IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 39 (LC)
Case No: LP/13/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

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

BETWEEN:

HELGA ELSABE AGNES PEARCE **Applicant**

- and -

(1) CHRISTOPHER JAMES CONNELLY **Objectors**
(2) LOUISE ANN CONNELLY
(3) JOHN WILMOTT BANNISTER

Re: Croquet, Upper Guildown Road, Guildford GU2 4WZ

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Before: P R Francis FRICS

Sitting at: Royal Courts of Justice, London WC2A 2LL
On 13 December 2016

Katie Gray, instructed by direct access, for the Applicant
Jonathan Wills, instructed by Barlow Robbins, solicitors of Guildford, for the first and second objectors
The third objector was unrepresented and appeared in person

The following cases are referred to in this Decision:

Re Bass Limited's Application (1973) 26 P & CR 156
Gilbert v Spoor [1983] Ch 27
Re Zopats Developments' Application [1966] 18 P & CR 156

DECISION

Introduction

1. This application was made on 5 May 2016 under ground (aa) of section 84(1) of the Law of Property Act 1925 by Mrs Helga Elsabe Agnes Pearce and Mr Terrence Ernest Pearce ("the applicants") for the modification of a restrictive covenant currently burdening land at Croquet, Upper Guildown Road, Guildford, Surrey GU2 4EZ ("the application land") so as to enable them to build a new dwelling, for which planning consent has been obtained, on part of their garden. Sadly, since the application was made, Mr Pearce has died and his widow is, therefore, now the sole applicant.

2. The restriction was imposed in a conveyance dated 24 October 1962 made between (1) Whitnorth Estates Limited (Vendor) and (2) Reginald James Percival (Purchaser). Although no copy of the original conveyance can be traced, the relevant restriction is recorded in the Land Certificate at section 4 and reads:

> "FOR the benefit and protection of the Vendor's dwellinghouse and property known as "Littleholme" aforesaid or so much thereof as belongs to the Vendor or any part or parts thereof and so as to bind the property hereby conveyed into whosoever hands the same may come the Purchaser hereby covenants with the Vendor that the Purchaser and the persons deriving title under him will at all times hereafter observe and perform the restriction and stipulations set out in the First Schedule hereto
>
> THE FIRST SCHEDULE before referred to
>
> 1. Nothing shall be erected or set up on the land hereby conveyed except one dwellinghouse and usual outbuildings not more than twenty-eight feet high
>
> 2. Nothing upon the said land (except trees on or within twenty feet of the western boundary) shall be permitted to be of a greater height than twenty-eight feet and the Purchaser will cut lop and top any tree now or hereafter on the land hereby conveyed (except on or within twenty feet of the said western boundary) so that it shall not be a greater height than twenty eight feet
>
> 3. The land hereby conveyed shall not be used [other than][1]as and for a single private residence only with outbuildings and for no other purpose whatsoever and no business or profession shall be carried on upon the said land."

3. The application is for modification solely under ground (aa).

[1] It is agreed that words have been omitted in the third restriction and the parties are treating it as prohibitive of uses other than as a single residence

4. The first and second objectors are Christopher and Louise Connelly, the freehold owners of 1 Littleholme, Upper Guildown Road, Guildford which lies immediately to the north of the application land, and due to the topography of the location, sits on the steep hillside at a significantly higher level than Croquet. They contend that the restriction secures practical benefits to them which are of substantial value and advantage and the proposed new house would, if constructed, detrimentally affect the magnificent views they currently enjoy. The application should therefore be dismissed, but if the Tribunal finds in favour of the applicant compensation in the sum of £36,250 (2.5% of the value of their property) should be awarded. The third objector is Mr John Bannister, the freehold owner of 2 Littleholme. His arguments as to why the modification should not be allowed were similar but whilst he said the development would devalue his house, the alleged diminution was not quantified. It is agreed that these three objectors have the benefit of the restrictive covenant. The only other property with the benefit of the restriction is 3 Littleholme, but the owners, Mr & Mrs Webster, do not object.

5. Miss Katie Gray of counsel appeared for the applicant who had provided a witness statement and was called, as was Mr Thomas Grillo FRICS of Grillo LLP, Chartered Surveyors of Godalming, who provided expert evidence on Mrs Pearce's behalf. Mr Jonathan Wills of counsel appeared for the first and second objectors and called Mr Connelly who had provided a witness statement. Mr Michael Ginsberg BSc (Hons) Est Man MRICS gave expert valuation evidence for the Connellys. Mr John Bannister, the third objector, had provided a witness statement to which he spoke.

6. I carried out an accompanied inspection of the application land and the objectors' properties together with the immediate surroundings on 12 December 2016.

Facts

7. Upper Guildown Road is an attractive high class residential street lying on a steep south facing hillside about 1 mile to the north-west of Guildford town centre. Croquet, which was constructed in the 1960s on land that originally formed part of the garden of Littleholme, is an extended detached house lying on the south side of the road and is approached over a long, steeply downwards sloping drive. The house, its driveway and turning/parking area immediately to the west of it, together with a detached garage/office building in the southwest corner and part of the property's immediate garden, along with a narrow private footpath leading down to Guildown Road, occupy about three quarters of an acre which is registered with the Land Registry under title number SY 296745.

8. A further half acre of land now forming the main garden area for Croquet and containing some small outbuildings, is registered under title number SY 358779 and lies between the house and the retaining wall forming the southern boundary of the rear garden of No.1 Littleholme, and part of the western boundary of the longer rear garden of No.2 Littleholme. That land was the subject of a transfer dated 5 April 1967 between (1) Whitnorth Estates Ltd (Vendor) and (2) Reginald James Tavendale and Edna Joan Tavendale (Purchasers), and contained a covenant that reads:

"1. That no messuage or dwellinghouse or other erection whatsoever except a flat roofed extension of not greater than Four hundred square feet having walls not exceeding eight feet in height to the dwellinghouse situate on the adjoining land of the Purchasers or walls or fences not exceeding a similar height shall be erected or set up upon the land hereby conveyed and that no tree shrub or bush or other vegetation shall be permitted to grow thereon to a height greater than Twenty feet."

9. Littleholme was designed as a substantial and imposing single residence in 1907 by Charles F A Voysey, an important exponent of the Arts and Crafts style, and built by his Master Craftsman Mr G Muntzer, for his own occupation and use. It was constructed of brick with whitewashed render elevations and bath stone facings under pitched tiled roofs and had a garden design to complement the house. It had accommodation on two floors with dormer windowed attic rooms above and all the principal rooms had magnificent views to the south from the first and second floor over Guildford and the Surrey Hills beyond, but the near views of Guildford have become partially obscured from the ground floor by substantial yew hedging (agreed to be between two and three metres in height) along the rear boundary of what is now No. 1 Littleholme. Conversion to three separate dwellings occurred in the 1960s at around the same time as the two titles now forming Croquet were sold off, along with another area of land immediately to the west which now contains a detached bungalow known as Weyview. Littleholme is Listed Grade II.

10. The applicant proposes to erect a detached two-storey "Baufritz" bespoke timber framed and glazed Eco-house extending to approximately 1,944 sq ft gross internal area (180 sq m) immediately to the west of the existing house on what is currently the turning/parking area in front of the garage/office which will be demolished. It is proposed that a new parking area will be provided on what is currently the western end of the land under title number SY 358779 (this title, whilst also being affected by the restrictive covenants recorded above, is unaffected by the one house restriction affecting the land which is the subject of this application), but the intention is that the main house shall be erected on the burdened land. Planning permission was granted on 2 May 2014 (ref: 14/P/00108) subject to conditions which included:

"Condition 3. Immediately following the implementation of this permission, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended on 1st October 2008) (or any order revoking and re-enacting that order with or without modification) no buildings extensions or alterations permitted by Classes A, B and E of Part 1 of the Second Schedule of the 1995 Order (as amended on 1st October 2008) shall be carried out.

Reason: To safeguard the residential amenities of neighbouring properties…

Condition 4. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended on 1st October 2008) (or any Order revoking and re-enacting that Order with or without modification) no additional windows or similar openings shall be constructed in the roof or first floor elevations of the building except for any which may be shown on the approved drawing(s).

Reason: To safeguard the residential amenities of neighbouring properties …

Condition 7: The development shall not commence until details of all boundary treatment has been submitted to and approved in writing by the Local Planning Authority …

Reason: To safeguard the visual amenities of neighbouring properties and the locality …

Condition 8: No development shall take place until there has been submitted to and approved in writing by the Local Planning Authority a scheme of landscaping which shall include indications of all existing trees and hedgerows on the land and details of any to be retained, together with measures for their protection …

Reason: In the interests of visual amenity."

Statutory provisions

LAW OF PROPERTY ACT 1925 Section 84:

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

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper 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

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; 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 Upper Tribunal is satisfied that the restriction, in impeding that user, either –

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

(b) is contrary to the public interest;

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

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

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

Evidence for the applicant

11. **Mrs Pearce** said that she and her husband purchased Croquet in 1999. In obtaining planning permission in 2014 for the additional dwelling on part of their garden, it was their intention to occupy it when construction was complete, and for their daughter and three grandchildren to move into Croquet. Her daughter, who is a teacher, would be on immediate hand to provide care for the applicants as they got older and became more frail. It was proposed that the new house should contain some adaptations to cater for disabled people. Since the recent death of her husband, who had been very ill, Mrs Pearce said that it was now even more important for her family to be close by as she wanted to remain in that location and avoid having to, eventually, move into an old people's home. It had, she insisted, always been the intention that the two properties should remain in familial ownership, and that was still the case. This meant that any concerns that neighbours might have about increased traffic were unjustified as her daughter already visits every day.

12. The applicant pointed out that in granting planning permission, the local planning authority had been happy with the design of the new house, and did not feel it would be detrimental to the immediate neighbours or the neighbourhood. Indeed, there had been no objections to the application from the owners of the properties (Weyview and Treetops) that bordered each side of the driveway to Croquet. Mrs Pearce said she had tried to discuss the proposals with the owners of both Nos 1 and 2 Littleholme but, having achieved no success, she had been forced into making this application. As to No. 3 Littleholme, which also has the benefit of the covenant, the owners had confirmed that they would not be objecting. They had obtained planning consent for the construction of an annexe in their own garden, and works had commenced in late 2016. There were also a number of other properties in the immediate area where additional properties had been built in large gardens including land at 'The Moorings', 2 Upper Guildown Road, land adjacent to 44 Upper Guildown Road and on land at the junction of Upper Guildown Road and Guildown Road, that creating a property now known as Pine Tree Cottage.

13. Mrs Pearce confirmed that the Baufritz "kit house" had not yet been purchased, but a deposit had been paid. It was not, she said, a large house in comparison with many others that had been built in the locality, and she refuted the suggestion that the large picture windows that the design incorporated would be left without curtains or blinds (as was often the case with Scandinavian or German Eco buildings) as it would be important for her to maintain her own privacy. In any event, the principal rooms were designed to face south, and there were to be no large windows on the northern elevation (facing towards Littleholme) so any suggestion of increased light pollution was unfounded. Finally, Mrs Pearce confirmed that she was aware of the restrictions in respect of heights of trees on all but the western boundary, and said she had no intention of planting any more as part of the planned development.

14. **Mr Grillo** is a Chartered Surveyor who has been practising as a residential valuer and surveyor in the area for over 50 years.

15. In respect of the relevant covenants, he pointed out that there was no restriction on the height of trees that could be allowed to grow on or within twenty feet of the western boundary of the application land. Thus, the applicant could have allowed trees to grow to any height along that boundary, and the views from Littleholme down towards Guildford would have been affected accordingly. It was therefore not considered, he said, at the time that the restrictions were drafted, that a high line of trees along that boundary would have had any detrimental effect upon the Littleholme properties following its division into three units. Mr Grillo said the covenantor was permitted to grow trees up to 28 feet in height anywhere else within the application land, and if this occurred, it would have interfered with views from Littleholme as much as the proposed new dwelling would.

16. The interference with views that the objectors were concerned about, he said, was imagined rather than real. The value of the views was in the ability to see great distances towards the Surrey Hills, rather than at a steep angle downwards towards the developed areas of Guildford. The proposed new house would subtend only a very small arc of vision below the sight line from any part of the Littleholme houses and from those rooms from which it would be visible it would be necessary to stand directly in front of the window and look downwards to

see it. It would be virtually impossible to see any part of the new house from any of the ground floor rooms of the objectors' properties, or from the terrace behind No.1 Littleholme due to the existence of the high yew hedge along the rear boundary, immediately behind the retaining wall.

17. It was his opinion that the restrictive covenants preventing the erection of an additional dwelling contained in Croquet's title are now of little relevance to the character of the area bearing in mind the amount of infill development that has taken place since the 1960s and their existence did not confer any practical benefits of substantial value or advantage. There would certainly be no loss of value to any of the benefitted properties if the proposed dwelling were to be constructed. A prospective purchaser would take the property as he found it, and the fact that there might be one additional dwelling next to Croquet would not affect their view on value in any way. The new building would be very much less visible from No.2, so if there was found to be some diminution in value, it would be substantially less to that property.

18. Mr Grillo said that there could be no question that the user of the proposed property was reasonable given Guildford Borough Council's adopted Development Plan and the general pattern of development in the area. It was submitted that the relevant paragraphs within the Local Plan (adopted in 2003) were 3.7, 3.13 and 3.32, all of which supported the use and reuse of already developed land and conversion of existing buildings in an efficient way, primarily within existing urban areas. It was also argued that in impeding the reasonable user of the land, the restrictions do not secure to the persons entitled to the benefit any practical benefits of substantial value or advantage in that all three of the houses now forming Littleholme are built at a substantially higher level than either Croquet or the proposed new dwelling. They are behind a retaining wall that is some 3.4 metres high to the rear of which (within the garden of No. 1 Littleholme), is a dense yew hedge which is between two and three metres tall. The ridge of the roof to the existing house is approximately 1.6 metres below the level of said retaining wall, and that of the proposed new dwelling will be at a similar height. Thus, Mr Grillo said, the new property will be well below the line of sight of the Littleholme properties and views from any of the windows will therefore not be substantially affected. It is the splendour of the distant views that adds value to the Littleholme properties, not the near, lower level, views which include other residential properties and their gardens.

Evidence for the objectors

19. **Mr Connelly** gave oral evidence for himself and his wife in support of the witness statement that he had filed. In it he explained that they purchased the property in July 2010, having moved from a more built up part of Guildford. After some 4 years spent seeking an alternative house in the area, they were attracted to No.1 Littleholme by its quiet location, its architectural style and particularly the garden. There was little passing traffic and the location was peaceful. During the six years they had owned the house, Mr Connelly said that they had "fallen in love with it" and in good weather the combination of the garden and the views were "stunning". The house was particularly conveniently located only a mile from the centre of Guildford, and a 5 minute taxi ride from the station, and yet the neighbourhood felt like it was in the countryside. An additional attraction was the fact that the house had been built by Charles Voysey for occupation by his own Master Builder, and unusually the garden had been

specifically designed to complement the house. It has been featured in a number of books and publications, and Mr Connelly said that he and his wife occasionally host open days for people interested in Voysey's legacy.

20. The reasons for the objection to the application were that the proposed new house would permanently and irretrievably damage the character of the immediate neighbourhood. It would constitute an over-development of the existing Croquet plot and would result in more traffic and noise generally. It would impact the views that they currently enjoy, and would be visible from a number of their rooms and from the semi-circular terrace at the rear of the garden which acts as a vantage point for enjoyment of the views. Whereas Croquet can be clearly seen from that viewpoint, the area of garden that will house the new dwelling is used as lawns. If the new property is built there will be two families enjoying the garden areas rather than one, thus resulting in more noise and disturbance. Whilst it was acknowledged that the existing yew hedge along the rear boundary substantially shields Croquet (and the plot) from view, an arboriculturalist consulted by Mr Connelly had expressed concern about the hedge's condition, and had recommended that it be quite severely pruned back. If this was done, the new dwelling would become very much more visible from the ground floor and garden. There was also particular concern that the property would be visible from the Connelly's main first floor bedroom, and from the dormer window of a room Mr Connelly uses as an office on the second floor.

21. In summary, Mr Connelly said that the proposed development would be devastating, and its presence would detract from the main characteristics of No.1 Littleholme. It was those characteristics that had motivated them to buy the property in the first place, and their ongoing use and enjoyment of the house would be seriously compromised. He did not agree that the eye is naturally drawn to the distant views, and whilst he acknowledged that "one does not spend one's days gazing down at Croquet" and its gardens, both near and far vistas were equally important. He accepted that the positive statements in the planning report that was before the planning committee differed from his own views, but said that "the planning officer does not live there."

22. Mr Connelly acknowledged that he had made no reference to any claim for compensation if the application were to be successful, but said he relied upon the opinion of Mr Ginsberg that that the house would be devalued by around 2.5%.

23. **Mr Ginsberg** is a Chartered Surveyor and a director of Romans Commercial based in Guildford. He has been dealing with residential and commercial property in Guildford for over 20 years. He said he had been asked to comment upon the impact that the proposed development might have on the practical benefits enjoyed by No.1 Littleholme, particularly in respect of the effect on views, increased traffic and disturbance generally, and to assess what depreciation it may cause to the value of the property. He confirmed that he was not acting for the third applicant, Mr Bannister, and he had not been in his property.

24. Describing No.1 Littleholme as occupying one of the most sought after locations in Guildford, and designed to take maximum advantage of its outlook (one of the best in Upper

Guildown Road) over the Wey Valley and the Surrey Hills beyond, Mr Ginsberg said that whilst it was accepted the yew hedging and other foliage in the rear garden almost completely obscured views of Croquet and the proposed development site from the ground floor rooms, the roof of Croquet was clearly visible from all the south facing windows at first and second floor. The roof of the new building would therefore also be clearly seen when the property was complete. The outlook from the vantage point at the rear of the garden (in a gap between the two halves of the yew hedge) would be particularly badly affected, it being the closest point to the existing and proposed properties immediately behind.

25. Noting Mr Connelly's concerns about the condition of the yew hedge, and the advice he had received that it should be severely pruned, Mr Ginsberg said that in his opinion, it was an overly dominant feature in what was, in reality, quite a small garden, and he would recommend that it should be either very substantially reduced in height or even completely removed if the house were ever to be put on the market. This would open up the lower views to the south from the ground floor rooms as well. He thought that the whole reason that the yew hedge was in place was to reduce the impact visually of the close proximity between No.1 Littleholme and Croquet and the fact that it was there should not be used to justify an argument that the views from the ground floor are, and would be, unaffected by the proposed development. In any event, he said that the proposed new house was of a contemporary, modern and eye catching design and there would thus be a material impact from whichever of the windows in No. 1 Littleholme it could be seen from.

26. Mr Ginsberg pointed out that the fact the restrictions prevented the construction of the single property which became Croquet to any more than 28 feet high and also prevented the growth of trees to more than 28 feet in height (except along the western boundary) was clearly, in his view, to preserve the views from the benefited properties. It was not, as Mr Grillo had suggested, a vehicle to enable the developer who owned Littleholme, or its successors in title, to extract money from the purchaser if they should ever want to add an additional property. Mr Ginsberg said, at paragraph 7.8 of his report:

> "It would make sense to me that if the owner was seeking to sell the newly developed, high end conversion units, it would be prudent for him or her to convince buyers of the value of the views in perpetuity so that they would not have any fears about their enjoyment of the properties or, most importantly, the resale value when they came to sell. Any uncertainty in this respect could be anticipated to affect the price the purchasers would be prepared to pay (as I contend is the case now) and so the vendor would wish to eliminate uncertainty while it was within his or her power to do so."

27. The fact that there were, in the immediate vicinity, a number of properties where infill development had occurred (including the construction on land formerly belonging to Littleholme of Weyview, which itself impacts on the view from the French doors off the kitchen of No.1 Littleholme and lies between it and the driveway leading to Croquet), does not lend support to the application, Mr Ginsberg said. Indeed, quite the converse. The increase in local densities (including the property now being developed in the former garden of No.3 Littleholme) meant the restriction on further development was even more valuable than it was when originally applied in serving to protect the premium value of the properties.

28. Mr Ginsberg agreed with Mr Connelly's concern about increased traffic flows and noise created by the new dwelling even if it remains within the same family ownership as the applicant's existing property. As to the point that was made about some existing conifers within the 20' zone of the western boundary which were clearly more than 28 feet high, he said they were at a fairly acute angle to the main windows, being so far to one side, and did not therefore catch the eye. They also blended in with the generally green vista beyond. However, he did stress that if the Tribunal were to allow the modification of the restriction on building, it was most important that the sections of the Schedule applying to the heights of trees should be left intact for obvious reasons.

29. Mr Ginsberg said in conclusion that whilst it was accepted that the distant views of the Surrey Hills would not be affected, and the construction of the new house as proposed by the applicant would not deal a "killer blow" to the desirability of No.1 Littleholme, there would undoubtedly be some impact on value.

30. Having considered a number of comparable transactions, details of which were annexed to his report, Mr Ginsberg estimated the open market value of No.1 Littleholme as at September 2016 (the date of his second inspection and his report) to be in the region of £1,450,000. Mr & Mrs Connelly had acquired it in 2010 for £1,250,000 and had carried out a number of improvements including opening up part of the first floor landing to provide a further living area. Applying indexing for the period from purchase to late 2016 would produce a figure of £1,780,000 which, whilst not being a particularly reliable indicator, demonstrated vividly the premium that purchasers were prepared to pay to secure a property in this location and with its outstanding features. He said this underpinned his opinion that the premium created by the location and amazing views would be particularly vulnerable if anything occurred that served to detract from those special features.

31. As to the diminution in value which would be caused by the proposed development, Mr Ginsberg accepted that his opinion that a 2.5% reduction seemed appropriate and sensible in all the circumstances (£36,250 based upon his estimate of open market value) was highly subjective and was not be supported by direct comparable evidence.

32. **Mr Bannister** has lived at No.2 Littleholme for some 45 years. In his witness statement he rehearsed similar concerns to those expressed by Mr Connelly and produced a number of photographs that indicated what could be seen from various south facing windows in his house. In addition, he stressed the importance of Littleholme as it had been described by the Hon President of the Voysey Society as being "justifiably renowned as perhaps Voysey's most important house in Surrey." The gardens were a particular feature but Croquet was clearly visible from them through gaps in the yew hedge behind No.1 which had grown and thickened up substantially during the period of his occupation. He agreed that the hedge needed works to significantly reduce its size, but any such works would make Croquet and the additional property, if it was built, very much more visible.

33. He accepted that the gardens of many houses in the Upper Guildown Road area had been progressively built upon over the years, however, in his view "a red line needed to be drawn

somewhere" and the proposed house on Croquet's plot would destroy Littleholme's appeal and integrity. He said that his house was valued by local estate agents in September 2016 at £1.25 million, but he would prefer that the development did not go ahead rather than receive some kind of monetary compensation if it did.

34. In his email to the local planning authority of 14 February 2014 objecting to the applicant's planning application for the new house, Mr Bannister said:

> "The layout and density of buildings (new plus old) proposed for this site (Croquet) is too great. The house proposed is very similar in size, both bulk and footprint, to the existing house on this plot. The existing house footprint has been greatly extended incrementally over the years. The massing of the two combined houses will be excessive for this plot and totally out of character with other houses in the Guildown area. The ridge height of the proposed house is higher than the existing house. Four new hard standing car parking places are proposed, which will add further to the massing and the environmental damage to the site."

He acknowledged however that in granting planning permission, the local authority expressed different views and did not think the effects of the proposal were severe enough to warrant refusal despite Littleholme being a listed property. Nevertheless, he felt strongly that the views from the Littleholme properties would be seriously compromised – and that the lower views were as important as the distant views. The existing garage and office was clearly visible from his house. This was proposed to be removed and replaced with a very much larger structure which would therefore be even more visible, although he did acknowledge that his house was further away from the site of the proposed new dwelling than No.1 Littleholme.

Submissions and conclusions

35. This application for modification of restrictive covenants was made solely under ground (aa) and counsel for the applicant and Mr & Mrs Connelly referred, in considering the tests to be satisfied, to the seven questions posed in *Re Bass Limited's Application* (1973) 26 P & CR 156.

36. The first two, under ground (aa), are: (1) Is the proposed user reasonable? (2) Do the covenants impede that user? Mr Wills for the Connellys submitted that whilst it was accepted that residential use *per se* was a reasonable use of the Croquet land, it was not accepted as a matter of fact in this case that two houses on the Croquet land was a reasonable user. Although generally the fact that planning permission has been granted has been held to support an argument that the proposed use it permits would be reasonable, it should be borne in mind, it was submitted, that the planning authority here considered it necessary to remove permitted development rights (conditions 3 & 4), and to apply other conditions that clearly demonstrate the risks there would be to neighbouring properties if they were not imposed.

37. Miss Gray for the applicant submitted that the proposed user clearly was reasonable. There are many other examples in the vicinity where infill development has been permitted,

and the grant of planning permission was in accordance with the Development Plan. This reasonableness was further supported by the applicant's intention to keep the two properties within the same family ownership.

38. In connection with that stated intention, it is a matter to which I can attach no weight. There is no requirement in the planning permission, the conditions or the section 106 Agreement that ownership or occupation of the property should be restricted in any such way. Further it has not been suggested by the applicant that the modification sought should include any such restriction. If I were to allow the modification of the covenant so as to permit the construction of the new dwelling there would be nothing to stop it being sold to a third, unrelated party and so any perceived benefit of that familial ownership simply would not apply. In any event, even if there were to be a restriction in the terms of ownership and/or occupation, the 'benefits' outlined by the applicant are in my judgment overstated (particularly as to there being the likelihood of fewer vehicle movements) so it would by no means be determinative of the matter.

39. Planning consent in accordance with the relevant Development Plan has been obtained for the proposed dwelling and it is in an area where a number of other, similar, permissions have been granted in recent years. I am therefore satisfied that the proposed user is reasonable and there is no question that the covenant does, as was common ground between the parties, impede that proposed use.

40. The third and fourth questions under subsection 1A and 1A(a) are, it seems to me, the key issues: (3) Does impeding the proposed user secure practical benefits to the objectors? If so (4) are those benefits of substantial value or advantage? It was submitted for the objectors that the ability to prevent the imposition of a new house on the burdened land does secure to them practical benefits by enabling them to prevent their views being affected, to retain the peace and tranquillity they say they currently enjoy and to prevent the detrimental impact of more traffic and human movement in the immediate vicinity. The answer to the questions of impact under these heads need to be considered on a broad basis, and assessed by their value to the objector and not by comparison with the importance of the development to the applicant. For instance, a very attractive and significant building might be proposed but if it is likely to interfere with restrictions that protect the objector's amenity that is the issue which must be considered. As was said by Eveleigh LJ in *Gilbert v Spoor* [1983] Ch.27 at p.32F-G:

> "The expression "any practical benefits" is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal [as it was then known] to take away from a person with 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."

41. It was also submitted that any claim by the applicant that more detrimental uses might be made of the application land – such as building upon the adjacent garden land (that was not affected by the one house restriction) or indiscriminate tree planting without breaking the restrictions than what the applicant now proposed would be a bad argument. The question, as explained in *Restrictive Covenants and Freehold Land: A Practitioner's Guide – Fourth*

Edition (Francis) at para 16.137 is: does the restriction achieve some practical benefit – e.g., protection of the view. It is not: what was the original intent of the restriction and is that intention being achieved? Thus, it was argued, Mr Grillo's suggestion that the original intent of the covenantee (Whitnorth Estates) was to secure monetary payments is not relevant to the proper test. I agree that Whitnorth's original intention is not the appropriate test, and do not in any event think it is relevant to the questions I have to answer. As to the suggestion that the applicant could build her new house on the land between No.1 Littleholme and the current application land, I agree that it would be highly unlikely that planning consent would be secured due to the fact it would be awkwardly and inconveniently sited especially bearing in mind the higher level of the land on that plot, and would clearly be too close to the objectors' properties. If a two storey house were to be constructed on that land it would impose on the dominant views from Littleholme.

42. For the applicant it was submitted that, in terms of the protection of the view, the covenant does not secure to the objectors the benefit of any view below 28 feet above ground level into or beyond the application land because of the clearly stated height allowances for the existing house (Croquet) and the trees on the land. The proposed new house would also not exceed 28 feet in height. It was also pointed out that trees of any height can be grown along the western boundary of the application land.

43. I note that in addition to the restrictions on the height of the building (Croquet), and on the height of trees (28 feet) on parts of the application land, there is a similar restriction within the title to the area of garden ground that was conveyed to the then owner of Croquet in 1967 restricting the height of any trees on that land to a maximum of 20 feet. These facts suggest to me that the intention of the restrictions in both conveyances was to protect the distant, dominant, view rather than the immediate, lower level, views from Littleholme.

44. Whilst of course from certain vantage points the new house will be visible, and its existence will be marginally more intrusive then what is currently on this part of the application land (the lawn and, beyond, the garage/office), I consider that its existence will not materially affect the amenity or enjoyment of the objectors. Unless one is standing directly behind any of the south facing windows at first or second floor of either No.1 or No.2 Littleholme, the existing roofline of Croquet and the garage/office building are not visible. From a sitting position in any of the living rooms or bedrooms the views are all distant to the Surrey Hills. It is only when standing within quite close proximity to the windows and looking downwards towards the gardens and immediate vistas beyond that Croquet and hence the new dwelling which is proposed to be built at the same level and to the same height, are and will be, if it proceeds, at least in part visible. I therefore agree with Mr Grillo's assertion that the new dwelling would be below the (general) line of sight of persons within any of the Littleholme properties and that it would "subtend only a small arc of vision". There will certainly, as was common ground, be no detraction from the distant views.

45. I do not accept Mr Ginsberg's suggestion that the yew hedge was planted to shield Littleholme from Croquet – it has clearly been in situ since long before Croquet was constructed, and would, in my judgment, have been planted when the gardens were first landscaped at the time Littleholme was built. Having been there for upwards of 100 years, and

with no evidence that any steps have been taken to date to reduce its clearly dominant effect, I concur with Miss Gray's submission that there must be some question over whether the near views are really as important to the Connellys as they suggest. I also agree with the suggestion by Mr Grillo that the detrimental impact of the new dwelling will be more imagined than real - see *Re Zopats Developments' Application* [1966] 18 P & CR 156 where Erskine Simes QC said, at 159, having considered the concerns of the objectors (which were not at all dissimilar to those expressed by the objectors in this case):

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

It seems clear to me that the lower level view from the majority of the rear garden, and from the ground floor rooms of No.1 Littleholme, is not valued by the Connellys sufficiently for them to have taken any action to cut back or indeed remove the yew hedge during the six years they have been in residence.

46. As to the effects on peace and tranquillity, I am satisfied that, as set out in the applicant's skeleton submissions, there would be no material impact upon the quiet enjoyment of No.1 Littleholme (or for that matter, No.2) by the erection of the additional dwelling. Whilst there will, of course, be additional vehicle movements whether or not the property remains on the ownership of the applicant, I accept the point that the access drive is to the west of Weyview, and no vehicles or individuals will have to pass the objectors' properties along Upper Guildown Road to gain access. Also, with the fact that the house will be at a considerably lower level, vehicles using the newly formed parking area on the land between the application land and the retaining wall to the rear of No1 Littleholme will not, I would suggest, even be noticed. In any event, the increase in vehicle ownership generally, and the fact that there have been many other infill developments in the immediate area means that the peace and tranquillity enjoyed by any property has been reduced over the years. In my judgment, this one additional unit sited in its proposed location will have no material impact on the objectors' properties under any of the heads that have been argued, and in that respect therefore, I conclude that the restrictions do not secure to the covenantors any practical benefit.

47. It follows that the question as to whether or not such practical benefits are of substantial value or advantage does not fall to be answered. Even if I had found that impeding the proposed user secured to the persons entitled to the benefit any practical benefits, I am satisfied that they would not have been of substantial value or advantage. Mr Ginsberg's assessment of the diminution in value that he proposed for No.1 Littleholme was, as he admitted, entirely arbitrary and I am satisfied that the applicant's proposals will cause no reduction in value. The same goes for No.2 Littleholme.

48. In my judgment Mr Connelly's assertions that the effect of the proposed development would be "devastating" and would "permanently and irretrievably damage the character of the immediate neighbourhood" are overstated. His fears, it seems to me, are very much a case of the prospect terrifying but the reality being harmless.

49. No.2 Littleholme is further away from the site of the proposed new house will be sited, and the restricted views of that part of the site are at a much more acute angle from the main windows (of the upper floors only) than from No.1. Mr Bannister said that the ridge of the roof of the new dwelling was to be higher than that of Croquet and indeed I noticed that that was how it appeared on the plans that were provided. However, I have also noted that in the supporting statement dated 17 January 2014 to the full application to Guildford Borough Council, the applicant's architect stated that "the design of the roof has been amended so that the ridge runs parallel to that of the adjacent dwelling [Croquet] …and the large double glazed windows [on the rear elevation] have been removed." I am satisfied that at least some of the concerns about the impact of the proposed dwelling as set out by Mr Bannister, including the fear of further light pollution, appear to have been addressed.

50. The application for modification of the restrictive covenants succeeds under ground (aa) because unless modified they impede a reasonable user of the land. That reasonable user is the implementation of the planning permission referred to which I deem to be not inappropriate and is sufficiently controlled by the planning conditions imposed to adequately protect the amenity enjoyed by the objectors.

51. Whilst an order modifying the restrictions under section 84(1) may direct the applicant to pay any person entitled to the benefit of them such sum by way of consideration as the Tribunal may think it just to award under section 84(1)(i) or (ii), I determine that as no loss or disadvantage will be suffered, no such consideration shall be payable.

Disposal

52. An order in the terms set out below will be made by the Tribunal.

53. The entry in the charges register for the application land (SY 296745) shall be amended to include a new paragraph 1a in the First Schedule set out under section 4 of the Schedule of restrictive covenants to read as follows:

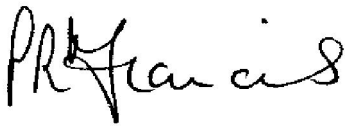
> "1a. Notwithstanding anything in paragraph 1 above, a new detached dwelling may be constructed in accordance with the planning permission granted by Guildford Borough Council on 2 May 2014 under reference 14/P/00108 and in accordance with the accompanying plans and subject to the conditions imposed. Reference to the said planning permission shall include any renewal of that permission and any other matters approved to the satisfaction of the conditions attached to that permission."

54. For the avoidance of doubt, there shall be no amendment to paragraph 2 of the First Schedule, but paragraph 3 shall be amended as follows:

> "3. The land conveyed shall not be used **other than** as and for a single private residence **(subject to the modification of paragraph 1 set out in paragraph 1a above)** only with outbuildings and for no other purpose whatsoever and no business or profession shall be carried on upon the said land."

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

Dated: 9 February 2017



P R Francis FRICS