LP/8/2005

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification or discharge – obsoleteness - practical benefits of substantial value or advantage – injury – proposal for conservatory and removal of part of garden wall – effect of development on visual amenity to objectors' retained land – planning permission granted – modification ordered – Law of Property Act 1925, section 84(1), grounds (a), (aa) and (c)

**IN THE MATTER of an APPLICATION
UNDER SECTION 84 of the LAW OF PROPERTY ACT 1925**

BY

**RICHARD O'BRIEN and
RUTH O'BRIEN**

**Re: 2 Turnpike Road, Eastfield Meadows, Tadcaster,
West Yorks LS1 8JT**

Before: P R Francis FRICS

**Sitting at: Leeds Combined Court Centre, The Courthouse,
1 Oxford Row, Leeds LS1 3BG
on
22 January 2008**

Josh Shields, instructed by 1 Law, solicitors of Birkenhead, for the applicants
William Hanbury, instructed by Richardson & Co, solicitors of Leeds, for the objectors

The following cases are referred to in this decision:
Solarfilms Application (1994) 67 P&CR 110
Re Page's Applications (1996) 71 P&CR 440
Re Truman, Hanbury, Buxton and Co Ltd's Application [1956] 1 QB 261
Re Gilbert v Spoor (1982) P&CR 239

DECISION

Introduction

1. The applicants in this case, Mr and Mrs O'Brien, seek the discharge or modification of a restrictive covenant burdening land at their home, 2 Turnpike Road, Eastfield Meadows, Tadcaster LS24 8JT so as to allow the construction of a conservatory on the southern gable end of the house, and the removal of a section of garden wall. The covenant, which is set out fully below, has the effect of restricting any building on the land to the private dwellinghouse and garages thereon in accordance with detailed planning consent granted for the development of the estate as a whole in about 1988. The applicants say that the covenant is now obsolete, that the proposed user is reasonable, will have no material impact on visual amenity and will not injure the objectors. The refusal to grant consent, they say, impedes the reasonable use of the land, and that preventing the construction of the conservatory gives the objectors no practical benefits of substantial value or advantage.

2. The objectors, (1) Oxton Farms and (2) Samuel Smiths Old Brewery (Tadcaster) who originally sold the land for the Eastfield Meadows development to Persimmon Homes Ltd, retained amenity strips on the southern and eastern boundaries of the land (at great cost, they say, in respect of the loss of otherwise obtainable development value), to shield the visual impact of the development from the A659 York Road to which it fronts, and the adjoining agricultural land. They also retained and still enjoy ownership of agricultural land on the opposite side of York Road. They say that, being only recently imposed (1988), the covenant is not obsolete, the ability to control development and protect the visual amenity of the area is of substantial practical value and advantage to them, and that discharge or modification in this instance would create a precedent (the 'thin end of the wedge') for further applications from occupiers of properties on the estate.

3. At the hearing, Josh Shields of counsel relied upon the Application and his submissions, and called Mr O'Brien who had produced a brief witness statement of fact in response to the statement of Mark Butler, the Estates Manager for the first and second objectors, who was called by William Hanbury. Mr Hanbury also, with permission of the Tribunal, called Clare Brockhurst, Managing Director of Waterman CPM Ltd, Environmental Planners. She presented an expert witness report dealing with aspects of the landscape character and visual amenity that had been prepared by her Associate Director colleague, Jonathan Berry BA (Hons) Dip LA AIEMA M ArborA, but who had been taken ill shortly before the hearing, and was unable to appear. I undertook an accompanied site inspection of the applicants' property, the estate and the surrounding area on the afternoon of 22 January 2008, immediately after the conclusion of the hearing.

The application land and surroundings

4. The Eastfield Meadows development within which the application land occupies one plot, was formed from a 3.13 ha (7.73 acre) parcel of land lying on the eastern edge of the developed area of Tadcaster, to the north of, and with access from, the A659 York Road, close

to its junction with the main A64 Leeds – York trunk road. Immediately to the west (Tadcaster side) of the site is the large inter-war Auster Bank residential estate, and to the east, an area of open farmland beyond which lies, on the far outer boundary of the town, a small warehouse/industrial complex. Land to the north of the development is agricultural, as is that on the opposite side of York Road (Slip Inn Farm) lying between the A659 and the A64. The Slip Inn Farm house and buildings which, together with areas of pasture with part wooded sections to the road boundary stretching towards Tadcaster town, remain in the ownership of the second objector, are approximately 100 m to the east of Turnpike Road, which is the main feeder road into the development. Planning consent for the residential development of Eastfield Meadows was obtained in about 1988, and 2.84 ha (7 acres) of the total area was conveyed to Persimmon Homes (Yorkshire) Ltd by the objectors, during that year. The remaining 0.29 ha (0.7 acre) was retained for the purposes providing approximately 8 metre wide landscape buffers between the road (on the southern boundary of the development), and the fields on the eastern boundary. Further off-site landscape buffers extending to about 1.20 ha (3 acres) have been provided within the fields on Healaugh's Farm on the eastern and northern boundaries.

5. Persimmon proceeded to construct an estate of approximately 64 mainly detached houses and garages on Turnpike Road, Toll Bar Way, Bow Bridge View and Eastfield Close. The applicants' property is situated at the entrance of the estate on the eastern side of Turnpike Road, its plot backing onto the landscape strip between York Road and the estate, with its principal (northern) frontage, vehicular access and detached garage onto Toll Bar Way which contains a further 9 houses, all of which are on that cul-de-sac's northern side, facing south. The O'Brien's house faces west, and the western boundary is separated from Turnpike Road by a further short section of return landscaping strip, about 5 metres in depth. The southern and western boundaries are, therefore, directly onto the retained, landscaped areas and are separated from them by an approximately 1 metre high wooden fence, which belongs to the objectors. The landscaped buffers have been planted with a mixture of holm oak, holly and some conifers, with a now substantial 1.8 metre high and about 2 metre thick hawthorn hedge on the far (from the application land) side. The section of wall referred to in the application runs between the south-east corner of the house and the north east corner of the detached garage, and acts to separate two areas of predominantly lawned garden.

The restrictions and discharge/modification sought

6. The covenant is contained in a conveyance dated 18 April 1988 made between (1) Oxton Farms, (2) Samuel Smiths Old Brewery (Tadcaster) and Persimmon Homes (Yorkshire) Limited. It provides:

> "1. The purchaser with the intent so as to bind (so far as practicable) the property and the land edged green on Plan number 1 and each and every part thereof into whosoever hands the same may come for the benefit of the retained land of the Vendor edged blue and in part coloured blue on Plan number 1 annexed hereto and each and every part thereof and for the benefit of the land of Samuel Smith coloured pink on Plan number 2 annexed hereto and each and every part thereof (but not so as to render the Purchaser personally liable for any breach of covenant committed after it shall have parted with all interest in the Property and in the land edged green on the said plan with

number 1 in respect of which such breach shall occur) HEREBY COVENANTS with the Vendor and as a separate covenant HEREBY FURTHER COVENANTS with Samuel Smith that the Purchaser and its successors in title will at all times hereafter observe and perform the following stipulations namely:

(a) Not to erect any building or other erections on the property and on the land edged green on the plan number 1 annexed hereto except private dwelling houses and garages in accordance with detailed planning permissions and plans elevations and specifications first approved in writing by the Vendor, such approval not to be unreasonably withheld.

(d) Not to construct any buildings on the property or on the said land edged green on the said plan with number 1 annexed hereto except with natural clay red pantile roofs.

(e) Not to construct any buildings or other erection (including garages and boundary walls) on the Property and on the said land edged green on Plan number 1 annexed hereto except with evenly cropped magnesian limestone.

7. By a transfer dated 26 June 1992, the applicants acquired title to the application land from Persimmon Homes, the developer. The applicant sought discharge of the covenant or, in the alternative, modification, whereby 1(a) above would be modified to:

(a) Not to erect any building or other erections on the property and on the land edged green on the plan number 1 annexed hereto except private dwelling houses and garages in accordance with detailed planning permissions ***and the conservatory and alterations referred to in the Planning Permission dated 2 January 2003.***

The statutory provisions

8. The grounds upon which the application was made were those set out in section 84(1)(a) (aa) and (c) which provide:

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

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or

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

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

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

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

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

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

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

(b) is contrary to the public interest;

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

Applicants' case

9. Referring to the grounds under which the application had been made, Mr Shields said that under (a), the applicants understood that the covenant had been imposed to ensure that the objectors could retain control of building on the estate, in order to retain its character and to protect the visual amenity of the land that they had retained. However, due to the fact that consent had been granted, either upon application or retrospectively for conservatories in respect of 17 other properties on the estate (some 26% of the total), that restriction must now be obsolete – certainly as far as conservatories were concerned. As to (aa), it was submitted that the construction of the conservatory (for which planning permission had been obtained) would increase the amenity of the property, and the demolition of the wall (for which planning consent was not required) thus allowing uninterrupted access for the applicants between two currently separated areas of garden, was a reasonable and sensible proposal. Refusal of consent to discharge or modify the covenant would impede that reasonable use, and in impeding that use no practical benefits of substantial value or advantage were secured to the objectors, especially as their retained land principally consisted of fields in agricultural use. If there were any loss or disadvantage, money would be sufficient compensation.

10. The benefit of the restriction accrued, Mr Shields said, to the objectors, but in Mr Butler's witness statement it had been suggested that in preventing development that was visible from the public highway, it was the public that would benefit. Such a benefit was not,

as a matter of principle, relevant for the purposes of the Act. Not only were the objectors private limited companies with no public duties or functions, but public benefit would be too indirect to be considered a benefit to the objectors. Regarding (c), no injury would be caused to the objectors if the proposed works were carried out.

11. In response to the objectors' specific concerns, Mr Shields said that the impact of the proposed conservatory would be very limited, and no more than that created by any of the others that had been permitted on the estate. It would be traditional in appearance, with a roof line no higher than the level of the ridge tiles to the existing single storey utility room section of the house, and the base walling would be, as had been confirmed by the applicants as far back as November 2002, the required magnesian limestone to match the main house walls. The majority of the building would be invisible from the main road and from Turnpike Road in any event, due to the thick hawthorn hedge that already existed. This would be especially so in the summer. Furthermore, as the tree screen planted in the buffer zone matured over the years, it would be even better shielded.

12. By virtue of section 84(1B), Mr Shields said that the Tribunal needed to take into account that over a quarter of the houses on the estate have conservatories that have been permitted, including outside plots that face onto the northern and eastern boundaries and landscaping areas. It was unreasonable therefore, for the objectors to object to the appearance of a conservatory, per se, and their only real ground must be that it would be located at the entrance of the estate. However, such an argument was unsustainable, as was their expert's opinion that the proposal would add to the urbanisation of an otherwise predominantly rural area. Far from being rural, it was submitted, the area was already built up, and it was not right on the urban fringe as there was an industrial estate further to the east. Although not a conservatory, there had been a substantial two storey extension to the south of 11 Eastfield Close, and similar extensions to 19 Toll Bar Way, both of which faced onto the main road. Thus, the townscape had already been altered, and preventing the applicants' proposals would be of very limited, if any benefit to the objectors.

13. The objectors' contention that granting consent to the modification or discharge could lead to future disputes as to overshadowing caused when the objectors' tree screen grew to full height was, Mr Shields said, so remote as to be not even worth considering. In any event, the applicant had indicated that he would be happy to waive any rights to light, such having been a requirement of the objectors in other cases where consent had been given. As to the removal of the wall, the objectors had said that it would affect their visual amenity, but in reality it was an internal wall within the garden area, and in the applicants' view, there could not possibly be any effect.

14. Mr O'Brien produced a very brief witness statement commenting upon Mr Butler's statement for the objectors. He said that there had never been any intention that anything other than magnesian limestone would be used for the base walling of the conservatory, and produced a copy of his letter to Oxton Farm Estates of 17 November 2002 in which he sought consent for the development. He also produced a schedule of the properties upon which conservatories or other extensions had been built. In cross- examination, he accepted that the proposed conservatory was very large, would take up a significant amount of the side garden and would effectively increase the ground floor area of his house by 26%. However, he said

he did not consider that to be relevant, and its size, in terms of area rather than height made no difference to the visual impact question that was the key concern of the objectors. Whilst he agreed that the granting of consent could act as a precedent for conservatories on the York Road frontages, Mr O'Brien pointed out that all the other houses that had their southern boundaries onto the York Road landscaping strip, faced that road rather than backed onto it – hence nobody would be putting a conservatory on the front of their house, so the situation would not arise.

Objectors' case

15. Mr Butler is employed as Estates Manager for both Oxton Farms and Samuel Smiths Old Brewery (Tadcaster) Ltd. In his report, he pointed out that the retention of the landscape strips was not a planning requirement, but they had been incorporated by the vendor in an attempt to reduce the visual impact of the residential development and to ensure that it was in keeping with the rural nature of the surrounding land. He said that the applicants' property could be clearly seen from the objectors' retained land on the opposite side of York Road but, in cross-examination, he acknowledged that it was barely visible from Slip Inn Farm cottages and the adjacent buildings, and that with the land opposite the application land being purely agricultural, those working the land would be unlikely to be affected by the addition of a conservatory.

16. He explained that all the conservatories that had been permitted on the estate were on properties that were on the inside of the development, and would not be visible from the retained land or from the main road, although he acknowledged that there were some on properties that backed onto the northern and eastern landscape strips. He said that Healaugh Farms, who owned the agricultural land which abutted those boundaries of the estate was a wholly owned subsidiary of the second objector, but that any extensions to properties adjacent to that land are not visible from the public highway, and thus "do not detract from the overall appearance of the development from public viewing". Mr Butler referred to 19 Toll Bar Way, which was in the south-eastern corner of the development, and whose eastern boundary was on to the eastern landscape strip. The southern (front) boundary was onto Toll Bar Way. Modification of the restriction on that property (all of estate properties being subject to the same covenants) had been agreed to permit the construction of a utility room and additional garage extension. However, the initial application had also sought permission to construct a conservatory in the rear garden, and that was refused. He said that as the conservatory would have been well hidden behind the trees planted within the eastern landscape strip the objectors had subsequently offered to grant consent, subject to the owners relinquishing any rights to light.

17. In cross-examination, Mr Butler accepted that the ridge line of the proposed conservatory would be no higher then the utility room roof, that only a small amount of the building would be visible from the road or from the retained land, and as the tree screen grew, it would become even less visually intrusive. He said that it was his companies' boards of directors that were uncomfortable with any development on the estate that might be visible from the public highway as they were keen to preserve, as far as it was possible to do so, the rural character of the area. There were also concerns that building so close to the landscape strip could increase the likelihood that it would be affected, in years to come, by overshadowing from the trees and

possible damage from falling branches. His directors were keen to avoid any potential for future disputes, and, he said, that had been pointed out to the claimant in the objectors' solicitors letter of 6 January 2003. As to the proposal to remove a section of garden wall, Mr Butler said that it provided a screen from the landscape strip, the road and the retained land. Furthermore, it was part of Persimmon's approved landscaping plan, its removal could cause a precedent that would lead to a haphazard destruction to the fabric of the estate.

18. The objectors' expert witness report had been prepared by Mr Jonathan Berry, who is an associate director of Waterman CPM Ltd, a firm of Environmental Planners. His evidence dealt with landscape character and visual amenity matters associated with the justification for the restrictions, and the impact that would be caused by what he considered to be the implementation of inappropriate development. Due to illness, he was unable to appear, and his report was therefore presented by Mrs Brockhurst, who is the managing director of Mr Berry's firm.

19. Mr Berry had set out the background to the objectors' consideration of the application, and included a table setting out the details of all the applications that had been considered by the objectors since the development was completed. He said that those upon which consent had been granted, and covenants modified, demonstrated a general willingness to permit development that was visually less prominent, and where the integrity of the existing development line was not compromised. The existence of the covenants had served historically to deter applications for inappropriate and visually intrusive extensions. The tree screen had been specifically planted to provide a screen to the estate, and succeeded in doing so particularly during the summer months when, he accepted, the proposed conservatory would be barely visible. However, during the winter, it would be clearly visible due to the fact that the majority of the trees and the hawthorn hedge were deciduous. In his view, the proposal was of an inappropriate scale in relation to the constraints of the available garden area, and the close proximity of the tree screen, as it matures, would cast significant shade over the conservatory, and possibly threaten the integrity of the foundations. Its visibility, he said, would contribute to erosion in the amenity of the development frontage, and the eastern approach into Tadcaster "as viewed by a range of receptors".

20. He said that in accordance with section 84(1)(a), the covenant could not be deemed obsolete as the objectors' land had been protected from inappropriate development since 1988, and it was important that they retained the right to exercise those controls. As to (aa), he was of the view that the use of the applicants' existing land would not be impeded, and there was substantial value in the ability to be able to safeguard the amenity and surroundings of the site. Under (c), the objectors would undoubtedly suffer injury if the covenant were modified or discharged.

21. Mrs Brockhurst accepted in cross-examination that she had not seen the application land, and was unable therefore to offer objective comment on visual aspects of the proposal. She said that her understanding of "visual amenity" was not necessarily that it depicted a significant view, but what people enjoy as a result of the characteristics of what can be seen. She thought that the existence of the conservatory on what was otherwise a blank and uncluttered gable end wall might draw the eye, and thus it would have some impact. In response to a question from the Tribunal, she said that, from Mr Berry's evidence, she did not

think the ability of the objectors to prevent the proposed development was a practical benefit of substantial value or advantage to them. The development would be noticeable, but not significantly so.

22. Mr Hanbury, referring to *Gray: Elements of Land Law,* 4th edition, submitted that, in respect of ground (a) a restriction which tends to preserve a particular environment is not to be deemed obsolete merely because it "frustrates proposals which, were it not for the covenant, would seem entirely reasonable". The covenant had only recently been imposed, and was clearly not obsolete as it continues to serve the purpose of controlling development in the area. As to (aa), he said that the 'value and advantage' to the objectors may include non-commercial considerations provided they are cogent and rational. In addition to the effect on the visual amenity of the retained land, the Tribunal should also consider what precedent may be created by granting discharge or modification – the "thin end of the wedge" argument.

23. Mr Hanbury said it was not part of the legal test to just consider whether the owner of the dominant property could see the proposed conservatory, but it was important that the objectors retained the power to control development generally. In *Solarfilms Application* (1994) 67 P&CR 110, which was an application to continue using a bungalow on a small estate as a children's day care nursery, HH Judge Michael O'Donoghue said (at 117):

> "The objectors who gave evidence each stressed that one of the factors which weighed heavily with each of them when they purchased their respective houses was the advice which they had received that their restrictive covenants were enforceable and were designed to preserve the strictly residential nature of the small and compact estate and to prevent the intrusion of any user other than residential...
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> ...Counsel for the objectors drew my attention to the decision of Mr JPC Done in *Re Chandler's Application* [(1958) 9 P&CR 512 at 517]. In that case the member in his judgment considering the provisions of section 84 in their original and unamended form, said:
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> > ...the injury envisaged in the section is not limited by statute to the effect on market value; it may be related to something entirely personal and, even if a general relaxation of the restrictions would in fact facilitate the sale of properties and enhance market values, if the personal convictions and wishes of the objectors are seen to be sincere and well founded, and their objections not tinged with ulterior motive, to reject them would be injurious within the terms of the section ...
> >
> > It seems to me that the practical benefit which is secured to (the objecting covenantees) is the power left in their hands to scrutinize and if necessary veto any proposals tending to alter the character of the neighbourhood and I do not think that the Tribunal's discretion extends to depriving them of the measure of control when objections to a proposal are practically unanimous and appear to be reasonable...
>
> Grane Park is a small and compact residential estate which has a pleasant and distinct character of its own, different to the older terraced housing in its immediate neighbourhood of Grane Road.

> In giving their evidence and on the submissions made by them and by counsel on their behalf, the objectors impressed me as wholly sincere and concerned and not tinged by any ulterior motive – their prime concern being to retain the character of Grane Park as an exclusively residential enclave and to avoid traffic disturbance which they claim is being caused by the user of the day nursery.
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> Even though none of the present objectors claimed that Mrs Lord's children's day care nursery adversely affects the value of their properties there is, in my judgment, evidence that these covenants are of practical benefit and of substantial benefit and advantage to them."

Mr Hanbury said that HH Judge O'Donoghue also went on to conclude that the covenants in that case were not obsolete, and the application was dismissed. The circumstances here were similar, and it was submitted that I should similarly find for the objectors.

24. As to the thin end of the wedge argument, Mr Hanbury referred to *Re Page's Applications* (1996) 71 P&CR 440, where the applicant was seeking to convert part of a stables complex into residential accommodation. Mr P H Clarke FRICS said, at 454:

> "I should, at this point, say something about the 'thin end of the wedge' argument put to me by Mr Warnock [counsel for the objectors], namely that modification of the covenant leading to the introduction of a residential use in the Stables could lead to further residential development at the Stables or on adjoining land. Mr Birks [counsel for the applicant] countered this argument by reference to the planning policies for the area. He said that planning permission is unlikely to be granted for further residential development. I have no doubt that the implementation of the planning permission for the proposed flat at the Stables would make it easier for permission to be obtained for further residential development in the area. Furthermore, the modification of the restrictive covenant under the present application would make it easier to seek the discharge or further modification of the covenant on the remainder of the Stables, even though a further application would be considered on its merits. In my view, some weight should be given to the thin end of the wedge argument in this application, which gives further support to my conclusion that the covenant secures valuable benefits to the objectors."

25. Mr Hanbury concluded by saying that what Mr and Mrs O'Brien were seeking was inappropriate development on this particular part of the estate and it should be borne in mind that the objectors had readily granted modifications on the estate in circumstances where it was considered reasonable to do so – in other words, where there would be no detrimental visual impact to the objectors' retained land, or where the appearance of the estate would be altered as far as its impact from the road was concerned. The objectors were entitled, he said, to adopt a strict approach, and if the Tribunal were to find for the applicants, it would be giving the green light to other efforts to change the character of the estate.

Conclusions

26. If an application is to succeed under paragraph (a), the applicant has to demonstrate that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may find material, the restriction ought to be deemed obsolete. In *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261, Romer LJ (with whose judgment Lord Evershed MR and Birkett LJ agreed) referred to the expression "obsolete" in the following terms:

> "It seems to me that the meaning of the term 'obsolete' may very well vary according to the subject-matter to which it is applied. Many things have some value even though they are out of date in kind or in form – for example, motor-cars or bicycles, or things of that kind – but here we are concerned with its application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them.
>
> It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84(1)(a).

27. In this case, I find I cannot accept the applicants' argument that because so many conservatories have been permitted, the restriction must be deemed obsolete. The additional development that has been permitted to properties on the estate mainly consists of small scale, typical domestic extensions and, in my view, by no stretch of the imagination could it be concluded that they have had the effect of materially altering the character of the estate or, indeed, of the individual properties on it. The restriction was imposed solely for the benefit of the retained land, and as argued by the objectors, serves the purpose of preventing development that that might have a material affect upon visual amenity. None of the extensions that have been permitted could in my judgment be considered to have such an effect, but the restriction is still capable of preventing development that did. I conclude therefore that it is not obsolete and the application therefore fails on ground (a).

28. Turning to ground (aa), I think that by preventing the erection of the conservatory as proposed by the applicants, the covenant impedes a reasonable user of that land. There was no evidence to suggest that a conservatory, per se, was not a reasonable use of the land, and the only argument advanced by the objector related to the building's scale and resulting impact on visual amenity. The proposed conservatory does, indeed, appear quite large from the isometric drawings provided with the evidence, but in my view it is not excessively so. The fact that the side garden upon which its footprint will lie is fairly narrow at this point, and there will be only about 1 metre clearance between its south eastern corner and the boundary fence, may have added to the illusion that it seems larger than it will be. Increasing the ground floor area by

some 26% does not seem to me to be unreasonable, and the size of the additional accommodation does not appear out of keeping in relation to the size of the house overall. A conservatory extension is undoubtedly a reasonable use on a residential plot, and the covenant clearly impedes it.

29. There can be no doubt, from what I have said in respect of the application under ground (a), that the covenant must secure to the objectors practical benefits, but the key question (under 1A), is whether they are of substantial value or advantage in relation to the retained land and the wider area. In my judgment, they are not. I have carefully considered the arguments advocated by Mr Butler about the impact of the proposal on the "otherwise rural surroundings", the contribution it would make to the erosion of the amenity within the development frontage and his report of the directors' concerns about the need to avoid potential future disputes that might come from overshadowing or falling branches from the retained tree screen. On the question of visual amenity, I think Mrs Brockhurst summed it up nicely when she said she thought the "development would be noticeable, but not significantly so". As to Mr Shields' suggestion that I could only take into account the effect from the retained land, and should ignore any arguments about the effects on visual amenity from anywhere else, he is clearly wrong. The matter was dealt with by the court of appeal in *Re Gilbert v Spoor* (1982) P&CR 239 (Waller, Eveleigh and Kerr LJJ). That was a case in which an application was made to discharge or modify covenants restricting building on land to one house, to permit two additional houses. The objectors, of whom there were several who owned properties on the estate, were concerned at the potential loss of what, in his decision, the Tribunal Member had described as a "resplendent view" albeit that that view was not directly enjoyed from their benefited properties. In dismissing the applicant's appeal, Eveleigh LJ said, at 243:

> "It is clear from the introductory sentence of subsection 1 of section 84 that its provisions apply as between the original parties, and to restrictions of any kind. I therefore do not think that it is permissible to construe subsection (1A) only in the context of restrictive covenants which run with the land. The first task is to construe the section in isolation and then to relate it to the facts of the present case.
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> The words of the subsection, in my opinion, are used quite generally. The phrase 'Any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather to a restriction which secures any practical benefits. The expression 'Any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit them in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis...
>
> ...In my judgment, the Tribunal was entitled to hold that the view was a benefit whether or not that benefit could be said to touch and concern the land. However I am also of the view that the land of the objectors is, in each case, touched and concerned by the covenant. The covenant is intended to preserve the amenity or standard of the neighbourhood generally."

Agreeing, Waller LJ said, at 247:

> "I do not accept the appellant's argument that because the view is the most important thing it must be a view from the objector's land that is being interrupted. In my judgment the question is one of degree. If on a building estate a restrictive covenant is broken by any plot holder it is potentially an interference with the rights of all the other plot owners. It may be such that it is a momentary irritation to the owner of land some distance away. The nearer it is the greater the possibility of it being an interference with the amenities of owners. If a building estate contains a pleasant approach with restrictions upon it and some building is done contrary to those restrictions which spoils the approach, if then the owner of a plot complains about that breach, the fact that he does not see it until he drives along the road, in my opinion does not affect the matter. He is entitled to the estate being administered in accordance with the mutual covenants, or local law; so in this case."

30. See also *Re Mahavir* (2006) LT ref LP/69/2004 at para 56 which applies this principle.

31. In determining this issue, it is clear then that I need to consider not just the effect upon amenity from within the objectors' land, but also from the main York Road leading into the town, and indeed to the objectors' retained land. The objectors' retained land opposite the applicants' property consists of fields and woodland and it was accepted by Mr Butler that the applicants' property could not be seen from the part of the retained land that is occupied for residential purposes (Slip Inn Farm) so the visual impact would be minimal. It was clear to me from the plans, photographs and my site inspection that the visual impact of the proposed conservatory will also be minimal from the main highway and, for that matter, from any other property on the estate, even in the winter months due particularly to the high and extremely thick hawthorn hedge that provides a screen. In that regard also, it is instructive to note that there had been no letters of objection from any of the other occupiers of houses on the estate.

32. So, having concluded that it is right to consider the broader affects upon visual amenity, I have come to the view that the impact of the proposed development will be so little as to render the ability to prevent it taking place is not a practical benefit of substantial value or advantage. Whilst the objectors' stated objectives in relation to the enforcement of the covenants generally are, I have no doubt, admirably founded, I do not think that, in this instance, their concerns are supported by the evidence.

33. Although it is accepted that the land belonging to Healaugh Farms on the northern and eastern boundaries of the estate do not benefit from the restrictions, I think it can be implied from what Mr Butler said that they have similar concerns about visual amenity, hence the provision of a screening strip also along those two sides. However, it was clear from the evidence that conservatory extensions have been allowed on properties backing onto those boundaries, and consent was said to be likely to be forthcoming for the proposed conservatory at the rear of 19 Toll Bar Way, which is right beside the eastern landscape strip. I noted from the site inspection that the screen had grown along the boundary of no. 19 very much better than the screen in front of the application land, and its thickness there was indicative of how well that proposed extension would be shielded. It is not the fault of the applicants that the screen along their southern boundary has taken so long to thicken up, and in my view, some prudent replanting by the objectors along that section of screening strip would serve to resolve any lingering concerns they may have about what impact the applicants' conservatory may have.

34. Then there is, of course, the question of precedent. Undoubtedly one has been set by the earlier consents and I do not think one more will make very much difference. This is particularly so as I accept Mr Shields' argument that none of the other frontage properties are likely to want a conservatory addition on their front elevations. The existence of the covenants on all the properties on the estate gives the objectors continuing control over inappropriate development, the impeding of which might be of substantial value or advantage, but in my view the modification sought in this instance is most unlikely to create a stronger thin end of the wedge argument for other potential applicants in the future. The *Solarfilms* application referred to be Mr Hanbury was clearly a case where the circumstances were somewhat different and one in which there had been a large number of objectors.

35. In concluding that the covenants, whilst securing practical benefits to the objectors, are of no substantial value or advantage to them, it follows that ground (aa) is made out. Whilst money would be adequate compensation for any disadvantage they would suffer, no evidence was adduced on that question and, in any event, as I think I have indicated above, in my view no disadvantage will be suffered. My conclusion on (aa) is sufficient for the application to succeed, but in my judgment discharge would not be appropriate, taking away, as it would, any residual control that the objectors would have over other, future development proposals at the application land. I consider modification in the manner sought to be appropriate. Finally, on (c), it is my view that little if any injury would be caused to the objectors by the proposed modification.

36. It just remains for me to deal with the application to remove a section of wall. This is clearly not a boundary wall, but one that purely serves the purpose of separating one area of garden from the other. In my view its removal will be of considerable benefit to the applicants, and being virtually, if not completely, invisible both from the retained land, and from the highway, I can see no reason whatsoever for the objection.

37. Adopting the discretion afforded to me under the Act, I therefore determine that the covenant should be modified in the terms suggested by the applicants, as set out in paragraph 7 above.

38. The parties are now invited to make submissions on costs, and a letter about this accompanies this decision, which will become final when the question of costs is resolved.

DATED 22 February 2008

P R Francis FRICS