



LP/31/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification – dwellinghouse – restrictions preventing erection of more than one dwellinghouse or bungalow – application to modify to permit two or three dwellinghouses – whether restrictions obsolete – whether proposed user reasonable – whether restrictions secured practical benefits of substantial value or advantage – whether discharge would cause injury – application refused – Law of Property Act 1925 s84(1)(a), (aa) and (c).

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

by

ALAN HOWARD FISHER

**Re: Dayspring
Shady Lane
Bromley Cross
Bolton
BL7 9AF**

Before: N J Rose FRICS

**Sitting at Preston Combined Court, The Sessions House, Lancaster Road, Preston, PR1 2PD
on 28-30 May 2008**

Ian Foster, instructed by Harrison Drury and Co, solicitors of Preston for the applicant.
Michael Collard, instructed by Colemans-ctts, solicitors of Kingston-upon-Thames for Ian Christopher Swift, objector.
Andrew Clark, instructed by DWF LLP, solicitors of Preston for Bridget Horner Nutter, objector.
Nigel Dennis Tinker, objector, in person.

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The following cases are referred to in this decision:

Re Fairclough Homes Ltd's Application LP/30/2001, unreported
Shepherd v Turner [2006] 20 EG 294, CA

The following cases were referred to in argument:

Re Davis' Application (1950) 7 P & CR 1
Wakeham v Wood (1981) 43 P & CR 40, CA
Knight v Simmonds [1896] 2 Ch 294, CA
Re Quaffer's Ltd's Application (1988) 56 P & CR 142
Price v Bouch (1989) 58 P & CR 257

DECISION

Introduction

1. This is an application by Mr Alan Howard Fisher under section 84(1) of the Law of Property Act 1925, seeking the modification of restrictive covenants affecting freehold land containing a dwellinghouse, garden and swimming pool and known as Dayspring, Shady Lane, Bromley Cross, Bolton, BL7 9AF so as to permit the construction of one, two or three new dwellings thereon.

2. The applicant has, since 12 November 2001, been the registered proprietor of the whole of the site of Dayspring. A principal part of that site (the application site) was conveyed by deed dated 23 December 1953 (the 1953 conveyance) by The Personal Representatives of Algernon Seymour Hoare deceased (the Vendors) to Annie Gill (the Purchaser). The conveyance contained, among others, the following covenants by the Purchaser:

“For the benefit of the Vendors and their successors in title owners and occupiers of the land known as ‘The Turton Estate’ adjoining the property hereby conveyed and each part of such land” ...

- (2) Not to erect build or maintain on the said property more than one dwellinghouse nor to use the same for any other purpose than that of a private or professional residence in one occupation and that nothing shall be done or suffered thereon which shall be a nuisance or annoyance to the owners or occupiers of adjacent hereditaments.
- (3) Not to rebuild alter or add to any building on the said property except in accordance with plans previously approved in writing by the Vendors’ surveyor.”

The application seeks the modification of these restrictions so as to permit one or more of the following residential development proposals to be implemented:

- (a) The retention of the existing dwelling and the construction of one additional two-storey dwelling on the north-eastern part of the site, where a swimming pool currently stands, pursuant to planning permission granted on 2 October 2003.
- (b) The demolition of the existing dwelling and the construction of two new two-storey dwellings on the south-western part of the site, pursuant to planning permission dated 15 April 2005.
- (c) The demolition of the existing dwelling and the construction of three new dwellings pursuant to planning permission granted on appeal on 20 June 2005. The permitted houses would have two main storeys and an additional floor lit by dormers at the front and rooflights to the rear.

3. It is to be noted that, if proposal (b) were carried out following the implementation of proposal (a), the effect would be almost the same as if scheme (c) were undertaken.

4. There are three objectors to the current application, each of whom owns a dwellinghouse abutting the application site. They are Mr Nigel Dennis Tinker of 7 Grangewood, Mr Ian Christopher Swift of 9 Grangewood and Mrs Bridget Horner Nutter of Oak Lea, Shady Lane. It is agreed that all three objectors are entitled to the benefit of the restrictions in the 1953 conveyance.

5. Mr Ian Foster of counsel appeared on behalf of the applicant. He called two expert witnesses, Mr Anthony Whitehead Dip TP, MRTPI, sole principal of Whitehead and Company, town planning and development consultants of Wigan and Mr Alan Bell Firth, MRICS, sole principal of Joseph Jackson & Sons, general practice chartered surveyors of Bolton. Mr Michael Collard of counsel appeared for Mr Swift. He called Mr Swift and one expert witness, Mr Peter Richard Higham FRICS, senior partner of Higham & Co, chartered surveyors and planning consultants of Manchester. Counsel for Mrs Nutter, Mr Andrew Clark, called his client and, as expert witness, Mr Keith Woodrup Skelhorn FRICS, MCI Arb of Longden and Cook Commercial of Salford. Mr Tinker appeared in person and gave evidence.

6. On the morning of 30 May 2008, the third day of the hearing, I inspected in company with counsel the application site, the objectors' houses and the surrounding area.

Facts

7. In the light of the evidence and my inspection I find the following facts. Bromley Cross is an attractive residential area about 2½ miles north of Bolton town centre. It is hilly and on the edge of open countryside and moorland. The east side is bounded by the steep valley of Bradshaw Brook and the west side by the equally steep valley of Eagley Brook. The Jumbles reservoir and country park is about quarter of a mile to the north, approached by Shady Lane and Grange Road. The early development of Bromley Cross, mainly a mixture of terraced and larger houses, was focused on Shady Lane. There is now a small local centre about half a mile to the north-west. A local railway line runs north/south through the area and Bromley Cross station is centrally situated. There are some very large individual pre- and post-war homes. Most of the housing in Bromley Cross, however, has been developed over the last 40 years or so in the form of private housing estates, generally of good quality, with the majority comprising detached houses.

8. The application site contains a bungalow, built in the mid 1950s and subsequently extended. Walls are of brick, with some timber panelling at the rear, and a mono pitched roof slopes forward towards the road. The total site area (including parts of the site not included in the 1953 conveyance) is 0.24 hectare (0.59 acre). The plot is generally level, although there is a pronounced fall south-eastwards across a woodland area to the north (that is, down from Grange Road). The site also starts to fall to the east, close to the boundary with 9 Grangewood. This fall in levels continues beyond the eastern boundary of the application site. There is a large swimming pool enclosed with a glazed, aluminium frame to the north-east of the house, and a shed and a boiler house nearby. The site has a main, western frontage of approximately 280 feet to Shady Lane and Grange Road, both of which are unmade. The southern frontage of approximately 138 feet is to a private driveway which serves two other bungalows, Oak Lea

and Sunningdale and runs south-east from Shady Lane. Immediately south of this driveway is a large detached house known as Beechwood, currently used as a nursery school. On the western side of Shady Lane, opposite the entrance to the driveway, are three pairs of modern semi-detached houses. They lie immediately north of a building currently use as offices, but otherwise the immediately surrounding area is in residential use.

9. Nos.7 and 9 Grangewood form part of an estate developed in the 1970s on the Turton Estate land and comprising attractive housing, built in medium density along an undulating estate road, Grange Park Road, and incorporating several small cul-de-sacs of which Grangewood is one. Both houses are detached two storey dwellings, with gardens at the front and rear. They are located at the western end of Grangewood, which runs west from Grange Park Road. The head of the cul-de-sac is marked by a large grass island containing three mature trees and there are additional mature trees in the verge. The road has a pronounced fall eastwards, giving views across the valley to the hills beyond. It contains 8 detached houses and 5 bungalows. No.9 lies to the north-east of Dayspring, with which it shares a common boundary of approximately 130 feet. No.7 lies immediately south-east of No.9. Its rear, south-western boundary is approximately 55 feet long, of which approximately 15 feet are shared with the eastern boundary of Dayspring and 40 feet with the north-eastern boundary of Oak Lea. Nos. 7 and 9 Grangewood lie at a significantly lower level than Dayspring and Oak Lea.

10. Oak Lea is an attractive detached bungalow designed and constructed in the 1970s. The design of the house is focused upon a landscaped front garden area which is the main garden to the property. This garden is open plan and fronts directly onto the north-east side of the private driveway. It is overlooked by full length picture windows in the main rooms to the bungalow. To the north-west, Oak Lea shares a common boundary of approximately 100 feet with Dayspring. In addition to Dayspring and Oak Lea, the private roadway serves a third detached house, situated at its southern extremity and known as Sunningdale.

Grounds for the application

11. The application is made under paragraphs (a), (aa) and (c) of section 84(1). I start with ground (a), namely whether, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete. It is agreed that the restriction is obsolete if its original purpose can no longer be fulfilled.

12. For the applicant Mr Foster submitted that the purpose of the restrictions was to maintain the status or exclusivity of the neighbourhood by ensuring that development was restricted to single detached properties on reasonably large plots. He said that the character of the neighbourhood which included the application site had changed radically. He referred to the six semi-detached houses opposite Dayspring, constructed on what had been agricultural land in 1953; the significant amount of residential development on small plots along Shady Lane and Grange Road, very often in the form of infilling, which had led to the intensification of the use of Shady Lane, a no through road; the change of use of Beechwood from residential to educational and the construction of many houses on the Grange Park Estate. Taking all these

factors into account, said Mr Forster, the plot size of the application site was now significantly larger than that of the majority of the other residential properties in the neighbourhood. The covenant had therefore failed to achieve its objective of maintaining the status of the neighbourhood by ensuring the retention of reasonably large plots. It was therefore obsolete to the extent that it restricted the use of the application site to one dwellinghouse.

13. Mr Clark submitted that the purpose of the restrictions was to benefit the remainder of the Turton Estate – an area of approximately 25 acres adjoining the application site to the north, east and south-east. The preamble to the restrictions in the 1953 conveyance expressly stated this intention. He also relied on Mr Higham's opinion that the Estate land had been identified for residential development at an early stage and with increasing certainty during the 1960s until the formalisation of the residential allocation in the approved Turton Town Map in 1968 and the subsequent grant of planning permission for that use in the 1970s. Mr Higham considered that the only way the restrictions could benefit the retained land was by protecting the future residential development of that land, which was intended to extend up to, and abut, the land to be sold. The adverse effect of any inappropriate development on the retained land, and thus on the future housing, would be exacerbated by the elevated nature of the three plots fronting the private driveway. Mr Collard adopted Mr Clark's submissions on this issue.

14. I accept Mr Higham's evidence on the purpose of the restrictions. I have not overlooked the fact that a document entitled the Town Plan for Turton 1947 suggested that the Estate was suitable for industrial development. The proposed industrial area, however, included the sites of the three houses fronting the north side of the private driveway. As Mr Higham pointed out, the sales for residential development of the application site in 1953 and of the Oak Lea site in 1957 took place despite the suggestions made in the 1947 Town Plan. Moreover, if the owners of the Estate had considered that their remaining landholding was likely to be used for industrial purposes, it is difficult to imagine why they would have considered it necessary to impose the restrictions which form the subject of this application. I accept Mr Higham's characterisation of the 1947 Town Plan as an informal document, suggesting rather grandiose plans for the Turton area which were never acted upon. I find that the purpose of the restrictions was to protect the potential residential development of the Turton Estate. That purpose is still capable of fulfilment and the restrictions are not obsolete.

15. I should add that there was disagreement between the experts as to the extent of the neighbourhood which falls to be considered for the purposes of ground (a). Mr Whitehead took the view that the neighbourhood consisted of the area which was visually and physically linked to Dayspring. In his opinion this included the western side of Shady Lane, Grange Road north-east from the junction with Shady Lane as far as a house known as Langtry (a distance of approximately 400 feet), Beechwood, Dayspring, Oak Lea, Sunningdale and Nos. 7, 9 and 11 Grangewood. Mr Skelhorn, on the other hand, felt that the relevant neighbourhood was much smaller, consisting only of Dayspring, Oak Lea and Sunningdale, constructed on land which was at a higher level than the surrounding properties. Whereas the character of Mr Skelhorn's neighbourhood has remained largely unchanged from that which existed or was clearly envisaged in 1953, the density of residential development in Mr Whitehead's neighbourhood has increased significantly in the intervening period. I consider it is unnecessary for me to determine which of the two approaches is to be preferred. Irrespective of the extent of the

neighbourhood which has to be taken into account, the changes which have occurred have not, for the reasons I have given, been such as to render the restrictions obsolete.

16. I now turn to ground (aa). The applicant submits, and Mrs Nutter accepts, that each of the three development proposals would result in a reasonable use being made of the land for private purposes. Mr Swift does not agree, relying upon Mr Higham's opinion that, whilst the erection of two houses on the application site would be a reasonable use, the construction of three units would not. Mr Higham was less than forthright in expressing this opinion. He described the erection of three units on the site as "rather tight". I am in no doubt that such a development, for which planning permission was granted on appeal, would represent a reasonable use of the application site for private purposes. The applicant does not suggest that the restrictions, in impeding any of his proposals, are contrary to the public interest. The issue under (aa), therefore, is whether the restrictions secure to the objectors any practical benefits of substantial value or advantage.

17. Mr Firth has had more than 40 years experience in valuing commercial and residential property in Bolton and the surrounding districts. In his opinion the only properties having the benefit of the restrictions that might possibly be affected by the proposed modification were Sunningdale and the three houses occupied by the objectors. Mr Firth said that he had considered in detail the three alternative proposals and in particular the existing site levels and the proposed floor levels of the new dwellings. He had had regard to the siting, location of the dwellings, the number and size of the window openings to be included in the proposed new dwellings and the orientation of the new buildings in relation to existing dwellings. He had also considered the distance between the proposed new dwellings and the existing properties and the extent of existing and proposed screening separating Dayspring from adjacent properties. Taking these matters into account, it was Mr Firth's opinion that completion of any of the three proposed developments would not cause injury to or reduce the value of any surrounding land including Oak Lea, Sunningdale and 7 and 9 Grangewood. On the contrary, he thought that the redevelopment of the rather neglected site at Dayspring would benefit and improve this location.

18. Mr Whitehead has practised in the United Kingdom in the public and private sectors since 1979 and has regularly given expert evidence in respect of planning related matters. In his written report he said that since the restrictions were imposed the local area had been subject to an extensive range of housing developments of a variety of type and scale. In particular the extensive tracts of land west and east of Shady Lane and Grange Road had now been fully developed as large housing areas. More locally, the frontages of Shady Lane, Higher Shady Lane and Grange Road had been similarly developed with individual infill developments of semi-detached and detached houses. On Higher Shady Lane a former laundry building had been demolished and a mix of terraced and detached houses constructed in several phases, together with extension of the adopted roadway.

19. Mr Whitehead said that it was proposed to retain all existing trees and other natural features within the site, especially along the Shady Lane and Grange Road frontages where trees protected by preservation orders would be safeguarded. The proposed new dwellings

would be laid out in line with the specified privacy distances required by the local planning authority in supplementary planning guidance and no adverse impact on the privacy of neighbouring residents would result. The development would be similar to many others in the local area and the resultant density of 15 dwellings per hectare was well below the current recommended level of between 20 and 30 dwellings advocated by Government and Bolton Borough Council.

20. In granting planning permission for the developments now proposed, both officers and members of the Council had agreed that the development would be of an appropriate character for the local area. This had been supported by the planning inspector on appeal who stated:

“Having regard to the diversity of house types in the general area I do not consider that the proposed houses would have a seriously damaging effect on the street scene and I do not consider that rejection of the proposal because of its physical impact would be justified”.

21. Mr Whitehead concluded that redevelopment of the application site with three new houses would be wholly appropriate. Whilst the local area clearly had been substantially undeveloped and of a more rural nature in 1953 when the covenant was imposed, the local character around Shady Lane and Grange Road and in this part of Bromley Cross generally had changed considerably since then as a result of many diverse residential developments. The existing building was unique in design, but suffering from deterioration. Its replacement with more traditional dwellings would constitute an improvement. In Mr Whitehead’s opinion demolition of the building would not be harmful to the character of the site or the local street scene. In line with several developments on the east side of Shady Lane which had already taken place the proposal would retain the pleasant wooded areas along the site frontage, an important feature of the site. It would protect the privacy of nearby residents by utilising a design and layout which accommodated recommended privacy distances to all boundaries and to adjacent dwellings. Whilst in 1953 the site had been on the fringe of the open countryside, it was now surrounded by modern housing of various styles and size and lay in the heart of the urban area. Mr Whitehead pointed out that the restrictions did not impose any limitation on height. There would therefore be nothing to prevent the replacement of the existing building with one house of any of the designs now proposed.

22. The site was sufficiently large to accommodate the proposal. Development of the site with three dwellings would represent an efficient use of land in a highly sustainable location. It was the form of development advocated by both central government and Bolton Borough Council and was typical of other developments locally. The development now proposed would be wholly appropriate for the local area and suitable for the site.

23. Mr Tinker said that he and his family had moved to Grangewood specifically because of the quiet, semi-rural appearance of the area, and in particular the high degree of privacy afforded by his property. The proposed development of several houses would remove much of that privacy because of the raised elevation at Dayspring. When sitting out in his rear garden/patio area he and his family would be looked down upon by the proposed properties, losing much of their valued privacy. In addition, the orientation of those properties would

mean that their occupants could look down into the bedrooms of his two young daughters. The development would cause him injury in terms of loss of valued privacy and potential decrease in house value. Bolton Borough Council had placed an emergency tree preservation order on seven trees on the Dayspring site. The local amenity was slowly being eroded by the gradual loss of trees and development of the site would dramatically change the semi-rural feel of the area.

24. Mr Swift said that the main feature of his property which had attracted him to it was its tranquil and semi-rural location. The rear garden was fairly small. An important factor in his decision to purchase the property was that the garden was not overlooked and that he would have complete privacy in the rear garden and the conservatory. Mr Swift was concerned that the applicant might not comply with the condition in the planning permission which required a landscaping scheme to be provided. Long term enforcement of any landscaping scheme would be at the discretion of the local planning authority and he would have no say in the matter. In any event the landscaping which the planners had imposed did not apply to the boundary between his property and the application site and would therefore have no effect on protecting his privacy. Moreover, the close proximity of the nearest of the proposed houses to the boundary would make landscaping either impossible or liable to early removal.

25. The application site contained a bungalow which could not be seen from his garden and was only partly visible from the first floor of his house. The redevelopment of the application site with any number of town houses would have a detrimental impact on the aesthetics of the area. Because the application site was some 3m higher than his own rear garden, the proposed development would in effect cause his property to be overlooked by the equivalent of a three- or four-storey property. He would also lose the benefit of the sun in his rear garden and conservatory much earlier in the day. Moreover, his rear garden became very wet after rainfall. This situation would become worse if a development proceeded because it would require a considerable amount of hardstanding. It was also likely that patios would be added to the new properties. This would all add to the run-off of water into his garden and reduce its amenity. Mr Swift was also concerned about increased activity and noise emanating from the other side of his rear fence as well as additional light pollution.

26. Mrs Nutter married in 1951. In 1957 her husband purchased a building plot of 1,111 sq yds in Bromley Cross and, in the mid 1970s, he designed and constructed a single house known as Oak Lea on the plot. Mr and Mrs Nutter lived there until his death in 2002 and Mrs Nutter continues to live there.

27. Mrs Nutter said that Oak Lea, together with the adjoining bungalows, Dayspring and Sunningdale formed a quiet semi-rural enclave, on higher ground than the surrounding area and enjoying unspoilt views and tranquility. These three properties were all low level dwellings situated in a quiet country environment. Many of the trees in the surrounding gardens, including those in the garden of Dayspring, were protected by tree preservation orders. Although her front garden adjoined the rear boundary of Dayspring, it had never been overlooked by or had its view spoilt by that bungalow. Mrs Nutter said that buildings of the height and number proposed would overlook all her main windows and have a detrimental

effect on her privacy. They would form an obtrusive block in full view of Oak Lea. The proposed development and in particular its density would have a detrimental effect on the character of the neighbourhood, adversely affecting the surroundings currently enjoyed by her property, as well as the country environment in which it was situated. The increased traffic from such development would affect the tranquility of the neighbourhood.

28. The applicant's first planning permission authorised the construction of one additional two-storey property. This would materially alter the nature of the neighbourhood in which her property was situated and would have a depressing effect on the value and amenities of Oak Lea. The planning permission granted on appeal authorised the demolition of the existing bungalow and the construction of three three-storey properties. Given the height of these properties and the density of the development, this would be totally out of keeping with the rural nature of the neighbourhood and would spoil the view which she currently enjoyed. In addition, the rear of the proposed development would overlook her main window, all three of her bedrooms and the entire garden, thus depriving her of the privacy previously enjoyed.

29. The remaining planning permission envisaged the construction of two new two-storey properties. The rear elevations of these buildings would overlook her house and garden and be highly intrusive. Finally, in each case the appearance of the proposed buildings would produce a uniformity of design of two- or three-storey dwellings, which was out of keeping with and detrimental to the character of the present neighbourhood, comprising low-level and individual dwellings.

30. Mr Skelhorn has practised as a chartered surveyor for over 40 years. His specialist field is surveying and valuation and most of his work is in the north of England. He considered that Dayspring, Oak Lea and Sunningdale were of a quality of location and design which set them apart from the wider area.

31. In Mr Skelhorn's opinion the height and massing of the proposed houses was out of character with other developments in the area. Their bedrooms would overlook Oak Lea. Each house would be a source of increased activity and noise. A prospective purchaser would view the location of Oak Lea as being different from the one that currently existed. This would deter some potential purchasers. The resultant diminution in value would vary from £22,500 if one additional home was permitted to £50,000 if three houses (with effectively three storeys) were constructed. For Mrs Nutter, who had been involved with the site since 1957 and the development of the property in the 1970s, and had lived there ever since, the impact of a relaxation of the covenant would be traumatic.

32. Mr Higham said that his professional expertise was in relation to planning and development, including valuation and compensation matters. He considered the practical benefits of the covenants firstly in terms of the three house proposal which received planning permission on appeal. The difference in levels between 9 Grangewood and Dayspring (and also Oak Lea and Sunningdale) was equivalent to just over one storey in height. The redevelopment of the application site with multiple dwellings would have a significant adverse impact on 9 Grangewood. Any view to the rear of that property would be dominated by the

proposals. The adverse effect would be most severe in the ground floor rooms, but it would also extend to the first floor rooms. Views of the sky would be entirely obstructed from parts of the ground floor rooms and the rear garden, but the first floor rooms would also be affected. The existing bungalow on the application site, by contrast, had no impact upon those views.

33. The overall difference in height from the site level of 9 Grangewood to the ridge of the proposed properties would be 12.08m. Allowing for eye level (standing) this produced an angle of inclination from the horizontal of some 31% from the conservatory of 9 Grangewood. This was an extremely high angle of vision, which would clearly have a major impact upon the amenity of 9 Grangewood.

34. All of this was to be compared with the uninterrupted view currently enjoyed from 9 Grangewood of the rear boundary fence, shrubbery and trees and sky beyond. Mr Higham also referred to the photographs of 9 Grangewood taken from the front of the property. He considered that the proposed development would completely alter the setting of the house, from being entirely one of shrubs and trees and devoid of any buildings, to being dominated by urban development.

35. Mr Higham also thought that 9 Grangewood would suffer from loss of privacy, especially in relation to its two first floor bedrooms, which would be directly overlooked by the ground, first and second floors of the nearest of the three proposed houses, and to a lesser extent by the other two houses. Normal domestic noise and general activity would also increase substantially above that expected from one house. This would result from an intensification of the use of the site and also because the generation of new noise and activity would be transferred to immediately beyond the common boundary with 9 Grangewood.

36. In Mr Higham's opinion the proposed development would reduce the amount of sunlight to 9 Grangewood, could lead to pressure to remove individual trees on the application site and was likely to exacerbate the existing problem of surface water running off the application site down the slope to Mr Swift's rear garden. He thought the one house proposal would have a similar impact to the three house proposal, because the new dwelling would be situated in a similar position to the nearest of the three houses.

37. The two house proposal would have the least impact of the three, as it would leave a margin of land unbuilt upon and the two houses would broadly occupy what could be the site of one redeveloped house at Dayspring. However, this scheme would be somewhat dysfunctional if taken on its own, as it would leave a large area to the north-east of the second plot which could only be used as the garden to that plot. The house was, however, designed on the basis that this land would be separately developed, both because of the position of the footprint which left an equal size plot to the side, and also because there was limited fenestration looking towards this land – no first floor windows and only one small ground floor window. Clearly, if only this scheme were to be permitted, there would be a natural desire to resite the two plots, and redesign the two houses, probably involving larger houses and windows on the north side. This would thus result in a level of impact which was closer to that which he had described in relation to the three house proposal.

Conclusions on ground (aa)

38. I would at the outset make a general observation on the nature of Mr Whitehead's approach to this application. His written report contained no reference to the provisions of section 84. His ultimate conclusion was that the proposed development "would be wholly appropriate for the local area and suitable for the site as the circumstances associated with its development are now significantly different from those in 1953 when the covenant was imposed". In the course of cross-examination he said, and I accept, that his conclusion that the applicant's proposals would not diminish the residential amenity of the area applied equally to those individuals who had the benefit of the restrictions. Nevertheless, I accept Mr Clark's submission that Mr Whitehead's evidence was largely directed to planning issues and not to section 84 matters.

39. Planning factors are not irrelevant to a consideration under paragraph (aa). Subsection 84(1B) requires the Tribunal to take into account among other matters the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas in determining whether paragraph (aa) applies. But in my view planning considerations should not form the starting point for such an exercise. The starting point should be an appraisal of the impact, upon those with the benefit of the restrictions, of allowing a development proposal to proceed, bearing in mind that it would otherwise be obstructed by the covenants.

40. Before stating my conclusions on the extent of that impact in the present case, it will be convenient to deal with two preliminary matters. The first is the quality of the existing bungalow on the application site. Mr Whitehead suggested that it was ugly and had suffered from deterioration as a result of its complex design and particularly its extensive flat roofs. Mr Skelhorn, on the other hand, thought that the bungalow was capable of beneficial use without any modernisation or adaptation. In the light of my inspection I do not consider that the house can properly be described as ugly, or even unattractive. Its design is somewhat dated and it suffers from certain limited elements of disrepair, but I am not persuaded that these are incapable of being remedied, nor that the form of construction means that the building's condition is bound to deteriorate further in the foreseeable future. The bungalow is located on an attractive plot, substantially screened by frontage woodland and vegetation. There is in my view no reason to assume that the property, which is currently tenanted, will not be maintained in a reasonable condition and prove attractive to potential occupiers in the future.

41. The second preliminary matter is the form of development which is likely to take place on the application site if the current application is refused. Mr Whitehead said that there would be nothing to prevent the demolition of Dayspring and its replacement with a single house, of similar height to those which were permitted on appeal, in the vicinity of the existing swimming pool and close to 9 Grangewood. He suggested that the impact of any of the current proposals upon 9 Grangewood would be no worse than such an alternative.

42. I accept that it would be possible for the applicant to demolish the existing bungalow and, subject to planning permission, erect a tall house, or a tall outbuilding to a house, close to

the back garden of 9 Grangewood. The impact of such a building on Mr Swift's amenities would not be very different from the impact of the one additional house scheme, or the three house scheme which are before me. Whether, in preventing those schemes, the restrictions secure to Mr Swift practical benefits of substantial value or advantage is likely to depend on the degree of probability that, if the current application is refused, the existing bungalow will be replaced by a tall structure close to 9 Grangewood (see the decision of the President in *Re Fairclough Homes Ltd's Application*, LP/30/2001, unreported, approved by the Court of Appeal in *Shepherd v Turner* [2006] 20 EG 294). In cross-examination Mr Whitehead accepted that there was no proposal to demolish the existing bungalow and replace it with a single dwelling, but he insisted that such a development was "feasible". Such a redevelopment scheme is certainly feasible, but there was no evidence to suggest that it is in any way probable. Similar considerations apply to the triangular piece of land within the Dayspring title immediately to the north of Oak Lea. There is no covenant restricting the number of dwellings that may be erected on this land. There was no evidence, however, to suggest that this site might be developed if the current application is refused.

43. In setting out my conclusions on the impact of the applicant's proposals I start with the three house scheme. I find that the effects of that scheme would be as follows:

1. There would be a significant loss of privacy as a result of overlooking caused to all three objectors.
2. There would be a serious overbearing effect on 9 Grangewood and a material overbearing effect on Oak Lea.
3. There would be a serious adverse effect on the character of the neighbourhood so far as Oak Lea is concerned.
4. There would be a loss of sunlight to the rear garden of 9 Grangewood and a risk that it would receive additional surface water run-off, exacerbating the existing drainage problems.

44. The effects of the proposal to erect one additional house would be as follows:

1. A significant loss of privacy to 9 Grangewood and a limited such loss to 7 Grangewood.
2. A serious overbearing effect on and a loss of sunlight to 9 Grangewood.
3. A risk of increased dampness to the rear garden of 9 Grangewood.

45. The two house proposal would lead to:

1. A loss of privacy to Oak Lea.
2. An adverse effect on the character of the neighbourhood of Oak Lea.

3. A risk that it would be followed by a further application for a form of development having a more serious effect on the objectors' properties.

46. In the case of each of the applicant's three proposals I consider that the power to prevent the respective effects which I have outlined above is a practical benefit of substantial advantage to the objectors. None of the evidence about the development plan and the pattern of planning decisions in the area suggests that a different conclusion should be reached. Ground (aa) is therefore not made out. The fact that each proposal would cause such injury to one or more of the objectors means that ground (c) also fails.

47. Since the applicant has failed to establish any of the grounds relied upon the application must be refused. The parties are now invited to make submissions on costs, and a letter dealing with that accompanies this decision, which will become final when the question of costs has been determined.

Dated 30 June 2008

N J Rose FRICS