose their house in the knowledge that the application land would not be developed, Ms Arundel said that the boundary planting was in place at the time of purchase and she considered that the only green space was the land provided by Bovis Homes as part of the development. She went on to comment that the application land was required by the covenant to be used as garden land and open green space and would therefore be used for a variety of purposes. A further consideration was that the whole of the land which forms numbers 1-9 Buttercup Drive and includes the application land, was the subject of a live planning permission for development at the time Mr and Mrs O'Raw bought their house. Ms Arundel thought it should have been obvious that the land was suitable for development and the covenant might be challenged in some point in the future.

52. Ms Arundel also disputed Mr and Mrs O'Raw's comment that the previously clear uninterrupted view was completely blocked by the new house. In response she said that the only clear view over the application land would have been from the first floor windows, and that if Mr and Mrs O'Raw had desired a clear uninterrupted view, a dwelling located in a rural area may have been more suitable. She did not dispute that there was a window looking directly into the bedrooms, lounge and study of Mr and Mrs O'Raw's house but noted that the distance between the two was 25m and she considered that the view from the window in the new house did not look directly into the rooms as it was simply too far away. In her conclusions she said that neither property was unduly overlooked by the new house which she considered to be much further from either Mr and Mrs O'Raw's house or Dr Bell's house than the neighbouring estate housing. Whilst this might be true at the rear of the properties, from my inspection it is certainly not the case at the front.

Submissions for the applicant

53. In relation to ground (a) Ms Eilledge said that there had been significant changes to the character of the local area since the covenant was imposed in 1996. In addition to the eight bungalows in Buttercup Drive, more than 500 houses had been built as part of the Birch Gate scheme on land benefitting from the covenant. Further development on a site to the north of Osprey Crescent had also been completed. The result was that the area had changed from being residential in nature with views over open farmland to being substantially urban. In support of her contention that the covenant was obsolete, Ms Eilledge said that the test was not that the covenant had become completely useless and referred the Tribunal to the view expressed by Romer LJ in *Truman, Hanbury, Buxton & Co's Application* [1956] 1 QB 261, where he said:

> 'If the [tribunal] did, in fact, ask himself whether the covenant had become absolutely valueless, it may be that he was applying rather too strict a test….'

54. At page 272 of the decision he provided additional guidance:

> '…..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).'

55. As far as the original purpose was concerned Ms Eilledge referred to paragraphs 74 and 75 of *Hancock v Scott* [2019] UKUT 16 (LC) where the Tribunal (P R Francis FRICS) said:

> '74. In determining whether the restriction has become obsolete, it is necessary first to consider the original purpose of the restriction and whether it can still be achieved. If, in the light of changes in the character of the property, the neighbourhood or other material circumstances it can no longer be achieved, the restriction should be deemed obsolete.
>
> 75. I agree with Mr Sheriff's submissions that the only purpose of the restriction clearly identifiable is the purpose of limiting the extent of residential development on the land. Any other suggestion (including Mr Sheriff's own assumption that one of the purposes may have been a desire to maintain open space around the house) can only be supposition. The suggestions as to the extent of the original purpose identified by Mr Adams-Cairns, and the submissions by Mr Francis as to ECA's and the residents' alleged 'special interest' are, as Mr Sheriff observed, not based upon evidence and are an inference that is at odds with the wording of the restriction that effectively permits a more extensive (in terms of comings and goings and traffic generation) use than purely as private residential dwellings.'

55. Ms Eilledge noted that the objectors considered that the original purpose of the covenant was to protect the views over open countryside enjoyed by neighbouring properties on Silfield Road. She considered this to be speculation, and questioned why, if it was the purpose of the covenant, it only extended to a small part of the land associated with 93 Silfield Road. She further noted that the covenant did not contain an absolute prohibition

against buildings on the land, and in her view it was possible to construct a building for garden use.

56. She also submitted that the Tribunal should not assume that the covenant was imposed to protect green open space and referred to comments made by Ms Arundel that the land could be used to store old cars, broken kitchen appliances or simply become completely overgrown. None of those uses would breach the covenant.

57. Returning to *Hancock*, and in particular paragraph 84 (as follows):

> 'It would in my view be incongruous if the second objector were able to succeed on this ground as it is its own and its predecessors' actions over the past 30 years or so that have served to completely transform the immediate area into an intensively developed housing project. I accept, as Mr Francis argued, that when The Conifers and Lyefield Court both vested in ECA on 21 June 2016, the restrictions over The Conifers were extinguished by unity of seisin. However, the incongruity is only heightened, to my mind, by that fact.'

Ms Eilledge said that the objectors were in the same position as ECA (the objectors in *Hancock*), insofar as they were successors in title to the vendors of the land who sold it to Bovis and should not be put in a better position than their predecessors in title. She concluded it was likely that the covenant was imposed to prevent an increase in the density of housing in the locality and given the degree of development in the area this purpose could no longer be achieved.

58. Turning to ground (aa) Ms Eilledge identified three issues for consideration. The first of these was to ascertain whether the proposed user was reasonable. Her answer was perfunctory; the new house was granted planning permission on 21 July 2021 and her conclusion was that the question was answered in the affirmative and no further examination was necessary.

59. The second issue was whether impeding the proposed user secured any practical benefits for the objectors and whether those benefits were of substantial value or advantage? She noted that the benefits cited by the objectors were essentially the view over an open green space and freedom from being overlooked. Ms Eilledge drew attention to the meaning of substantial in this context and referred to the well-known explanation by Carnwath LJ in *Shephard v Turner* [2006] 2 P & CR 28 where at paragraph 22 that 'substantial' means 'considerable, solid, big'.

60. Ms Eilledge also referred to paragraphs 44 and 47 of *Re Pearce's Application* [2017] UKUT 0039 (LC) where the Tribunal considered the visibility of a new house from certain vantage points, and she remarked that the decision was relevant to Dr Bell's house as the new house was only visible when looking in a particular direction.

61. Ms Eilledge questioned whether the application land could be characterised as open, green space since it could be used for a variety of purposes and was fenced. She sympathised with the objectors as far as loss of trees at the back of the site was concerned but noted that

the objectors' houses were on a very large estate with open space and significant boundary planting. If there was a practical benefit, she submitted that it was not substantial.

62. As far as privacy was concerned Ms Eilledge relied on Ms Arundel's judgment that the distance between the new house and the objector's homes was too great for there to any impact. She acknowledged that the objector's concerns were valid but said it was not a situation where you could see anyone inside Nos. 39 or 41 Osprey Crescent from the eastern facing window in the new house. She submitted that with a path and roadway immediately in front of both houses privacy was compromised in any case. She noted that it had not been the intention of the developer to put a window in that elevation and said that the applicant was willing to install opaque glass if necessary.

63. The final matter for consideration was compensation in the event that the Tribunal was persuaded that the covenant should be discharged or modified. Ms Eilledge said that Ms Arundel had concluded that no compensation was necessary.

Discussion

Ground (a)

64. None of the parties adduced evidence in relation to the purpose of the covenant. I note that the land on which the bungalows have been built, and which is closer to 93 Silfield Road than the application land, had no such restriction. This would indicate that the purpose was not to protect the amenity of that property and leads me to the conclusion that the restriction was intended to prevent development in favour of the properties at 87 and 89 Silfield Road. However, they do not occupy land with the benefit of the covenant. There is a degree of irony that the objectors' houses are on land which, according to the objectors, the covenant sought to protect views towards.

65. The wording of the covenant refers to use of the land in connection with the adjoining property (93 Silfield Road). It was apparent from my inspection that there is no physical connection between the two, the land between having been developed as part of Buttercup Drive. They are no longer adjoining and a function which was present when the covenant was included in the transfer can no longer be fulfilled.

66. In *Chatsworth Estates Ltd v Fewell* [1931] 1 Ch 224, Farwell J said at 229:10:

> "To succeed on [ground (a)] the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all."

When the covenant was imposed the application land was on the periphery of Wymondham adjacent to open farmland. The purpose of the restriction is likely to have been to preserve the boundary between the developed area and the open farmland. Land to the west of Silfield Road had been developed in the 1950s but on the eastern side, development was far less comprehensive and was concentrated closer to the town centre. The application land is now completely encircled by housing with developments having occurred on land to the north, east and south. Taken together this development essentially

constitutes a whole new district in the town and extends the boundary of the built part of Wymondham as far as the bypass (A11). The boundary between developed and open land has been relocated and, to the extent that it was intended to preserve the original boundary, the covenant has become obsolete. I conclude that this ground is made out.

Ground (aa)

67. A proper evaluation of ground (aa) is a little more nuanced than Ms Eilledge's submissions would suggest. Most applications under s. 84 tread the familiar path set out in *Re Bass Ltd's Application* (1973) 26 P&CR 156 and I will follow that route. The evaluation is framed by a series of questions the first of which is:

Is the proposed user reasonable?

68. This is a case where planning permission has been granted for the use of the application land for a new house and none of the objectors has advanced a reason why (apart from that it breaches the covenant) that use is not a reasonable one. It seems to me that it is.

Does the covenant impede that user?

69. It is self-evident that the covenant impedes the development of the application land for residential purposes. The fact that the covenant has not yet been enforced and the new house has been built in breach does not alter the effect of the covenant.

Does impeding the proposed user secure practical benefits to the objector?

70. The benefits identified by the objectors are twofold; an open aspect and privacy, or putting it more precisely, the absence of being overlooked. It is clear from their evidence that both objectors chose to buy their particular houses because, in part at least, they had a relatively uninterrupted view at the front. They were in a part of the estate where they did not face into another house. It was apparent on my site visit that in planning of the estate, the developer had been careful to ensure that with the larger, more expensive houses (of which the objector's homes are two), there was significant separation at the front. The objectors are located on the very edge of the estate and initially enjoyed the same degree of separation as elsewhere. However, as a result of the development of the new house, they now find themselves in the same position as some of the occupiers of the smaller, cheaper houses on the estate with a truncated outlook. It should be pointed out that Mr and Mrs O'Raw's house is, in my view, in a materially worse position in this regard than Dr Bell's on account of being directly opposite the new house. In my view the retention of an open aspect is a practical benefit secured by the covenant.

71. The loss of privacy is easier to assess. It was not possible on my visit to tell whether the occupiers of the new house could see directly into the rooms at the front of Mr and Mrs O'Raw's house as they had installed vertically hung blinds at each window. However, when I was in Mr and Mrs O'Raw's house looking out I could see into the new house without much difficulty. It would be reasonable to conclude therefore that the first floor bedroom at the new house offered a view into the bedrooms and lounge at 41 Osprey

Crescent. Ms Arundel said in her conclusions that neither 39 or 41 Osprey Crescent was overlooked by the new house but she did not assess the situation from the interior of either. I am not satisfied, on the evidence before me, that the planting by Bovis Homes when Osprey Crescent was built will provide adequate screening of the new house. It will take many years to mature, appears largely deciduous and was not intended for the purpose that Ms Arundel said it would fulfil. I disagree with her conclusions, the prevention of overlooking at the front of the properties is a practical benefit.

If the answer to question 3 is 'yes' are those benefits of substantial value or advantage?

72. Ms Arundel had attempted to quantify the value of the open aspect, but I found her methodology could not supply an answer. Mr and Mrs O'Raw submitted that they had received an offer for the house which demonstrated that its value had declined when measured against an unaffected house at 7 Hobby Drive. The difference between the sale price of 7 Hobby Drive in November 2022 and the offer they had received in September 2023 was £50,000. However, it is interesting to compare the sale price of the two houses in 2018 when 41 Osprey Crescent sold for £384,995 in mid-November and 7 Hobby Drive fetched £411,000 six weeks later. In percentage terms the difference was 6.75% in 2018 and 10.5% now. It would be imprudent to conclude that the difference represents the effect on value. Mr and Mrs O'Raw did not submit any evidence about the condition or specification of 7 Hobby Drive, and it should not be assumed that all of the other factors that contributed to the relative prices in 2018 are still present. Similarly, no evidence was adduced about the general level of change in house prices between November 2022 and September 2023. Nevertheless, in the absence of any other evidence and assuming that the whole of the modest change is attributable to presence of the new house by September 2023, I do not consider that the benefit of the restriction has substantial value to Mrs and Mrs O'Raw as owners of their house.

73. In my judgment Mr and Mrs O'Raw have experienced a loss of the open aspect and privacy that they previously enjoyed. They chose a house in an area where development was taking place on an adjoining site and they possibly did not appreciate, or were misinformed about, the likelihood of development on the application land. It is unfortunate that the applicant chose to build a house rather than a bungalow especially bearing in mind that the rest of the development comprises bungalows. Nevertheless, the open aspect has gone and has been replaced by a situation whereby they are overlooked. It is clear that they have felt the loss of privacy very keenly and it has affected the enjoyment of their home. I note that they are overlooked by just one window at a distance of 25m but as Ms Eilledge rightly pointed out, a road and pathway pass directly in front of their house meaning that their location is not entirely private in any case. I conclude that there is an effect on amenity and value, but it is not substantial.

74. The case at 39 Osprey Crescent is less clear cut. Dr Bell still enjoys an open aspect at the front of her house and I judge the loss of privacy to be marginal. In my judgment the practical benefits that the covenant confers are not of substantial value or advantage to any

of the objectors. It follows that I have jurisdiction to modify the covenant in favour of the applicant on ground (aa) as well as on ground (a).

75. Both objectors sought compensation, Mr and Mrs O'Raw in the sum of £25,000 to £50,000 and Dr Bell in the sum of £10,000 to £20,000.

76. Following my conclusion in relation to ground (aa) I find the objectors will be injured by discharging or modifying the covenant. Ground (c) is therefore not satisfied.

Discretion

77. Having established that I have the jurisdiction I also need to decide whether to exercise my discretion to allow the discharge or modification of the covenant.

78. The applicant's conduct is relevant in this respect. The lack of a witness statement from anyone at the applicant company was a notable omission and has hindered an examination of its motives. It is likely, being an experienced developer in receipt of legal advice, that the company was aware of the covenant. Indeed, earlier planning applications for the development of Buttercup Drive specifically avoided development of the application land. I also note that having made an application to the Tribunal in October 2022 the construction work continued and by the time of the hearing the new house was complete and occupied. Ms Eilledge submitted in her closing remarks that it was not obvious who had the benefit of the covenant, but the applicant adduced no evidence about the steps taken to identify the occupiers of the land who were ultimately found by the Tribunal to be entitled to the benefit of the covenant. The applicant could also have provided evidence that it believed the covenant was spent or unenforceable, if that was the case, but it has chosen to remain silent.

79. The Supreme Court has recently encouraged courts and tribunals not to take too technical an approach to the inference which can be drawn from the absence of a witness. In *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, a case about proving discrimination, Lord Leggatt JSC commented as follows:

> 'The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not

> given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.'

80. Similarly, in Ahuja Investments Ltd v Victorygame Ltd & Anor [2021] EWHC 2382 (Ch), HHJ Hodge KC at [33] considered the same sort of issues in a case about misrepresentation where a party failed to call its own solicitor to give evidence about a transaction:

> 'Second, the failure to call a witness who might have been able to give evidence on a material issue may mean that the court is left with no direct evidence at all on that issue. In that situation, the party who might be expected to have called that witness cannot complain if the court rejects that party's case on that issue and either makes a finding based on the inherent probabilities presented by the limited evidence that is before the court, or simply concludes that it is unable to make any finding of fact at all on that issue.'

On the inherent probabilities presented by the limited evidence that is before me, namely that the applicant was a well-resourced developer with access to legal advice which developed the bungalows first without building on the application land and then came to it separately, I draw the inference that it was aware of the restriction and that it was enforceable, and decided to take its chance that its neighbours would not seek an injunction or resist an application to discharge made after development had commenced. The first part of that gamble was successful, as no action was taken by any of the objectors to stop the construction work either before or after the application. Whether the second part succeeds depends on the willingness of this Tribunal to overlook what I can only conclude was a deliberate breach of the covenant.

81. Ms Eilledge distinguished the actions of the applicant company from those of the developer in *Millgate Developments Ltd and another v Alexander Devine Children's Cancer Trust* [2020] WLR 4783 (SC). In *Millgate*, a developer had proceeded with its project knowingly in breach of covenants which it then sought to have discharged. The Tribunal was prepared to do so only because it was satisfied that the retention and occupation of the social housing which had been constructed was in the public interest. That exercise of the Tribunal's discretion was challenged on appeal and reversed by the Court of Appeal and, for different reasons, by the Supreme Court. Ms Eilledge made submissions distinguishing the facts of this case with those in Millgate, but a comparison of the detailed facts of different cases is not of much assistance when a discretion is being exercised. What is significant about *Millgate* is the strength of the Supreme Court's disapproval of the conduct of the developer in deliberately committing a breach of the restrictive covenant with a view to making profit from so doing, conduct which Lord Burrows described as "cynical".

82. *Millgate* was not the first occasion on which the Tribunal had been asked to exercise its discretion to discharge a covenant which had already been breached. In *Re The Trustees of Green Masjid and Madrasah* [2013] UKUT 0355 (LC) the Tribunal (A J Trott FRICS) said at paragraph 129:

> 'Where jurisdiction has been established I consider that the discretion of the Tribunal to refuse the application should only be cautiously exercised. It should not be exercised arbitrarily and, in my opinion, should not be exercised as, effectively, a punishment for the applicants' conduct unless such conduct, in all the circumstances of the case, is shown to be egregious and unconscionable. On balance I do not consider the applicants' conduct as so brazen as to justify refusal of the application.'

In case this passage might give a different impression, I would emphasise that it is not for the objector to show that the conduct of a developer which has built in breach of a covenant was "egregious and unconscionable". On the contrary, it is for the applicant to explain why they acted as they did and to provide evidence which persuades the Tribunal that their conduct was not cynical because, for example, they proceeded in ignorance of the existence of the covenant, or under a genuine misconception about its effect.

83. There is no such evidence in this case. The applicant has failed to adhere to an obvious process to discharge or modify a restrictive covenant. It could have adduced evidence about why it failed to take the proper course but chose not to. I therefore infer that it deliberately went ahead with the development without seeking agreement from those with the benefit of the covenant or making an application to the Tribunal. I note that the applicant has offered to fit opaque glass in the window that overlooks 39 and 41 Osprey Close. That would, to an extent, mitigate the loss of privacy suffered by Mr and Mrs O'Raw in particular, but it will not mitigate its actions. In my view the applicant's 'build first and apply later' approach can be properly characterised as cynical. I therefore decline to discharge or modify the covenant to sanction the development.

84. I appreciate that this outcome leaves the parties in a state of uncertainty. The applicant's new house is the result of a breach of covenant, but unless a Court orders that it be demolished, it will remain where it is. The Tribunal has decided that the objectors are entitled to the benefit of the covenant so they are in a position either to seek to enforce it or to claim damages for the breach (which would be calculated by the Court on a different basis from the diminution in value assessments by Ms Arundel and the local estate agent who advised Mr and Mrs O'Raw). Neither of those remedies is within the jurisdiction of the Tribunal and will have to be claimed from the Court, but before the parties engage in further litigation I encourage them to seek to resolve the unsatisfactory position they find themselves in by agreement, after taking proper legal and valuation advice.

Mark Higgin FRICS
8 December 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.