



LP/65/2006

**LANDS TRIBUNAL ACT 1949**

***RESTRICTIVE COVENANTS – modification – dwelling houses – restrictions preventing erection of more than one dwelling house on each of two adjoining plots – application to modify to permit not more than two additional dwellings in existing rear gardens – whether restrictions secured practical benefits of substantial value or advantage – whether modification would cause injury – application refused – Law of Property Act 1925 S84(1)(aa) and (c).***

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

by

- (1) GERALD GEORGE DAVIES**
- (2) BARBARA DAVIES**
- (3) THOMAS GEORGE SHEEHAN**
- (4) CATHERINE BIRRELL SHEEHAN**

**Re: Land at rear of  
27 and 29 Highbury Crescent  
Camberley  
Surrey  
GU15 1JZ**

**Before: N J Rose FRICS**

**Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL  
on 25 July 2008**

Dr Thomas Sheehan for himself and the other applicants with permission of the Tribunal  
Dr Robert Crossley for himself and the other objectors with permission of the Tribunal

The following case is referred to in this decision:

*Re Glevum Estates (Western Counties) Ltd* LP/53/1972, [18 December 1973], unreported

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## DECISION

### Introduction

1. This is an application by Mr Gerald Davies, Mrs Barbara Davies, Dr Thomas Sheehan and Mrs Catherine Sheehan under section 84(1) of the Law of Property Act 1925. The applicants seek the modification of restrictive covenants affecting freehold land containing two dwelling houses known as 27 and 29 Highbury Crescent, Camberley, Surrey, GU15 1 JZ so as to permit the construction of not more than two additional dwellings in parts of the existing rear gardens.

2. The application site is affected by four restrictive covenants. The first was imposed by a conveyance dated 20 August 1930 between Rosamond Austin and Mary Winifred Hele (the Vendors) and Gladys Mary Johnson, Doris Straker Johnson and William Henry Johnson (the Purchasers). By Clause 5 of that conveyance the Purchasers covenanted

“For the benefit of the Vendors and their successors in title owners and occupiers of the land now belonging to the Vendors living on the opposite side of the road fronting the property hereby conveyed the Purchasers herein to the intent and so that the restrictive covenants hereinafter contained shall be binding on the part of the said land and premises hereby assured into whosoever hands the same may come ... that the Purchasers and the persons deriving title under them will not at any time hereinafter erect or permit to be erected on the land hereby conveyed more than four houses which shall be of less value than One Thousand Pounds exclusive of buildings and no pairs or other than wholly attached residences shall be built on the said land ...”

3. On 22 March 1957 the President of the Lands Tribunal, Sir William FitzGerald QC, modified this restriction so as to permit the erection of a total of 32 houses on the land the subject of the 1930 conveyance and an extension of it. It is apparent from the President’s decision that the plans and layout of the 32 houses had been approved by the local authority. In fact, the development which was eventually carried out on the site consisted of 34 detached houses. It is not clear whether any formal consents were granted for the additional houses. In any event, 34 detached houses were erected in a cul-de-sac development now known as Highbury Crescent. They have remained there, apparently without challenge, for many years.

4. The second restriction was imposed by a transfer dated 30 June 1969 between Arthur Frederick Instone and Mary Elizabeth Perring (the Transferors) to William Harry Hitchcock and Robert Lippett (the Transferees). The Transferees covenanted

“Not to fell any trees hereby transferred except such as may become dead or dangerous.”

No copy of the 1969 transfer was produced. The extent of the land affected by the 1969 transfer is not clear, but this uncertainty does not appear to be material in the context of the current application.

5. The third restriction was imposed by a transfer of 27 Highbury Crescent dated 18 January 1971 between William Harry Hitchcock, Henry Arthur Roberts and Robert Lippett (the Transferors) and two of the current applicants, Mr and Mrs Davies (the Transferees).

6. The fourth restriction was imposed by a transfer dated 23 April 1971 between William Harry Hitchcock, Henry Arthur Roberts and Robert Lippett (the Transferors) and James Bond and Barbara Bond (the Transferees). This transfer related to 40 Highbury Crescent, which is now known as No.29 and is owned by Dr and Mrs Sheehan.

7. Both the 1971 transfers contained the following covenant by the transferee

“so as to bind the land hereby transferred into whosoever hands the same may come and to benefit the remainder of the said estate or any part thereof that the transferee will observe and perform the restrictions and stipulations set out in the Third Schedule hereto”.

It is apparent from the transfers that the land with the benefit of this restriction is the Highbury Park Estate, consisting of the 34 detached houses forming Highbury Crescent.

8. The covenants in the Third Schedule were as follows:

“Not to do or suffer or permit to be done any act upon the land hereby transferred which shall cause annoyance to the owners or occupiers for the time being of any part of the said estate.

Not to use the property hereby transferred otherwise than as a private dwelling house.

Not to fell any trees growing on the land hereby transferred except such as may become dead or dangerous and to replace any such trees which may be felled with trees of a similar type”.

9. The modification of these restrictions sought by the applicants would allow the erection of not more than two further dwelling houses on the site of Nos.27 and 29. No planning permission has been granted for such development. The applicants, however, have provided the following details of the development which they envisage. The house or houses would be behind Nos.27 and 29 and would not border the existing Highbury Crescent. The house or houses would front Portsmouth Road (A325). The house or houses would be of a similar height to the existing houses in Highbury Crescent. The effect of the sloping site would be that the ridge height or heights of the proposed house or houses would be lower than those of Nos.27 and 29. All services and access to the house or houses would be obtained from Portsmouth Road.

10. All the objectors to the current application occupy houses in Highbury Crescent. They are all paid-up members of the Highbury Park Estate Preservation Group, which was formed to pursue objections to the proposed modifications. They are:

Mr and Mrs Bains (No.1); Mr and Mrs Nokes (No.3); Mr and Mrs Muriss (No.4); Mrs Sait (No.5); Mr Ford (No.8); Mr and Mrs Singh (No.11); Mr and Mrs Sussex (No.12); Mrs Johnston (No.13); Mr and Mrs Stevens (No.14); Mr and Mrs Morris (No.16); Mr and Mrs Willmott (No.18); Mr Griffiths (No.19); Dr and Mrs Crossley (No.20); Mr and Mrs Young (No.21); Mr and Mrs Hughes (No.22); Mr and Mrs Watson (No.24); Mr and Mrs Gooding (No.25); Mr and Mrs Lockett (No.26); Mr and Mrs Bath (No.34); Mr and Mrs Halliday (No.36); Mr Chown and Mrs Barr (No.38).

11. With one exception the applicants accept that the objectors are entitled to the benefit of the restrictions. They suggest that Mrs Sait is not so entitled, because she has sold her house. They also say that Mr Willmott and Dr Singh have not submitted notice of objection forms. These gentlemen did not register as private objectors, although they joined the Preservation Group. Since the Group does not itself have a legal entitlement to the protection of the restrictions, Mr Willmott and Dr Singh are not formal objectors to this application. Mrs Sait, on the other hand is a formal objector, since she is entitled to the benefit of the restriction, she has submitted a valid notice of objection and, at the date of the hearing, she had not completed the sale of her property. Dr Sheehan appeared for all four applicants with permission of the Tribunal and gave evidence. Dr Crossley appeared for all the objectors with permission of the Tribunal and gave evidence. He also called Mr Gooding and Mr Muriss as witnesses of fact.

12. I inspected the application site and the immediately surrounding area on 24 July 2008 in company with representatives of the applicants and the objectors.

## **Facts**

13. From the evidence and my site inspection I find the following facts. The town of Camberley was largely established to provide services and facilities for the adjacent military staff college and military academy at Sandhurst. Numerous substantial houses were erected in the locality in generous grounds to provide accommodation for military staff and for retired senior military officers. Smaller houses were constructed in and around the town and nearby for tradesmen.

14. In the 1950s Camberley became one of a number of towns that entered into arrangements with London boroughs to move businesses and their employees out of the capital. Large municipal housing estates were constructed in Camberley and nearby in Frimley, Frimley Green and Mytchett. Ready road access to London via the London Road (A30) together with a rail link resulted in significant private housing development, particularly during the 1960s to 1990s. Ease of access to Heathrow Airport resulted in Camberley becoming an attractive location for airline staff. Since the 1990s the further residential expansion of Camberley has been largely confined to the redevelopment of existing mainly residential properties and infill development.

15. The Highbury Crescent development is situated on the north-west side of Portsmouth Road, a short distance south-west of the junction with the A30. It was constructed between 1968 and 1970 and comprises 34 detached houses of broadly similar size and design. It is a cul-de-sac, running in a westerly direction for a short distance from Portsmouth Road and then turning south. It includes two amenity areas surrounded by roads. The larger of these is situated roughly in the middle of the estate and contains a group of trees protected by a tree preservation order (TPO). The TPO also relates to all trees of various species and condition within two areas extending along a major part of the boundaries of the estate. It includes some of the trees which would be felled if the development proposed by the applicants were to proceed.

16. Nos.27 and 29 Highbury Crescent presently stand on a wedge shaped site at the southern end of the road. The total site area is some 0.264 hectares, bounded to the east by Portsmouth Road and to the west by Gibbett Lane. The existing properties each have a curtilage that is significantly larger than most in Highbury Crescent. The application site itself has an area of 0.12 hectares. If it were sold off separately, the rear gardens of No.27 and 29 would be reduced to a depth of 13.5m.

17. In November 2003 a planning application was submitted on behalf of Dariston Land and Development, proposing the demolition of Nos.27 and 29 and the erection of 12 two-bedroom flats. The application was withdrawn in February 2004. Two revised applications for a broadly similar development project were submitted in March 2004. The application plans indicated the erection of a three-storey building of contemporary style, with accommodation at second floor level contained within the roof space, positioned in the same general location as the existing houses. The proposed flats were shown to be served via a new access from Portsmouth Road, the existing accesses from Highbury Crescent being closed off. As a result of the failure of the local planning authority to determine one of the duplicate planning applications within the statutory period an appeal was lodged with the planning inspectorate. The second application was presented to the Council's planning committee, which resolved that planning permission be refused. The appeal was subsequently withdrawn.

### **The evidence**

18. Prior to the hearing the applicants submitted two expert reports, one on planning and the other on market value. Neither expert was called to give oral evidence because, Dr Sheehan said, the objectors had failed to produce any expert evidence of their own to support their case.

19. The applicants' approach to the production of expert evidence demonstrates a misunderstanding of the nature of proceedings under s.84(1). The objectors are entitled to the benefit of the restrictions. If the applicants are to secure the modification of those restrictions, they must persuade the Tribunal that the provisions of one or both of the grounds upon which they rely – that is, paras (aa) and (c) – are satisfied and that the Tribunal should exercise its discretion to modify. This is the case even if there are no objections to the application.

20. In the event Dr Crossley chose to consider in some detail the matters raised in the two expert report. For that reason only it is appropriate that I summarise the expert opinions expressed.

21. Mr Michael Gilfrin Dip TP, MRTPI is the founding partner of MGA Town Planning and Development Consultants of Lightwater. He considered that the access to any development on the application site would be located on the outside of a gentle bend in Portsmouth Road and would benefit from generous visibility sight lines in both directions along that road. It was likely that planning permission could be obtained for one or two detached houses, either from the local planning authority or the planning inspectorate on appeal. Since the existing houses, Nos.27 and 29, would be retained, and since the proposed development would be substantially screened from view from Highbury Crescent, the impact on the street scene would be minimal, in clear contrast to that of the originally proposed block of flats. The erection of one or two houses would involve the removal of some trees, but this would have a limited impact on the locality and no impact on the character and appearance of Highbury Crescent.

22. Ground levels fell in a southerly direction from the end of Highbury Crescent. It was therefore likely that any house or houses erected on the application site would be of the same height or minimally higher to the roof ridge than the existing properties Nos.27 and 29, depending upon building design and the roof pitch. The bulk of the proposed houses would only impact upon the occupiers of Nos.27 and 29, since the new properties would be visible above any new boundary fence separating the existing and proposed development. It was likely that limited overshadowing would occur to the rear gardens of both properties, since the new development would be located immediately to the south. The majority of the houses in Highbury Crescent faced in an east-west direction, with main living rooms, kitchens and bedrooms facing garden areas to the front and rear of each property. The occupiers of these properties would not be able to see any development constructed on the application site from their houses or gardens. The development might just be seen if one looked at the site from the southern end of the footway and carriageway of Highbury Crescent. Because of the orientation of existing houses, existing site features including trees, and the separation of the application site from other properties in Highbury Crescent, the visual amenities and outlook enjoyed by the occupiers of such properties would not be affected.

23. Access to the application site would be solely from Portsmouth Road. It was anticipated that any planning permission to develop the application site would require the construction of an access from Portsmouth Road prior to any other works being undertaken. Thus, the occupiers of properties in Highbury Crescent would not be affected by construction works associated with site clearance and the subsequent erection of one or two detached houses. All services would be secured from Portsmouth Road. When development was completed future vehicular activity associated with residential occupation would similarly have no impact upon the residents in Highbury Crescent.

24. The proposed house or houses would be of a size similar to the existing houses in Highbury Crescent, albeit they would front on to and be served from Portsmouth Road. They would be in character with other residential properties fronting this part of Portsmouth Road,

which had been affected by a number of recently erected flat developments. The proposed house or houses would probably be a minimum of 50m from any dwelling on the east side of Portsmouth Road, from which they would be screened by existing well established trees and shrubs, including trees on the frontage of the application site. The proposed development would have no impact upon the outlook, amenities and privacy enjoyed by the occupiers of such properties, located on land which was once part of the substantial residential curtilage to Beaufront, a large Edwardian house. Nor would the proposed development have any impact upon the occupiers of properties on the west side of Gibbett Lane and to the west of the application land, since they enjoyed views away from the site, and were well screened by trees and hedges.

25. Mr A P Gribbon MRICS, IRRV is a partner in Gribbon and Pelham of Camberley. He said that, at the time of his site inspection, he had considered the likelihood that the occupiers of dwellings with the benefit of the restriction might be able to see the proposed new houses. At worst, the roof line together with the upper part of the side flank wall to one property might be seen from the footway and carriageway to Highbury Crescent. They would not be visible from any of the properties within that road. The proposed development would cause no material visual impairment to any of the dwellings in Beaufront Road, on the east side of Portsmouth Road.

26. The new house or houses might be seen in part from some dwellings fronting Portsmouth Road, namely Nos.17 and 21 and a flat development known as The Laurels. The same applied to a further property with no obvious numbering, but which he took to be No.23. All these properties had the benefit of tree screening. All were in an existing urban area and they mainly had an outlook over other dwellings. Assuming that a tree screen were retained to Portsmouth Road (which Mr Gribbon understood to be the applicants' intention) no significant visual impairment to those dwellings would be caused by the proposed development.

27. On the assumption that the development of the application site would be restricted to two two-storey dwellings "of appropriate size", Mr Gribbon considered that the modification of the restriction would have no adverse effect on the market value of any of the properties having the benefit of the restrictions.

28. Dr Sheehan made the following additional points. The purpose of the application was to enable the construction of two dwelling houses. There was no intention to erect flats. The proposed development had been carefully planned to avoid any disturbance to the residents of Highbury Crescent. Some residents fully agreed with the proposal and understood the benefit to them of removing "a plot of wasteland" and preventing the erection of a block of flats on the application site. Only two members of the Group had taken the trouble to inspect the plans of the proposed development. The visual appearance of Highbury Crescent had changed as a result of the construction of extensions and alterations to the frontage of many of the existing dwellings. If the proposed modification were granted only one or two dwelling houses could be erected, whatever the local planning authority decided.

29. Dr Crossley said that he had retired ten years ago as Rector of St Paul's Church, Camberley. He and his wife had chosen to move to Highbury Crescent, which was a "precious oasis of peace in a busy, noisy environment". It was possibly the only estate in Camberley with the benefit of mutual restrictive covenants. It was unique in the area. All the houses were of similar age and style. There were mature trees and grass in the middle of the road. Children could play safely there, since virtually the only traffic belonged to residents or visitors. The character of the estate had been retained because of the existence of the restrictive covenants and the Lands Tribunal decision in 1957. Dariston had confidently proceeded with their planning appeal until they discovered the existence of the covenants. Had a block of flats been built in the site of Nos.27 and 29, the damage to the estate would have been incalculable. In the absence of detailed planning permission for the proposed development it was not possible to form a realistic conclusion as to what any modification might entail in practice. The number of trees to be felled would depend on the number of properties to be built and their position on the site. In any event, the reference to the removal of 17 trees did not appear to take into account the trees which would need to be felled in order to create the proposed corridor for access from Portsmouth Road. Without more information it was not possible to be sure whether the felling of trees or the height of the development would have an impact on Highbury Crescent visually, or in terms of noise, or cause other injury, loss of privacy or loss of character or have other adverse effects on other property owners. The necessary detailed information could only be obtained with the benefit of a detailed planning permission. Most of the trees which it was proposed to retain behind Nos.27 and 29 were very large and situated outside the applicants' ownership. They were all very close to a gas substation. There was a risk that they too would need to be felled if their roots were shown to be interfering with the substation. Whilst the views of the applicants' experts were to be respected, they were only opinions. They were based on assumptions, which might or might not prove to be justified. The application site formed part of the rear gardens of No.27 and 29. If it were fenced in it would provide very attractive garden land for which there would be great demand. No rear gardens in Highbury Crescent could properly be described as "wasteland".

30. Dr Crossley added that the existing covenants had provided a valuable benefit to all properties in Highbury Crescent, including Nos.27 and 29, by preserving the essential character and privacy of the road; they ought not to be tampered with. Any modification would be bound to set a precedent. It was inevitable that it would increase the pressure to allow similar changes in the future, which could potentially destroy the nature of the road and its environment. The objectors had purchased their properties with the benefit of the restrictions. It would be unfair if they had to continue to live in apprehension of further modifications. A large majority of the residents in Highbury Crescent had contributed to the legal costs incurred by the Group in objecting to the application. They did not want the covenants to be changed.

31. In the course of cross-examination Dr Crossley accepted that, if extensions were added to the existing houses at Nos.27 and 29, the view of the trees from Highbury Crescent might be removed.

32. Mr Murriss lives at 4 Highbury Crescent. He said that his house was immediately next door to No.2, which was the first house on the right as one entered the road from Portsmouth Road. The site of No.2 was one of the largest plots in the road. It was owned by an estate



agent. A block of flats had been erected 100 yards further along Portsmouth Road. Discussions about a further flats development had taken place with the owners of the three houses lying between No.2 and the existing blocks of flats. Those discussions had not yet proved fruitful and the three houses were not part of the Highbury Crescent building scheme. Nevertheless, one could not rule out the possibility that, in the future, an attempt would be made to erect another large block of flats on a site which included part or all of the site of No.2. Mr Murriss did not know whether a developer would decide to apply to the Tribunal for a further modification to permit such development. Such an application, however, was more likely to be made if the present application succeeded and the Tribunal's decision could then be cited as a precedent. A block of flats at the entrance to the estate would have a serious effect on its amenities.

33. Trees were an important part of the estate's character. They formed a curtain round it, protecting the privacy of the residents. The proposed new access from Portsmouth Road would break this boundary and destroy the unity of design achieved by the original architect. The current overgrown state of the application site was the result of the approach adopted by the applicants. Some trees have been felled but not replaced, although the TPO required their replacement.

34. Mr Gooding lives at No.25 Highbury Crescent, immediately adjoining No.27. He said that his peace of mind had been disturbed by the original proposal to build flats on Nos.27 and 29 and by the threat that he might be responsible for costs if his current objection failed. He could not afford professional representation in presenting his objection at the hearing. If Nos.27 and 29 could be developed together, there was a risk that other adjoining properties could follow. He should have been in France on his employer's business, but had had to take time off work to attend the hearing. The application had caused him considerable stress. He had not inspected the plans of the proposed development at the location suggested by the applicants, because the owner of No.36 had prepared copies of the plans for him and other residents.

35. In response to some of the matters raised by the objectors, Dr Sheehan made the following additional observations. There was no risk of a further application to erect flats on the application site. It was impossible to obtain insurance cover for such a proposal in view of the restriction to dwellinghouses only. There was no realistic prospect of further development being proposed in Highbury Crescent in breach of the existing restrictions. A further block of flats might be proposed to the north-east of No.2, but no developer would trouble to include No.2 because of the need to apply to the Tribunal for modification of the covenants.

## **Conclusions**

36. There are two main objections to the application. The first is that, in the absence of a detailed planning permission, it is not possible to form a reliable opinion as to the effects of the proposed development on the objectors' property. The second is that, if the restrictions were modified, a precedent would have been established for further breaches of the restrictions. I consider each of these objections in turn.

37. In *Re Glevum Estates (Western Counties) Limited* LP/53/1972 [18 December 1973], (unreported) the President of the Tribunal, Mr Douglas Frank QC, said

“I find that the applicant has not made out his case under paragraph (aa). Perhaps I should add that as a general proposition any applicant seeking to rely upon that paragraph should be armed not only with a planning permission but also with detailed plans of a kind which could be incorporated in an order. What the applicants are in effect asking for is a blank cheque, which I should not have been disposed to have granted in any event.”

38. *Glevum* concerned a site of about 2.3 acres subject to a covenant restricting development to a single dwelling house. The applicants wanted the restriction to be discharged in order that they could carry out a form of high density development, probably of the order of 25 houses. The circumstances of the present case are somewhat different. The applicants are seeking modification of the restrictions, not their discharge. They are not asking for a blank cheque, but for permission to erect one or two additional houses. Nevertheless, the President’s remarks are still apposite. In order to satisfy the requirements of ground (aa) it is necessary to satisfy the Tribunal that the restriction, in impeding some reasonable user of land,

“does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them.”

If the Tribunal is to assess the extent of the benefit to an objector of impeding a particular user of land, it is essential for the Tribunal to be provided with full details of that user. It is true that the applicants have provided a general description of the form of development which they have in mind, and I infer that they would be prepared to agree that any modification should be subject to those conditions being adhered to in any future development of the application site. But without the benefit of a formal planning permission any description of the proposed house or houses would be difficult to express satisfactorily and enforcement problems could arise.

39. As Dr Crossley pointed out, Mr Gilfrin’s report was subject to certain caveats. He said that the overall ridge height of the proposed development would “depend on building design, including roof pitch”. He was unable to specify which trees would remain following development, but limited himself to saying that there would be “a significant number”. Mr Gilfrin’s caution is clearly justified. He made it clear that a full planning application would require floor plans and elevations and the identification of existing site levels, trees, and the location of adjacent buildings and roads. It would need to be supported by a Design and Access Statement “which will examine the design principles and concepts applied in preparing the proposed development on the site and how issues relating to access to the development have been dealt with.” An up-dated arboricultural report, assessing the impact of the proposed development upon existing trees and identifying the steps taken to minimise such impacts, would need to be prepared and submitted as part of any planning application. A noise survey would also be required, to assist the planning authority in deciding whether appropriate conditions could be imposed on any planning permission to ensure an adequate level of protection against noise from the adjoining Portsmouth Road. There can be no certainty that, once the necessary documentation has been prepared, it would be sufficient to satisfy the local authority that permission for development in the form proposed should be granted; Mr Gilfrin

made it clear that there was a possibility that consent might be refused and the matter would have to be taken to appeal.

40. In my judgment, in the absence of detailed planning permission, there is insufficient information available to enable the Tribunal to form a clear conclusion as to the effects of the proposed development on those entitled to the benefit of the restrictions. The applicants have therefore failed to prove that the requirements of ground (aa) have been satisfied. They have also failed to prove that the proposed modification would not cause injury to any of the objectors. Ground (c), therefore, has not been made out either.

41. I would add that I am in no doubt that, if the proposed modification were granted, it would establish a precedent and might well encourage other developers to apply for further modifications in the future. The risk of such applications being made is clearly a matter of great concern to some of the residents of Highbury Crescent. I bear in mind that, notwithstanding the building alterations which have been made in certain cases, the number of houses in Highbury Crescent has remained unchanged for nearly 40 years. In my judgment the power to prevent a precedent being established is a practical benefit of substantial advantage to the objectors. For this reason, too, the applicants have failed to establish either of the grounds relied upon. I therefore have no jurisdiction to modify the covenants and the application must be refused. The parties are now invited to make representations on costs, and a letter on that accompanies this decision, which will become final when the question of costs has been determined.

Dated 13 August 2008

N J Rose FRICS