

**UPPER TRIBUNAL (LANDS CHAMBER)**



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**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RESTRICTIVE COVENANTS – discharge – modification – proposed erection of low brick wall – covenant prohibiting erection of wall or fence – whether covenants secure practical benefits of substantial value or advantage – whether injury caused to persons entitled to benefit of restrictions – application dismissed – Law of Property Act 1925 s.84(1)(aa), (c)***

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

**BY**

**(1) RAYMOND HUGH DAVIE  
(2) ROSEMARY DAVIE**

**Re: 15 Arun Vale,  
Coldwaltham,  
Pulborough,  
West Sussex,  
RH20 1LP**

**Before: P D McCrea FRICS**

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

*Stephen Woolf* instructed by Fletcher Day Solicitors, appeared for the applicants  
Mr Simon Breasley, with permission of the Tribunal, appeared for the objectors

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The following cases are referred to in this decision:

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

*Re: Carter's Application* (1973) 25 P&CR 542

*Re: Davies' Application* (2008) LP/65/2006

*Re: Snooks' Application* [2015] UKUT 623 (LC)

## DECISION

### Introduction

1. This is an application concerning the proposed construction of a low height brick wall on the boundary of a residential property. It is made by Mr Raymond Hugh Davie and Mrs Rosemary Davie (“the applicants”), the freehold owners of 15 Arun Vale, Coldwaltham, Pulborough, West Sussex, RH20 1LP (“the application land”) for the discharge or modification of a restrictive covenant which prevents the erection of any wall or fence, save in replacement of a similar wall or fence. The application is made under grounds (aa) and(c) of section 84(1) of the Law of Property Act 1925.

2. 15 Arun Vale forms part of the Arun Vale Estate Extension, which is the second of two phases of residential development on the site of a former fruit farm. The Estate Extension is accessed from the A29 via the first phase, known as the Arun Vale Estate. Since this decision is not concerned with the first phase, I will for convenience refer to the Estate Extension simply as “Arun Vale”. There are 22 houses on Arun Vale. With the exception of the individual freehold titles of those houses, Arun Vale is held in trust. Acting on instructions from a majority of the residents, the objectors to this application are the trustees. There are Clifford James Stone, Linda Davidson, Carol Ann Forster and Adrian Robert Waller. I shall refer to them as “the trustees”.

3. Mr Stephen Woolf of counsel appeared for the applicants, and called both to give evidence. Mr Simon Breasley, a property consultant, made submissions on behalf of the trustees, but no evidence was submitted on their behalf.

4. On the afternoon of Monday 5 September 2016 I inspected the application land and Arun Vale accompanied by Mr Greg Barnbrook, solicitor for the applicants, Mr Breasley and two of the trustees.

### Facts

5. From a statement of agreed facts, the evidence, and my site inspection I find the following facts.

6. Arun Vale is situated off the A29 London Road, approximately two miles south west of Pulborough. The location is attractive, within sight of the South Downs. Arun Vale is well laid out, with a majority of the houses arranged around a central green, the maintenance of which is funded by a residents’ service-charge arrangement. The majority of the roads and pavements are adopted highway.

7. When entering Arun Vale using the single vehicular access from phase 1, the application land is directly to the left and 48 Arun Vale is directly to the right. The access road into the estate runs broadly in a southerly direction. The front elevation of the application land faces this road and accordingly its left-hand boundary is to the north, its rear boundary to the east and the open frontages to the access road are the west and south boundaries.

8. Both the application land and 48 Arun Value are corner plots. Immediately after them there is a T junction with five properties being accessed to the left and the remaining 15 to the right, arranged around the green. Adjoining the application land to the north (left) is 11A Arun Vale, which falls outside of the estate extension and does not have the benefit of the restrictions. Adjoining to the east (rear) is No.17 Arun Vale.

9. The applicants purchased 15 Arun Vale in November 2013. They were aware of the restrictive covenants affecting the property when they purchased it. In around May or June 2014, the applicants removed a large and overgrown leylandii hedge which enclosed part of the north western perimeter of the property. The majority of the front boundary and the whole of the southern boundary, fronting the highway, were open.

10. The removal of the leylandii hedge around 15 Arun Vale exposed number 17 to the highway. To remedy this, the applicants erected a 6ft high wooden fence between the application land and number 17. No issue is taken on this by the objectors. Indeed, the applicants are obliged to maintain this boundary as described below.

11. Following the removal of the hedge, the applicants began preparatory work to build a wall around the whole roadside frontage of the property. At the time of my inspection foundations had been laid; construction of the wall around the boundary had not started; a small retaining wall, a few bricks high, had been installed to support a widened tarmac drive; a small brick planting bed had been built to the south of the main house; and a brick enclosure, five or six feet high, had been built around an external oil tank and boiler. The trustees have no fundamental objections to the small wall which retains the drive, subject to sight of proposed finishing details and a plan as required under covenant 7. As regards the other areas, the trustees do not have fundamental objections, subject to there being no further construction.

12. In early August 2014 there was a discussion between the applicants and the trustees, and on 8 August 2014 the trustees wrote to the applicants outlining the restrictions and indicating that they would not give consent to the proposed wall. On 20 August 2014, the trustees advised the applicants that having canvassed opinion of the residents of Arun Vale, 18 of the 20 were opposed to the proposed wall.

13. There are a number of properties within Arun Vale which have boundary walls or fences and which are described in the submissions below.

## **The restrictions**

14. The restrictive covenants are contained in a conveyance dated 14 December 1967 between James Stephen Jupp and Lilian Esther Butcher as vendors, James Stephen Jupp and Norman William Holton as “the builders” and George James Doughty and Ethel Frederica Doughty as purchasers. The third schedule of the conveyance contained restrictive covenants in seven clauses. Whilst it is only clause 1 which the applicants seek to discharge or modify, the relevant clauses for the purpose of this decision are as follows:

- “1. Not to erect any fence or wall on any part of the property hereby conveyed except in replacement of any fence or wall existing at the date hereof and any fence or wall so erected shall not be other than of the height design and character of that replaced.
2. To maintain in good and substantial repair the boundary fences erected upon the side marked “T” within the boundary of the said property.
3. No front wall of any house or building to be erected on any part of the said property shall be built otherwise than to range and be in line with the existing building line and no building or erection of any kind excepting veranda, porches, bay windows or similar structures and excepting boundary fences shall be erected on that part of the said property which lies between the building line and the road.
4. ....
5. No building or other erection of any kind except fences in accordance with stipulation number 2 to be erected on any part of the property hereby conveyed other than one private dwellinghouse with usual outbuildings and a private garage.
6. ....
7. No building or other erection shall be erected on any part of the said property unless a plan showing the exact position of the site of the proposed building or other erection and the plans drawings and elevations thereof shall have been previously submitted to and approved of in writing by the vendors”

15. The conveyance excluded the original house on the fruit farm, which in time became 23 Arun Vale, but as a result of a further conveyance and trust deed dated 2 October 1978, a scheme of covenants was entered into, as a result of which all of the houses in Arun Vale have the benefit and burden of the covenants in the third schedule of the 1967 conveyance.

## **Statutory Provisions**

16. The application is made under section 84(1) of the Law of Property Act 1925 (“the 1925 Act”), relying on grounds (aa) and (c). So far as relevant, section 84 provide as follows:

“(1) the Upper Tribunal shall ... 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 –

...

(aa) that (in a case falling within sub-section (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 any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

....

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

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

(b) .....

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

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

## **The applicants’ evidence**

17. Mr and Mrs Davie both gave evidence. They said that when they moved into 15 Arun Vale there was a large leylandii hedge around part of the boundary, which was about 8 feet high and was out of control, having grown over the pavement and into the garden. They took the decision to remove it. Following the removal of the hedge, they were concerned that their grandchildren and dogs might run directly into the road. Mr and Mrs Davie did not want to have the maintenance liability of a new hedge, and decided to build a small wall, of perhaps 5-6 course, to serve as a reminder to their grandchildren of the property's boundary. This low wall, they felt, would leave a pleasant view across the estate.

18. In around April or May 2014, they replaced a six feet high interwoven fence panel around an external oil storage tank and boiler with a 5 feet high smart brick wall. Mr Davie said that no objection to this was raised by the trustees. Following removal of the hedge, a six feet high fence was erected to restore the privacy of the resident of number 17. Again, no objection was raised.

19. Mr Davie said that he and Mrs Davie were aware of the restrictive covenants affecting their property, but were advised that, from the information which they provided to their solicitor, the covenant had already been breached, as there were walls and boundary fences visible from their house. Mr Davie accepted that one of those examples was in respect of a house which fell outside Arun Vale, and was thus not caught by the restrictions.

20. Mr Davie said that he telephoned the local planning authority to enquire whether he would need planning consent for a low wall, and was informed that he would not. Work to install footings for the new wall started in May or June 2014. At that point no objection was raised by the Davies' immediate neighbours. On Mr Davie's builder's advice, he sought written confirmation from the local planning authority, and in an email of 2 July 2014, a Mr David Gibson of Horsham District Council confirmed that planning permission would not be required for the erection of a wall of 67cm high, since under the General Development Order walls or enclosures adjacent to a highway not exceeding 1m above ground level were permitted. The planning officer went on to suggest that the site may be subject to a restrictive covenant and advised the applicants to take legal advice prior to commencing works.

21. In August 2014, Mr and Mrs Davie met with some of the trustees, and after some interim correspondence and discussions, in a letter dated 20 August, the trustees declined to grant consent for the proposed wall, indicating that the majority of residents objected to it, since they wished to preserve the openness of the estate, soft landscaping and ultimately the saleability of their properties.

22. In Mr Davie's opinion, the proposed wall would not affect any views from any part of the estate, and would be well below eye-level. He said that there were a number of properties that were far more enclosed, with walls, fences and hedges surrounding them. He submitted that the covenant served no practical purpose. He referred to extensions that had been constructed at 39, 56, 41, 50 and 52 Arun Vale, which would have required the erection of new walls, and said that some properties had erected fences which would be in breach of the covenant. No enforcement action had been taken by the trustees.

23. He highlighted the following examples of other fences or walls which would have breached the covenant: a six feet high fence at number 41; a low level wire fence along the boundary of number 48; six feet high fences between numbers 48 and 50; a low retaining wall at number 56; a front brick wall at number 60; and many examples of rear fences. He said that the proposed wall would be in keeping with the wider area.

24. Mr and Mrs Davie considered that the proposed wall would not change any of the views on Arun Vale, and the spirit and intention of the covenant would remain.

### **Submissions**

25. Mr Woolf submitted that by virtue of the wording in the entire conveyance, it would be wrong to consider clause 1 in isolation. The application land was originally known as plot 8, which a Mr and Mrs Doughty purchased in December 1967. Subsequently, plot 8 became 15 Arun Value, with the builders mentioned in the conveyance constructing the house. Mr Woolf submitted that whilst clause 3 restricted erection of any house or building in front of the building line, that restriction did not include boundary fences which were specifically excepted and could therefore be positioned beyond the building line and before the road. This was in clear conflict with clause 1, which restricts the erection of any fence or wall on any part of the application land except if it replaces a fence or wall that existed as of 14 December 1967. Mr Woolf submitted that clause 1 cannot operate, as clause 3 envisages the erection of a boundary fence in the future: "shall be erected". His primary submission was therefore that clause 1 did not operate in the way advanced by the objectors as clause 3 clearly envisages boundary fences being erected after the conveyancing date. The proposed discharge of clause 1 would therefore not injure the objectors as they have never had the benefit that they maintain clause 1 provides in any event.

26. In the alternative, the continued existence of clause 1 must impede reasonable user because clause 3 expressly envisages the erection of a boundary fence on a day after 14 December 1967.

27. Mr Woolf stressed that clause 1 was in itself unreasonable, imposing a blanket refusal on any fences or walls and given the control which covenant 7 gave the trustees, was otiose. There would be nothing to counter the general intention of the openness aspects in the erection of a low wall. There need not be an absolute and mandatory refusal.

28. Mr Woolf considered the application under ground aa) by reference to the questions posed in *Re Bass Ltd's Application* (1973) 26 P&CR 156.

29. Mr Woolf accepted that regard must had to the estate plan, and its purpose to ensure the open character and soft landscaping of the estate. However, he submitted that a wall of only five or six courses, of a height of two feet or less, would maintain the development plan and not affect the character and outlook on the estate. He noted that the objectors had conceded that the erection of such a miniature wall would not require planning permission. Accordingly, the proposed user must be reasonable.



30. Mr Woolf submitted that the covenant did impede the proposed user – which he termed to be the safe and secure use of the garden of the application land.

31. The practical benefit of the covenant to the estate was to ensure that the open appearance remained unaltered from the original development, but the erection of a miniature wall would not prevent that benefit from persisting. In *Re Bass*, the Tribunal did not consider a new lodge to be significantly more intrusive than an existing house, and similarly in this case a miniature wall would not result in a substantially different appearance than as presently existed, particularly where the location of the appeal property meant that it was visible from only a small number of surrounding properties. A prospective purchaser of a property around the green would not see the proposed wall.

32. As for whether any practical benefits were of substantial value or advantage, Mr Woolf noted that one of the bases for objection was that surrounding house prices might decrease in value, yet there was no evidence from the objectors on value. If compensation were awarded, Mr Woolf submitted that an award of around £100 per property would be appropriate, following *Re Carter's Application* (1973) 25 P&CR 542.

33. In Mr Woolf's submission, the application under ground (c) of s84, had even greater merit than ground (aa). There would be no injury to the persons entitled to the benefit of the restriction. Clause 1 did not restrict the existence of walls and fences, even walls ten feet high, and the overgrown hedges at the appeal land could have continued to have grown unchallenged. The restriction is against the erection of new walls and fences, not the replacement of old ones.

34. Looking objectively at the existing view of the estate with that proposed, the difference would be minimal and insignificant.

35. In his oral submissions, Mr Woolf developed a new line of argument, which brought in the relevance of clause 7. There could be no injury to those having the benefit of clause 1 by its discharge or modification as under clause 7 the trustees had to give their approval having had sight of any plans and drawings.

36. In summary, Mr Woolf said that a balancing exercise was required, between the reasonable request of the applicants and the preservation of the character of Arun Vale. We know that the wall will be brick, we know it will be small, and the precise details will be dealt with under clause 7.

37. As I indicated above, no evidence or witness statements were submitted on behalf of the trustees. Their case was based upon submissions from Mr Simon Breasley, whose submissions took the form of eight parts.

38. His first submission was in relation to the covenants themselves. The trustees considered that clause 1 was a fundamental clause. Covenants 2 and 3 made a clear distinction between how proposals for the front garden and rear garden of each property were to be considered by the

trustees. As regards covenant 2, Mr Breasley submitted that contrary to the rear fence between 15 and 17 Arun Vale setting any sort of precedent, in fact there was a positive covenant on the applicants to erect a boundary fence, and the trustees therefore had no objection to it. Mr Breasley submitted that the covenants must be read as a suite, and the application to release or modify clause 1 in isolation would not resolve the dispute between the applicants and the trustees. In any event, no plan had been submitted by the applicants and the trustees therefore did not have a clear picture to consider.

39. His second submission was in respect of chronology, and pointed out that the applicants started work before written clearance had been given by the local planning authority, and before any consultation with the trustees had been undertaken. He reiterated the lack of plans, which was a breach of covenant 7. The trustees had only learnt at the hearing the details of where the proposed wall would be, and that there would be gates. No details of finish had been given.

40. His third submission was in respect of the trustees' attempts to mediate. The trustees had suggested that, as an alternative, either a hedge could be planted, or a brick wall along the building line towards number 11A (i.e. in line with the front of the Davies' house, rather than along the boundary itself). These alternatives, and an offer of mediation, were rejected by the applicants.

41. Mr Breasley's fourth submission was to consider whether the proposals met the applicants' stated objectives in any event. A miniature wall, or two-foot high wall, or a five/six course high wall, however variously described, would not in the trustees' view, would not keep children and dogs in the applicants' garden. He said that the "warning" element as described by Mr Woolf, was a lesser position than the original stated objective, which was to create a secure and safe environment.

42. Fifthly, Mr Breasley referred to the consensus among the property owners on Arun Vale, the trustees considered this to be highly relevant, and took seriously their obligations to reflect the residents' views when there was a clear majority objecting to the proposal. He said that the trustees had tried to avoid the application proceeding to the tribunal, "laying their cards on the table" by putting forward a full statement of case. In respect of the two owners who did not actively object, one did not wish to incur the cost of litigation, and the other wished to build a wall himself. So the trustees were concerned about a precedent being set. Should the covenant be released entirely, walls of up to 1m high could be built around the estate. He submitted that the suite of covenants should be considered as a whole, and it was impossible to simply release clause 1 without affecting the remaining covenants.

43. His sixth submission was as regards procedural issues. There had been no contact with the trustees in advance, no firm plan for the proposed work, the work had started before the written planning response, no plans had been submitted under covenant 7, and there had been delays from the applicants in complying with the tribunal's guidelines. As for the original application to the tribunal, this omitted any reference to the planning permission for the rear extension to 15 Arun Vale.

44. Seventhly, as regards the application under ground (aa), Mr Breasley made the following submissions, answering the questions posed in *Re Bass*:

- a. Mr Breasley submitted that the proposed user was not reasonable, since there were other ways in which the applicants' aims could be achieved. No detailed plan has ever been submitted, and the trustees were unaware of the design, extent, or layout of the proposed wall. He submitted that the previous hedge had provided an effective barrier for part of the property, and after its removal the trustees didn't consider it reasonable to replace it with a hard structure along the whole boundary.
- b. The proposed use of the application land was not impeded by the suite of covenants as a whole. The trustees consider that the proposed use could be met through other means.
- c. Impeding the user, he submitted, secured practical benefits to the trustees. The covenants, as a whole, play an important role in protecting the views, open character and soft landscaping of Arun Vale. The objectors believe that the covenants maintain and protect the original aspirations for the estate and continued the spirit, co-operation and overall ethos of the residents.
- d. The trustees considered that the benefits were of substantial value or advantage. Properties in the Arun Vale extension were of higher value, and commanded higher demand, and generally sold more quickly, than those in the Phase 1 estate. The trustees believed that this was partly owing to the more open views, character and soft landscaping. There would be injury to all of the beneficiaries of the restrictions, and the trustees did not consider that compensation would be realistic nor adequate. In any event, no evidence of compensation had been advanced by the applicants, on with whom the onus lay.

45. Eighthly, the trustees took a very reasonable approach, and couldn't have done much more. They offered alternatives, they offer mediation, they consulted the residents and took a majority view, and were applying the covenants in the way the trustees believed they had been intended. They didn't want the matter to get to the stage of a tribunal hearing, but had been instructed by the residents to defend the covenants and object at a hearing.

46. Mr Breasley also made submissions in rebuttal of Mr Davie's evidence. Mr Davie had referred to number 56 having a retaining wall, as a precedent. Mr Breasley submitted that this was a retaining wall, since numbers 56, 58 and 60 had significantly, and increasing, sloping sites. The retaining walls were put in when the estate extension was developed, and therefore before the covenants were entered into. Mr Jupp was a builder as well as a vendor. Some of the other properties upon which Mr Davie was relying were not on the estate extension, they were on private roads which lay outside the area affected by the covenants.

47. As regards the safety aspects which underlay the application, Mr Breasley submitted that Arun Vale was not a busy area, for example it was used by schools for cycling proficiency training. Mr Breasley emphasised that the application land was in a prominent location at the entrance to the estate.

48. In summary, he considered that the application had not been made out.

49. In answer to a question from me, Mr Breasley said that the high fencing panels at number 48 were in the rear garden, and the principle applied similarly to that at the application land. As regards the small fence which had been allowed at number 48, along the front boundary, a low fence had been allowed whilst a hedge was being grown.

50. As regards the six-foot high panel fence which had been allowed at Number 41, Mr Breasley said that the fence was allowed as part of a full planning application for a front extension, in regard to which there were no complaints from residents, and as he had submitted earlier, the trustees placed emphasis upon whether a planning process had been undertaken.

51. In response, Mr Woolf submitted that Mr Breasley's third and fifth submissions, regarding alternative dispute resolution options and the procedural history of the case were irrelevant to the decision that I am required to make on the substantive issue. In any event the applicants did not agree with Mr Breasley's account of these matters.

52. As regards the eighth submission, regarding the reasonable approach taken by the trustees, as it was described by Mr Breasley, again this did not go to the root of the matter. He accepted that the trustees had little option but to object to the discharge or modification of the covenant, but again he submitted that this was of little relevance.

53. Mr Woolf emphasised that there was no evidence, at all, from the objectors. He referred to the circular which the trustees had issued to the residents, of which only the "reply slip" had been included in the bundle. The "reply slip" said

"in the event of the construction of the brick wall around 15 Arun Vale I/WE would wish to be part of a group of like minded Residents who would wish to investigate referring the matter to the Lands Tribunal which may necessitate instructing Solicitors".

54. But, Mr Woolf submitted, despite asking for it the applicants had not seen a copy of the document to which this was attached, and therefore one didn't know the basis upon which the question was put. There was little evidential value on Mr Breasley's submission that 18 out of 20 residents objected, as there was no evidence in support of the basis of that. It was also telling, he said, that no objector was prepared to give evidence. There was no evidence whatsoever, therefore, of injury.

55. As regards Mr Breasley's first submission, Mr Woolf stressed that the applicants were simply seeking to discharge or modify clause 1 - in isolation. He returned to his point about the relevance of clause 7. There was no difficulty in discharging clause 1, but leaving clause 7 in place. Any applicant would have to submit plans etc to the trustees, who could then decide whether the proposals were acceptable.

56. In the alternative, Mr Woolf submitted that clause 1 could be modified to this effect:

“Not to erect any fence or wall on any part of the property hereby conveyed save where approved by the trustees in accordance with clause 7 herein”

57. This would ensure that the trustees would continue to benefit from clause 7 but, sensibly, it would remove the absolute bar on building anything except in replacement of any wall or fence which was present when the restriction was entered into. The true intention was that the trustees would have control, and they would continue to do so. And in fact, that is how the covenant works on the ground.

58. As regards clause 2, Mr Woolf submitted that it cannot have been intended that, when read in conjunction with clause 1, the applicants could not replace the fence between the application land and number 15 with a smaller fence, only with one of exactly the same height.

59. Mr Woolf submitted that boundary fences referred to in clause 3 are not the same as those referred to in clause 2. The fence in clause 2 is one which the purchaser was obliged to maintain on the boundary with a neighbouring plot. The reference in clause 3 is to any boundary fence. Arguably, he submitted, clause 3 allows boundary fences to be put up which would render clause 1 to be contradictory, although Mr Woolf did not stress the point.

60. As regards the objectives of the applicants, Mr Woolf submitted that these were twofold, the first being in respect of a safe and secure area for grandchildren and dogs, and the wall was to provide a reminder, and to demark the land so that the Davies’ lawn is not walked upon – precisely what had happened at number 48. Why, he asked, should it be allowed for the owner of number 48 but not the application land?

61. As regards the consensus between owners, Mr Woolf noted that the owner of number 54 also wished to build a wall – even though there was no first hand evidence on the point – but he emphasised that the trustees’ consent was still required under clause 7.

62. At my request, Mr Woolf dealt with the “thin end of the wedge” point. There had been five breaches already, at 56, 58 and 60 Arun Vale, together with 48 and 41, that had already undermined clause 1. Mr Woolf said that the location of the application land is different to one facing the amenity land, or green. He accepted that it was at the entrance to the estate, but 19 of the 21 properties in the development face the green, which was the most attractive area of Arun Vale, and which was the area that went to the root of the openness aspect of the covenant. The application land was clearly different from and distinct from the others. In any event, nothing that the applicants want to do sets a precedent, as the trustees retained the power under clause 7 to control whatever boundaries residents wished to erect.

## **Discussion and conclusions**

63. This application is made under grounds (aa) and (c) of s84(1) of the Act.

Ground 84(1)(aa)

64. In respect of the application to discharge or modify the covenant under ground (aa) of s.84(1) of the Act, both Mr Woolf and Mr Breasley referred to the questions posed in *Re Bass's Application* (1973) 26 P&CR 156, and it is therefore convenient to discuss their submissions, and my conclusions, in that order.

*Is the proposed user reasonable?*

65. In my view the proposed user is reasonable. In ordinary circumstances, a planning permission might be persuasive that a user is reasonable, but in this case planning permission is not required – and an inference can be drawn that the “development” (in planning terms), is less objectionable in principle than one which required planning permission.

66. However, since the applicants have not required planning permission, they have not needed to draw up plans of any kind. A lack of plans or specification can sometimes be fatal to an application under ground (aa) – see *Re: Davies' Application* (2008) LP/65/2006, or more recently *Re: Snooks' Application* [2015] UKUT 0623 (LC). However, following a lengthy discussion during Mr Davie's oral evidence, I am clear as to what is intended. The exact type of brick, coping stones, or finish might not be known, but those aspects are not at the heart of the objection – it is the height and the fact that the proposed wall is a hard surface that matter. But the “use” for the purposes of this question is not the presence of the wall, it is the use of the application land as a domestic garden with a small wall around it - as opposed to an open fronted plot - and in a residential estate that use must, in my view, be reasonable.

*Do the covenants impede the user?*

67. Mr Breasley said that the covenant did not impede the user, on the basis that there were other options available to the applicants. With respect to Mr Breasley, that is not the point. It is clear that the covenant, which prevents the erection of a small brick wall, impedes the use of the application land, if that use is to include the erection of a wall. I am satisfied that the covenant does impede the user.

*Does impeding the proposed user secure practical benefits to the objectors?*

68. I do not agree with Mr Woolf that clauses 1 and 3 are in conflict. As I read them, clause 1 prevents any new fence or wall, save as a replacement of an original one. Clause 3, which is primarily in respect of preventing extensions in front of the building line, excepts fences - in my view for the avoidance of doubt. There is no conflict. A new wall or fence can be erected in front of the building line, but only as a replacement of a predecessor.

69. I do not consider that the trustees should be expected to solely rely upon clause 7. This argument was mounted late in the day and to my mind is very much secondary to the ability of the trustees to rely on the absolute prohibition in clause 1. In this case, for example, the trustees' objection is not to the design or materials to be used in the proposed wall, but to the principle of a wall in that location.

70. The fact that the appeal property does not front onto the green is irrelevant. In fact, it has a pivotal location at the entrance to Arun Vale. Whilst the wall in itself might not be a significant structure, I am persuaded that it would set a precedent, particularly if facilitated by a decision of this Tribunal.

71. Having inspected the application land and the rest of Arun Vale, there is no doubt in my mind that the ability to refuse any application for a new fence or wall secures practical benefits to the objecting beneficiaries of the restriction. Whilst no evidence was submitted on their behalf, I accept Mr Breasley's submission that the purpose of the restriction is to prevent "hard" boundaries, and to maintain the open aspect of Arun Vale. That is very much a benefit that is practical.

*Whether practical benefits are of substantial value or advantage.*

72. There was no valuation evidence from either side, which ordinarily might assist in determining whether practical benefits were of substantial value. However, in my view, they are of substantial advantage. In short, they help preserve the ethos and identity of the estate.

73. The weakness of the objectors' case is that the trustees have allowed what on any fair reading have been apparent breaches of the covenant, for instance in the case of 41 Arun Vale where there is a six-foot high fence, although this is set back from the road to an extent. There is a difficulty in their position of apparently allowing breaches of the restriction, where such breach has been fully publicised as part of the planning process, but objecting to a wall which does not require planning permission. However, I can understand why they have done so. It might be tempting to conclude that the objection was simply because the applicants didn't display sufficient respect to the normal process by consulting the trustees prior to installing foundations – and in the past the Tribunal has taken a dim view of retrospective applications. But in this instance I am satisfied that the trustees' concerns are perfectly valid. The building of a new brick wall along the back of the pavement edge would, in my opinion, break new ground and if it were condoned by way of a discharge or modification by me, would inevitably lead to other applications which would soon erode the ethos of an open estate with, in the main, soft landscaping.

74. In my judgment the trustees have acted reasonably in resisting the application, and I am not persuaded to exercise my discretion to discharge or modify the restriction as it secures significant practical benefits of substantial advantage to the objectors. The application under ground (aa) is therefore refused.

Ground 84(1)(c)

75. Since the application under ground (aa) has not been made out, the application under ground (c) must also fail, since there would clearly be injury to the beneficiaries of the covenant should it be discharged or modified.

### **Determination**

76. The application is refused. This decision is final on all matters other than the costs of the application. The parties may now make submissions on costs, and a letter giving directions for the exchange of submissions on costs accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010<sup>1</sup>.



18 October 2016

P D McCrea FRICS

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<sup>1</sup><https://www.judiciary.gov.uk/publications/upper-tribunal-lands-chamber-practice-directions/>