UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0203 (LC)
Case No: LP/31/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – restriction preventing construction of more than one house per plot - land with planning consent for an additional dwelling adjacent to existing house — whether proposed user reasonable - whether covenant secures practical benefits of substantial value or advantage to the objectors – 'thin-end-of-the-wedge' - whether injury to objectors – application granted - Law of Property Act 1925, sections 84(1)(aa) and (c)

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

BETWEEN:

PAUL DAVID DEAN
and
HANNAH KATHERINE DEAN **Applicants**

- and -

(1) DAVID FREEBORN
(2) SIMON & CHARLOTTE NASH
(3) AURELIA JEAN GOODEVE-DOCKER
(4) GEORGE & JENNIFER EWER **Objectors**

Re: The Leasow, 4 River View Close, Chilbolton Stockbridge, Hants SO20 6AA

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Hearing date: 22 February 2017

Before: Paul Francis FRICS

Winchester Combined Court, The Law Courts, Winchester SO23 9EL

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Stephen Jones, instructed by Barker Son & Isherwood, solicitors of Andover, for the applicants

The objectors were unrepresented and appeared for themselves

Authorities

The following cases are referred to in this Decision:

Re Bass Limited's Application (1973) 26 P&CR 156
Re Snaith & Dolding's Application (1995) 71 P&CR 104
Re Forjac's Application (1976) 32 P&CR 464

The following cases were also referred to in argument:

Re Laav's Application [2015] UKUT 448 (LC)
Re Zaineeb al Saeed's Application (2002) LP/41/1999 (LT)
McMorris v Brown [1999] 1 AC 142
Dobbin v Redpath [2007] 4 All ER 465
Re Cain's Application [2009] UKUT 212 (LC)

DECISION

Introduction

1. This is an application, made on 9 September 2015, under grounds (aa) and (c) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act") by Paul and Hannah Dean ("the applicants") for the modification of restrictive covenants currently burdening land at The Leasow, 4 River View Close, Chilbolton, Hants (registered at H M Land Registry under Title No. HP575335) ("the application land"). Modification, if granted, will allow the applicants to demolish a large indoor swimming pool building, attached to their house, and replace it with a detached two-storey private dwelling house with integral garage, new landscaping and parking area on garden land between the house and the western boundary, in accordance with planning permission which was granted by Test Valley Borough Council on 23 October 2014 under reference: 14/01983/FULLN.

2. The restrictions which are the subject of this application were imposed in a conveyance dated 8 March 1963 (Registered at H M Land Registry under Title No. HP622974) made between Stella Mary Hallmark (1) (the Vendor), Charles Wheatstone Sabine (2) and Eade Brothers Ltd (3) (the Purchaser). They are set out in a Schedule thus:

> "*1. No buildings huts sheds garages caravans or erections of any kind whether of a permanent or temporary character (except for the purpose of building operations) other than 8 dwellinghouses or bungalows and garages as hereinafter mentioned should be erected or placed upon the property hereby conveyed the position and character of such dwellinghouses or bungalows and garages to be in accordance with the plan annexed to the outline Planning permission dated the 19th day of November 1962 granted by the Andover Rural District Council and otherwise with elevation plans and specifications (as to brick and tiles) to be first approved in writing by the said Charles Wheatstone Sabine or his Agents such approval not to be unreasonably withheld.*
>
> *2. Not to erect any buildings except dwellinghouses and garages to be used in connection therewith on Plots 1 2 3 4 and 5 marked on the said plan annexed to the said Outline Planning Permission.*
>
> *3. Not to erect any buildings except bungalows and garages to be used in connection therewith on Plots 6 7 and 8 on the said plan annexed to the said Outline Planning Permission."*

3. The objectors are:

> (1) David Freeborn, Landseer (formerly Swakeleys), River View Close, Chilbolton SO20 6AA
>
> (2) Simon Christopher Nash & Charlotte Jane Nash, Danebury, Drove Road, Chilbolton S020 6AB

(3) Aurelia Jean Goodeve-Docker, Down End, Drove Road, Chilbolton S020 6AZ

(4) George Anthony Ewer & Jennifer Lynn Ewer of Owls Roost, Drove Road, Chilbolton SO20 6AB

They contend that the restrictions secure to them practical benefits of substantial value or advantage, that money would not be sufficient to compensate them for the losses of privacy and amenity that they would suffer if the applicants were successful, and that each of the objectors would suffer injury, particularly in that such a modification would constitute the "thin end of the wedge" and potentially be a catalyst for a deluge of similar applications.

4. Mr Stephen Jones of counsel appeared for the applicants and called Mr Paul Dean who gave evidence of fact, and Mr Michael Tibbatts MRICS MEWI of Scrivener Tibbatts, Chartered Surveyors of London SW19 who gave expert evidence.

5. The objectors were unrepresented and had not appointed an official "spokesperson" to speak for them, although they had jointly obtained a report from Mr David Smith FRICS of Myddleton & Major, Chartered Surveyors of Andover, who gave expert evidence. Despite the lack of a specific advocate, I should record that I am particularly grateful to Mr Nigel Goodeve-Docker BA (Oxon), husband of the third objector, for his input and co-ordination efforts and for generally drawing the strings together in respect of the objectors' cases. Nevertheless, there was inevitably a degree of repetition particularly in respect of the objectors' witness statements and their stated concerns. For the sake of brevity therefore, I rely to a large extent (in addition to Mr Smith's evidence) upon the opening skeleton documents that the objectors (through Mr Goodeve-Docker) provided and, in particular, the helpful "Joint Submissions of the Objectors" produced in closing for the purpose of summarising their positions. The fact that I may not refer in this decision to every point raised by each of the objectors, both in writing and aired at the hearing, does not mean that they have not been duly considered and taken into account.

Facts

6. The experts produced a brief statement of facts and matters agreed between them, and there was also a similar document produced by the applicants' solicitors setting out facts agreed, matters in dispute and issues for determination. Although that document was not signed by the objectors, its contents were uncontroversial. From these, together with the evidence and my inspection of the application land, River View Close and the locality of the objectors' properties on the day prior to the hearing, I find the following facts.

7. The Leasow (formerly known as 'Erika') is one of ten properties built following an initial grant of planning permission in 1962. The development as originally devised was to comprise eight detached properties – nos. 1-5 being houses and nos. 6-8 being bungalows and would be served by a new "C" shaped cul-de-sac that, on the plan accompanying that planning consent (Bundle A p.30), was to be called Down End Close. Following the grant of planning permission the land (which was an area of scrub woodland) was sold to Eade Bros Ltd ("Eades"), builders, on 6 March 1963 by Mrs Stella Hallmark who was the sister of Charles Wheatstone Sabine, the then owner of Down End House and its extensive grounds

which adjoined the development land's north-eastern boundary. The transfer contained the restrictions set out above which were imposed "to benefit and protect…the adjoining property known as Down End House." Following the acquisition, Eades acquired some additional land to the south-west, sufficient to house a further two properties. A modified planning consent for a total of ten properties was thus obtained in 1964 (which also allowed plot 8 (now Greystones) to be constructed as a house rather than as a bungalow). The proposed name of this revised cul-de-sac development was changed to River View Close which is "Y" shaped with what the objectors described as the 'lower section' having allowed the construction, on the additional land (which is not burdened by the restrictions the subject of this application), of plots 9 & 10 ('Tilvenstre' and 'Filkins').

8. The burdened land is said to comprise the whole of the area transferred in 1963 upon which eight properties were originally constructed, now known as Withern, Birkdale, Greystones, Landseer (formerly Swakeleys), The Leasow, Fairways, Danemead (formerly Langley's) and Lusotho.

9. Subsequently two further properties have been constructed by the subdivision of Fairways (which was adjacent to the application land to the south-west). Firstly, in about 1984 a detached split-level chalet bungalow now known as 'Orwell House' was constructed between the south-western boundary of The Leasow and Fairways. Orwell House's north-east side wall is about one metre from the boundary with the application land. There was no evidence relating to whether or not any application was made (or indeed required – see below) for modification of the restrictions contained in the 1963 Transfer as far as Fairways was concerned to enable the construction of Orwell House to proceed. Then in about 2004 the third objector, Mrs Goodeve-Docker, consented to an application for modification of the restrictions so as to permit the construction of the detached house known as Montelimar on the opposite side of Fairways, in its south-west side garden. Thus Fairways' original plot, which was in the region of three quarters of an acre, now accommodates three properties.

10. There appears to have been some confusion relating to the inclusion or otherwise of the 1963 restrictions in the title and transfer documentation relating to Fairways, Montelimar and Orwell House, this being evidenced by exchanges between the applicants' solicitors, Barker Son & Isherwood ("BS&I") and Weymouth District Land Registry following the applicants' instructions to them to investigate, given in October 2014. BS&I were seeking a copy of the 1963 Conveyance to establish whether or not that one conveyance covered all eight plots, thus meaning that each of the properties when transferred to their new owners would indeed be subject to exactly the same conditions. It appeared from BS&I's investigations that the title to Fairways does not contain a reference to the 1963 conveyance and the restrictions and neither does the title to Montelimar. However, the title to Orwell House does contain reference to it, and BS&I were seeking an explanation from the Land Registry. It was confirmed that Fairways' transfer did not contain such reference and that was the reason why Montelimar's did not either as it was transferred out of the Fairways' title. It was acknowledged that the omission in Fairways' entry could have been down to human error. However, that did not explain how the Orwell House transfer came to include the restrictions in its transfer as that was also thought to have been transferred out of Fairways' title. No satisfactory answer to that conundrum was produced.

11. Although the objectors initially contended that the River View Close development comprised a building scheme of mutually enforceable covenants, as was explained in the applicants' skeleton argument, it does not. This was accepted by the objectors and the issue was not pursued. For the sake of the record, I agree that the application land is not part of a building scheme (which, if it was, would have had ramifications in the consideration of this matter), and there is therefore no need to refer to it further.

12. The benefitted land lies to the north-east of the burdened land and consists of Down End (which when the covenant was imposed in 1963 was owned and occupied by Charles Wheatstone Sabine, the brother of the Vendor, Stella Mary Hallmark), along with Drovers Lodge and Peagreen Lodge (the owners of which initially objected to this application, but have subsequently withdrawn), Owls Roost, and Danebury. Each of those four properties were constructed upon land which originally formed part of Down End and thus enjoy the same benefits as Down End. It is only objector (1), Mr Freeborn, whose property is accessed off River View Close, and whose house is one of those originally constructed under the 1964 planning permission. His ability to object stems from the fact that he has subsequently (in 2008) purchased an area of garden ground from the owners of Danebury and Owls Roost and added it to his own property. Thus it is only that additional area that benefits from the restriction, and otherwise, Landseer is similarly burdened to the application land.

13. The Leasow, which was purchased by the applicants in December 2012, is a substantial two-storey detached house of traditional brick construction under shallow pitch tiled roofs standing more or less centrally in a substantial plot which extends to about three quarters of an acre. The site inclines upwards from the front, north-west, road boundary towards the rear. The accommodation includes four reception rooms, kitchen/breakfast room and utility room on the ground floor with four bedrooms and three bathrooms on the first floor. There is an attached triple garage on the north-east side of the house approached off a driveway located towards the northern end of the road boundary. Attached to the house on the south-west side elevation is a large heated indoor swimming pool contained within a single storey extension of matching brick and tiled construction with shower/changing and wc facilities and sliding double-glazed patio doors to front and rear elevations giving on to the gardens and terrace. The house has a gross external area of about 2,048 sq m (including the swimming pool building). As described above, Orwell House lies immediately to the south-west of The Leasow and Landseer lies to the north-east.

14. Chilbolton is an attractive and popular West Hampshire village situated in the upper Test Valley midway between Stockbridge and Andover. River View Close is located outside the Chilbolton Conservation Area (designated 1984) with open farmland to the north-west on the other side of Coley Lane off which the close is accessed, and more intensive residential development to the south-east and south.

15. Full planning consent for the applicants' proposed development was granted, subject to conditions, by Test Valley Borough Council on 23 October 2014. Those conditions included the requirement to provide samples of the proposed construction materials for approval; access proposals including details of the required visibility splays; on-site parking and vehicle turning provisions; a detailed soft landscaping scheme and details of finished ground levels and building height details (to ensure a satisfactory relationship between the new

development and the adjacent buildings, amenity areas and trees). In a further note, the planning authority said: "In reaching this decision the Test Valley Borough Council (TVBC) has had regard to paragraphs 186 and 187 of the National Planning Policy Framework and takes a positive and proactive approach to development proposals focused on solutions…". These paragraphs, under the sub-heading "Decision-taking", refer to the need for LPAs to approach decision taking in a positive way, and that they should "look for solutions rather than problems and decision takers at every level should seek to approve applications for sustainable development wherever possible."

Issues

16. The applicants say that the proposed development upon the application land will have no adverse impact upon the value, enjoyment and amenity of any of the objectors' properties and that grounds (aa) and (c) of s.84(1) of the 1925 Act are satisfied.

17. The objectors contend that in accordance with the terms of clause 2 of the 1963 conveyance the restrictive covenants were imposed "to benefit and protect" their properties and that the application to modify the restrictions will, if successful, have an adverse impact upon the terms of the covenants and thus, inter alia, on the value, enjoyment and amenity of their properties. Thus grounds (aa) and (c) are not satisfied.

18. It was agreed that in connection with the application under ground (aa), the questions posed in *Re Bass Limited's Application* (1973) 26 P&CR 156 require to be considered.

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) …
>
> (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) …
>
> (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."

The case for the applicants

19. **Mr Dean** explained that he and his wife bought The Leasow in 2012. During the pre-contract enquiries, they were advised by their solicitors that there was an entry in the Charges Register referring to the restrictive covenants contained in the transfer of 8 March 1963, but a copy could not be traced and no copy had been provided to the Land Registry on the first registration of Title. Although details of the restrictions relating to Landseer (then Swakeleys) were obtained, it could not be established whether those affecting The Leasow were the same. Nevertheless, having at that time no intention of building a further house on the plot, they

decided to proceed, exchanging contracts on 16 November, and completing the purchase on 7 December 2012.

20. Considerable sums were expended on the swimming pool in 2013, and there were plans to carry out further updating works including upgrading the pool heating system and installing a new wc. However, due to an unexpected change in their financial circumstances, they had to consider what steps could be taken to enable them to stay in the property – particularly as their children were by then well settled into the village. One option would be to sell off part of their plot for development which, regrettable as that would be, would mean losing the swimming pool. An architect was consulted, and plans were prepared for a new two-storey detached house with integral garage to be located more-or-less on the footprint of the pool building.

21. An application for full planning permission was made in August 2014. Mr Dean said that he understood that his immediate neighbour, Mr Freeborn of Landseer, was the only one of the four current objectors who had any land that was part of the benefited land. In his objection to the planning application Mr Freeborn did not mention the covenant. Chilbolton Parish Council did not raise any objections when the application was considered at its meeting on 1 September 2014. One of the objectors to this application, Mr Ewer, was present at that meeting as he was a member of the planning committee. Apparently, although not relevant to the planning application, it was mentioned at the meeting that there was a covenant affecting the land that would prevent the development proceeding unless it was modified. The permission was granted on the first attempt under the Planning Officer's delegated powers on 23 October 2014, and was not referred to the Test Valley District Council Planning Committee.

22. Mr Dean confirmed that he had only consulted the person living directly opposite him in connection with the planning application, and, obviously, the reason he had not spoken to any of the objectors to this application when the planning application was made was because, at the time, he was not aware precisely of what the restrictions were, what the benefited land was and therefore who the potential objectors might be.

23. Mr Dean said that in early November 2014 he instructed his solicitors to try to locate a copy of the 1963 conveyance. Eventually, in December 2014, a copy of the Abstract of Title was traced, with assistance from the Land Registry who were dealing with another property that was similarly affected, and was provided by the solicitors acting in that matter to his solicitors on 8 December. The precise wording of the restrictions is as set out in this application. It was only at that time that he became aware that the restrictions were imposed for the benefit of Down End (which included the plots that have subsequently been constructed on its land (hence the further objectors).

24. It was pointed out that there had been 33 successful planning applications relating to properties in River View Close since 1981 (although at the hearing Mr Dean accepted Mr Nash's detailed analysis which showed 32 successful and five failed applications during the period). Four of the successful ones, he said, were for new properties. Two were on the part of the development that was burdened by the restrictions (Orwell and Montelimar) and two related to the houses that whilst being accessed from the close, were outside the burdened

land (Filkins and Tilvenstre). Mr Dean said that some of the applications for extensions to existing properties were significant to the extent that they might be considered to be in breach of the covenants – in particular those to Lushoto and Landseer.

25. It was Mr Dean's view that none of the objectors' properties, nor their values, would be affected by the proposed development. Hardly any of them could even see The Leasow, and those that could only had a glimpse – such as being able to see a small part of one of the roof gables and that only from a first-floor window. He responded to the individual concerns that had been expressed by each of the objectors. Firstly, Mr Nash of Danebury had said the proposed house was large and in a cramped position. In fact, the swimming pool that currently occupies the application land is itself a large building, so it is not a case of creating a new building on an area of open space. The suggestion that the peaceful and semi-rural character of River View Close had been preserved for in excess of 50 years "because of the covenants" was wrong. Both Orwell House and Montelimar had been built during that period, and although not benefited properties, Filkins and Tilvenstre had also been added. Several of the properties had had very large extensions as well.

26. Mr Freeborn's situation was somewhat different to the other objectors in that he was a resident of River View Close, and it was only the additional part of his garden (behind Danebury and Owls Roost) that had the benefit of the restrictions. That land was not subject to the same restrictions that applied to the main part of Landseer and the rest of River View close. Asked by Mr Freeborn why, in October 2014, he was registered as a director of a company called Enigma Developments Ltd, as it was suspected he had bought The Leasow as a development prospect, Mr Dean responded by saying said that that company was first registered in 2012 in connection with a buy-to-let matter. He had been a director of Enigma Polymers Ltd until October 2014, and then became a director of Enigma Developments. He said that Mr Freeborn had opened bank statements that had been intended for him because they had been delivered to Landseer in error by their postman – who he described as "dyslexic.". Mr Dean insisted that whilst he had been made aware that there were restrictions on the property when he purchased it, he was not aware of the detail in respect of the restrictions on development until after planning consent had been received, and his solicitors had, by chance (dealing with another property) come across the relevant abstract of title.

27. On the subject of his and his wife's original intentions for the property, he said he also resented the suggestion by Mrs Goodeve-Docker that they were property developers engaged in "opportunistic profiteering". He refuted the suggestion that the proposed house was too big for its proposed plot, citing Orwell House and Montelimar as similar examples of house to plot size, and the suggestion that "savage" pruning had been be undertaken to the "hedge" separating the new property from Orwell House. In fact, the hedge was a row of tall, ungainly and mostly dead conifers, in connection with which the planning permission contained a condition that those to the rear part of the boundary should be removed. A replacement plan (for a new six foot hedge) had been proposed and accepted by the planners when they approved the landscaping scheme that the applicants had prepared. Mr Dean also said that it would be clear from a site inspection that despite what Mrs Goodeve-Docker said about the close proximity of Down End to River View Close, The Leasow could not be seen from it.

28. **Mr Michael Tibbatts** is a Chartered Surveyor based in Wimbledon, London SW19 and is sole principal of his firm, Scrivener Tibbatts. He operates a predominately residential general practice and, as a member of the Expert Witness Institute, regularly appears as an expert before courts and tribunals. He appeared for the claimants in the recent restrictive covenant application *Re Laav's Application* [2015] UKUT 0448 (LC). He said he had been instructed to consider the effect, if any, that modification of the restrictions to permit the construction of the proposed new dwelling would have upon the market value or amenity of the objectors' properties. This included the potential loss or disadvantage that they may suffer in terms of access, increased traffic flow, the effects upon local infrastructure and amenities and whether the objectors would suffer injury. He said he visited the application land and the properties of all six of the original objectors over two days in April 2016, had carried out detailed research of planning policies and other relevant matters, principally via Test Valley Borough Council's website and had considered the witness statements and concerns expressed by the objectors.

29. Firstly, it was his view that there could be no adverse effect upon the market value of the objectors' houses because none of them had anything other than the minutest glimpse of The Leasow, let alone the potential for seeing the new house when it was built because it would be on the far side of the existing property. It had been agreed with Mr Smith that neither Owls Roost nor the area of benefitted land to the rear of Landseer had any view at all of the application land. From the first-floor master bedroom of Down End two gable ends of The Leasow are just visible through the trees – and it would be those gables that would shield any possible view of the new house. Similarly, one of The Leasow's gables is just visible from the first-floor rear of Danebury.

30. The area in general was now quite densely developed (particularly the properties in Branscombe Close onto which River View Close backs) and there was evidence of a number of nearby large houses that had formerly had grounds of an acre or more where infill development has occurred over the 50 years or so since the restrictions were imposed. This was because in many peoples' lives large gardens are now often seen as a burden rather than an advantage. The same, he said, goes for swimming pools which are now very much out of fashion, particularly for health and safety reasons, and it was agreed with Mr Smith that the pool at The Leasow added no value to the house.

31. The provision of one further unit within the land that now forms River View Close could not conceivably make any difference to them in terms of the enjoyment of their properties, and it would not change the character of the area in respect of material noise, light pollution or effects on wildlife. Furthermore, the house as proposed is in keeping with those in its immediate vicinity and its grounds, at about one quarter of an acre will not be "cramped" as had been suggested but would be on a par particularly with Fairways, Orwell House and Montelimar. He did acknowledge, however, that the new dwelling and Orwell House would be "quite close together".

32. On the subject of those properties, Mr Tibbatts accepted that, from the information that had only recently come to light, the land upon which Orwell House was built may, due to human error at the Land Registry, have been free from the restrictions that had been applied to all the other houses now forming the River View Close development (other than Filkins

and Tilvenstre). Nevertheless, he said that made no difference to his overall conclusions as he had assumed all the properties were subject to the same restrictive covenants. In his view the modification of the restriction as sought by the applicants would not constitute "the thin end of the wedge" and open the floodgates to other applications on the burdened land, even though it was accepted that it could be seen as setting a precedent in support of such applications if they arose. There was certainly no evidence to suggest that the owners of any of the remaining large plots have any intention of seeking to divide their properties. Whether or not past applications had been refused or granted were not he thought relevant to the issue, as each case, as with planning applications, needs to be considered on its own merits.

33. Mr Tibbatts pointed out that the proposed development accorded with the relevant policies in the Chilbolton Village Design Statement and the Test Valley Revised Local Plan (adopted December 2013). He did not agree with Mr Smith's comparison of River View Close with the development at Paddock Field (some way to the north-east) where he had said that they both had "special appeal" due to their exclusive locations and large plot sizes. This was because all but two of the properties in Paddock Field were in the Conservation Area, and River View Close was not. He also disagreed with Mr Smith's contention that due to the generally smaller plot sizes (due in part to the two additional houses constructed on Fairways' original plot) the properties in the "lower section" of River View Close were less valuable or desirable than those in the "upper section" which included The Leasow, Landseer, Birkdale, Greystones and Withern.

Applicants' Submissions

34. Referring to *Dobbin v Redpath* [2007] 4 All ER 465, Mr Jones submitted that the 'increased presumption' that restrictions would be enforced where a building scheme was present was not relevant in this case (it having now been agreed that a building scheme does not exist) and the objectors can therefore assert no special interest either on their own behalf, or, where they attempted to do so, on behalf of the residents of River View Close.

35. Turning to the questions posed in *Re Bass Limited's Application* (1973) 26 P&CR 156, there could be no serious suggestion that the proposed user of the land was not reasonable. The applicants obtained planning consent for their planned development at the first attempt, and the local councillors were content for it to be approved by the planning officer under delegated powers without referral to the Test Valley Borough Council Planning Committee. The only one of the objectors to this application who objected to the planning application was Mr Freeborn. The proposed development does not offend any of the relevant local plans or policies and the siting and design are consistent with the existing building on the application land, and surrounding properties. Mr Smith's view that the new house would be out of character with what is a "carefully planned development" was unsupportable, as was his contention that the upper and lower parts of River View Close should be divided in terms of considering the nature and ambiance of each. If the development scheme as laid out in the 1960s has been changed by subsequent infill development, it is not legitimate to artificially create a new area of benefited land effectively creating two halves (in terms of plot density). The burdened land is the whole of the area encompassed by the 1963 restrictions, and should be looked at as such. To do otherwise would be to "drive a coach and horses through the concept of 'thin end of the wedge'." In any event, the replacement of an existing large

structure (the swimming pool complex) with the proposed new dwelling will not affect the integrity or character of the upper part of River View Close. That the covenants impede the reasonable user is clear.

36. As to the question of whether impeding the proposed user secures practical benefits to the objectors, in terms of protecting their land from the suggested detrimental effects of the development, it was submitted that any impact would either be nil or at worst minimal. As had been said, the plot is already developed with a structure which the experts agree adds no value to The Leasow. The proposed new house has been designed to fit in with its environment, will be well screened from neighbouring properties and will not be visible from any of the objectors' properties. Any noise or disturbance from increased traffic will be minimal and if it had any effect at all, that would be to River View Close and not to the objectors' properties which (apart from Landseer) are accessed from a lane that is a not an insignificant distance away. The objectors' properties will still enjoy their quiet and peaceful location, and the proposed dwelling will have absolutely no impact on them whatsoever.

37. Mrs Goodeve-Docker, Mr Nash, Mr Ewer and their expert Mr Smith all conceded at the hearing that the proposed development would not, of itself, cause injury to the objectors. It was their fear that the modification, if allowed, would constitute the thin end of the wedge, and potentially lead to further applications from the occupiers of River View Close that was the central question in this application. Whilst it was acknowledged by Mr Jones that such harm, if established, could amount to injury (ground (c)), or alternatively the avoidance of such alleged harm by refusing the modification sought could, if established, amount to a practical benefit of substantial value or advantage to the objectors(ground (aa)), it was submitted that the objectors could not establish any such harm in this case (under either of the grounds), as there is no thin end of the wedge here.

38. Firstly, the integrity of the close as an estate of eight dwellings as originally permitted has already been destabilised by the construction of Orwell House and Montelimar. For the thin end of the wedge to apply, it should be the first application – see *McMorris v Brown* [1999] 1 AC 142 at page 151B. The position which now pertains is in some respects similar to that which was described in *Re Cain's Application* [2009] UKUT 212 (LC) where the Tribunal (P R Francis FRICS) said, at para 52:

> "…the major concern voiced by the objectors was the perceived risk that granting modification in this case would open the floodgates for future applications. It seems to me that whilst opportunities for further development in the area undoubtedly exist … the fact that the residents have clearly acquiesced in earlier breaches of the one house per plot rule, must severely weaken any arguments that they may pursue in terms of harm to the estate and the 'thin end of the wedge'.

39. Secondly, there is no realistic prospect of further development in River View Close as evidenced by the vociferous objections to the application from all but one of the residents of the burdened land stating that (although they do not have the benefit of the restrictions – apart from Mr Freeborn whose main property does not, but a small part of his rear garden does) they wish to preserve the existing character and ambience of the close. Further, in reality, the only properties that due to the size of their plots and general layout could conceivably house

further dwellings are Greystones and Landseer. Both of these are immediately adjacent to some of the objectors' properties so development thereon could have a much more significant impact upon the beneficiaries of the restrictions and could cause them injury. Also, some of Landseer's land that may be available for development is benefited land and is subject to wholly different covenants. Any land at Greystones and Landseer that could physically be hived off for development is currently garden land, whereas the footprint of the property intended to be built on the application land is already developed.

40. It was submitted that a non-injurious precedent (the present application) cannot be relied upon in support of a future injurious proposal – see *Re Forjac's Application* (1976) 32 P&CR 464. In that case, at 468, it was said:

> "If this modification causes no injury in itself – as is conceded – it cannot in my judgment be used in the future in support of an application under paragraph (c) for a modification which does cause injury."

Further support for that precedent appears in *Re Zaineeb al Saeed's Application* (2002) LP/41/1999 (LT) which at para 82 says:

> "In my judgment, *Re Forjacs* can be distinguished from the current application. In the former there was an existing building with established residential use; in the latter a new house is proposed to be built on open garden land. The former could not set a precedent due to the almost unique circumstances; in the current application a precedent could be set (or at least confirmed) for new building on unbuilt land."

In this case, the land is not "open garden land" and is previously developed accommodation ancillary to the existing dwelling.

41. For all these reasons, it was submitted that both grounds (aa) and (c) are made out in this case and the application should be allowed.

The case for the objectors

42. Each of the objectors filed witness statements in addition to their grounds of objection. **Mrs Goodeve-Docker** said she bought Down End in 1987 from her parents who were her immediate predecessors in title. It was they who had sold off most of the plots which now form the properties of all the present and former objectors (other than Mr Freeborn). She said she had refused to consent to the applicants' request (prior to the application to the Tribunal having been made) that the covenants be modified because the upper part of River View Close is a small, low density, private and secluded estate over which Down End has open views which she is very keen to retain. The original ambience and integrity of the upper part of the development had been maintained for over 50 years

43. The applicants' proposed development was too large for its site and wholly inappropriate. It would serve to increase the density of housing on the estate, and would thus diminish the enjoyment and use of her property which she wished to protect. Whilst she acknowledged that the proposed development site was some way away, she said that for a

large part of the year part of The Leasow is clearly visible through the trees from the first-floor rear facing rooms of Down End, and part of one of its roof gables was also visible from the ground floor dining room. It was her, and the other objectors', principal concern that by allowing this application, a wholly unwelcome precedent would be set. It was the upper section of the close that has the houses with the largest gardens, and the owners (or successors in title) of those that back directly on to her garden would be in a strong position to follow suit if they wished to do so. She said she would be in a much weaker position to refuse any such applications (which would have a far more damaging effect than the current proposals would in that she could end up looking out over a much denser development). The use and enjoyment of her property would be very much more seriously affected, and the value of her own house would be substantially reduced. At the end of the day, she said she was not seeking protection as such, but was trying to prevent the applicants removing the protection that she currently enjoys.

44. Mrs Goodeve-Docker said that the applicants' argument that they were unaware of whether the burden of the restrictions applied to The Leasow in the same terms that they had been advised applied to the other properties on River View Close, and who had the benefit of them, "was their problem". If they had carried out the level of research when they bought their property that was undertaken in October 2015 by their solicitors, then they would have obtained all the answers and knowledge which they now have. She was also very critical of Mr Tibbatts' report, and pointed out what she considered to be a large number of inaccuracies which, particularly in respect of the benefits, burdens and background, would not have been made if he had bothered to read the relevant abstracts of title that had been made available.

45. The proposals have caused uproar and rancour amongst the residents of River View Close, who, as they do not have the benefit of the restrictions, were relying upon her and the other objectors to "fight their corner". The statement by the applicants that they wish to live in peace and harmony with the other residents of the close does not sit comfortably with the actions they have taken.

46. Mrs Goodeve-Docker said that since 1987 she had formally refused consent relating to a proposal to demolish another of the houses on River View Close and replace it with two units, and a further proposal was withdrawn when the owner "sensed that she did not approve". Regarding Montelimar, because the applicants and their expert had placed importance on the fact that in 2004 she had given her consent (as had Mr Nash) to Mr & Mrs Fortune's proposal to subdivide Fairways to allow an additional dwelling to be constructed in its garden, she said this by way of explanation:

> "Mrs Fortune had a serious illness and doubted her ability for the future to cope with Fairways (the original house built on plot 3). Mr and Mrs Fortune had lived in Fairways for many years. They were desperate to stay in Chilbolton. Their children were settled in local schools; Mr Fortune's business was established locally; they had been unable to find a suitable alternative property. They were well liked and played a full part in the village community and its life. So they canvassed neighbours in River View Close to build what is now Montelimar, who fully supported them."

47. **Mr & Mrs Nash** and **Mr & Mrs Ewer** expressed similar concerns to those aired by Mrs Goodeve-Docker. Both of their houses have an aspect to the rear over the additional area of garden ground that was acquired by Mr Freeborn, towards his property Landseer and The Leasow beyond. Whilst it was acknowledged that, partly due to the lie of the land, and mainly because of the line of conifers separating the south-western boundary of Landseer from the north-east rear boundary of The Leasow, the new house would not be visible at all, the rear gables of the Leasow can just be seen from Danebury and Owls Roost and, of course, with the conifer boundary belonging to the applicants, they could remove that barrier at any time.

48. The principal concerns were the increase in density of the upper part of River View Close, which until now has been protected from the sort of infill development that has occurred throughout the village of Chilbolton and the risk that, if allowed, others (including Mr Freeborn) might be tempted follow the precedent that will undoubtedly be set if this application is allowed. Additional properties on both Landseer's and Greystones' plots would be even more harmful to them than development upon the application land, and would have a seriously detrimental effect upon the quiet ambience and amenity they currently enjoy.

49. Mr Nash said that it was worrying that Birkdale (the bungalow opposite The Leasow) had recently been valued with the benefit of potential for another plot within its garden. Further, he was of the view that there was room to develop the other side of The Leasow's garden, between it and Landseer. He and his wife had received a total of two approaches seeking permission to modify the restrictions. Firstly Mr & Mrs Fortune of Fairways had approached them about their proposed development of what is now Montelimar. Whilst they were unaware of Mrs Fortune's illness, they understood that their intention was to move into it and then sell Fairways. As the proposal was considered to fit in with the surroundings in the lower section of River View Close, was further away from their own house, and was not as overly dominant as the applicants' proposed property would be, Mr Nash said they had given their consent. A separate proposal to demolish Lushoto was considered inappropriate, and in any event was not pursued.

50. Mr Nash accepted that the new property would not be visible from his house and that it would not affect his enjoyment of his property, but it was the thin end of the wedge risk that was the real concern. He also thought that the proposed house was much too big and over dominant for its plot.

51. In a comprehensive rebuttal of the arguments for modification set out in the applicants' statement of case, Mr Ewer said the fact planning permission had been granted is not of itself a reason to modify the restriction. Under planning law and regulations, "the existence of a covenant is not a material planning consideration" hence the planning department is not permitted to take account of the restrictions when making its decision. Allowing the modification would undermine the protection to the beneficiaries that is afforded by the restriction, and would set a precedent for further applications which would be even more difficult to resist. The practical benefits afforded to the occupiers of the objectors' properties include the protection from overdevelopment that has been in place for over 50 years. That protection should be allowed to continue to prevent the over intensification of use of the estate and to preserve the character and integrity of the area. Whilst it was acknowledged

that this application on its own would not have a seriously detrimental effect upon the benefitted properties, it was the potential opening of the floodgates for further development on River View Close that had the most potential to cause lasting and irreparable damage to the immediate environment and the open and lightly developed character of the area.

52. Mr Ewer said that in his opinion, if the proposed modification were allowed, the injury caused to Owls Roost in terms of diminution in value would be in the region of £35,000.

53. **Mr Freeborn** is a former property developer who purchased Landseer in 2005 for his family's own occupation. He said that he bought in the full knowledge of the restrictive covenants, which were the same as those attached to the application land. He acknowledged that during the course of his occupation he had constructed a large flat roofed extension for which he had not sought consent from those with the benefit of the restrictions as he believed that it was only required for new units. He accepted that it overlooked the rear of Down End, but he had not had any objections from the Goodeve-Dockers. It was his view that the applicants' had purchased The Leasow with the intention of carrying out the proposed development and pointed out that Enigma Property Ltd had, according to Companies House, been set up in December 2012. Mr Dean was described as the managing director of a property investment company "currently planning our first residential new build development."

54. The applicants, Mr Freeborn said, had not consulted him at all in connection with their application for planning consent, and the Statutory Planning Application Notice had not been displayed in a prominent position on The Leasow and was difficult to see. Many of the other River View Close residents had also been unaware that the application was being made. He was particularly peeved at the applicants' actions, and whilst he was not currently considering an attempt to get additional units on his own property, he said he was well aware of the potential that this precedent would set and thought that there was room for "five additional houses" on his own plot.

55. **Mr David Smith** is a Chartered Surveyor based in Andover, Hants, has been practising throughout Hampshire since 1979 and, he says, has an intimate knowledge of the Test Valley and the area in which the application land is situated. He said small developments like River View Close and nearby Paddock Field have a special appeal because they are cul-de-sacs and have larger than average plot sizes. The extent of views (if any) that the objectors' properties have of the Leasow had been agreed with Mr Tibbatts, and it was his view that none of the objectors other than Mr Freeborn would have their immediate outlook affected by the proposed development.

56. In Mr Smith's opinion, particularly as a result of the infilling that had taken place (Montelimar and Orwell house), there was now a marked difference between the upper and lower sections of River View Close. All the properties to the upper part retain their original large plots, whereas the lower part now appears to be more densely developed. He thought there was thus a "special quality" to the upper part of the development, and allowing any further infilling (including the applicants' proposals) would damage the character of the area. The proposed plot would have the effect of significantly reducing one of the long frontages

and the new driveway to the applicants' additional plot would have an impact on the visual appearance of the cul-de-sac.

57. As the agent acting for the former owners of The Leasow in respect of the sale in 2012, Mr Smith said that it was his job to obtain the best price possible. He had therefore felt duty bound to advise prospective purchasers (including Mr & Mrs Dean) about what he considered to be development potential for replacing the swimming pool with a separate residential unit. However, he said he also advised interested parties that there was a restrictive covenant prohibiting such development. Whether or not large plots contain development potential, he said there was no difficulty in selling houses in Chilbolton that have very large gardens as there was always a high demand.

58. Mr Smith expressed the view that the proposed development would have a detrimental effect upon the value of all the benefitted properties due to the character and integrity of the area being changed, and this was particularly so with Landseer which was that much closer than the other affected properties (that opinion being supported by letters from two local agents who had recently advised Mr Freeborn in respect of the effects of the modification if it were to occur).

59. In connection with the grounds upon which the application had been made, Mr Smith said that for the reasons he had given, the proposed use of the application land could not be considered reasonable. If such use was deemed reasonable however, it was accepted that unless the modification is granted the covenant clearly impedes that use. The ability to prevent the modification was a benefit to the objectors of substantial value or advantage. The question of whether money would be adequate compensation if the restriction were modified should not arise if the Tribunal agrees that the proposed use is not reasonable. Ground (aa) is therefore not satisfied and ground (c) fails as the losses the objectors would suffer because of the thin end of the wedge risks would cause them injury.

60. As to why he contended that he proposed use of the land, despite the planning permission and the fact that there was already development on it, would not be reasonable, Mr Smith explained that whilst it was agreed the pool complex added no value to the house, its conversion into further accommodation as an integral part of The Leasow would add value and would be a reasonable user. In response to the suggestion that the integrity of the restrictions had already been destabilised with the building of Orwell House and Montelimar, Mr Smith said "what has happened has happened, but I firmly believe the restrictions should remain" over the remainder of the burdened land.

Objectors' closing submissions

61. Considering the questions in *Re Bass* the objectors said that whilst in many cases the existence of planning permission had been held to strongly support the argument that a proposed user was reasonable, it was not automatically conclusive of the question. There were a number of cases where, whilst the user was found to be reasonable, the Tribunal Member's comments had shown that consideration also needed to be taken of whether the proposals were "consistent with and in keeping with the rest of the surrounding area." For

example, in *Re Laav* Mr Andrew Trott FRICS had said, in paragraph 81 that the proposed user "is in keeping with the surrounding development on the estate."

62. However, here, the proposed development falls within the upper part of the estate where the original principle of one building per plot remained intact, so allowing the application would go against the heart of that policy. Further, it was the objectors' view that the design and positioning of what will appear to be a three-storey house on a rising plot will be overbearing and out of keeping with the other houses (including those that have been constructed after the imposition of the restrictions). For these reasons, there was a very strong argument for finding that the proposed user is not reasonable in this instance. It was agreed that if the Tribunal finds against the objectors on this point, the restriction does impede that user.

63. In the objectors' collective view the covenants continue to secure to them practical benefits of substantial value and advantage in relation to the upper section of River View Close in preserving the peaceful and semi-rural character of the area, the spaciousness of layout and design of that part of the close as originally developed and the open semi-rural views of the objectors' properties over and towards the close. They do accept however that, taken in isolation, the proposed new house would be either completely invisible to them or, if it could be seen, it would only be to a very minor extent.

64. The objectors' greatest concern was said to be the setting of a precedent for other similar applications on the upper part of River View Close it this application is granted. The more residents that follow suit, the weaker the restrictions become until they could only be deemed worthless. As Mr Smith had concluded, the benefited properties will all suffer reductions in value, that being particularly so in respect of Landseer. In connection with Down End, an effective covenant was said by Mrs Goodeve-Docker to be a key part of that property's title and any loss of control (caused by a precedent being set) would severely reduce the open market value.

65. On the suggested difference between the upper and lower parts of River View Close, it was submitted that as far as the lower section is concerned, the construction of Orwell House cannot in any event be considered contributory to the setting of a precedent because there was, for whatever reason, no reference to the restrictions in the title of Fairways – that being the reason why no consent for modification or discharge was sought or given. The development "just happened" without the beneficiaries' knowledge or consent.

66. As to Montelimar, it was submitted that the circumstances there were so different to those applying here that it too should not be considered a precedent. It is in a different part of the close, less visible than the applicants' proposals and could be deemed a "standard infill plot". Further, all the River View Close residents gave their support to the proposal whereas here that is not the case at all. In the objectors' opinions therefore, neither Orwell House nor Montelimar should be taken as precedents and the granting of the application here would thus effectively be the first breach of the covenant. It certainly would be so in respect of the upper part of the close, whatever the Tribunal thinks about the two earlier developments.

67. There will be a serious risk that other residents of the upper part of River View Close would jump on the development bandwagon, and the suggestion by the applicants' counsel that even if a modification here did become the thin end of the wedge, there was no evidence of the prospect of further development, simply was not true. Mr Ash of Birkdale had been told by a local estate agent that his property contained development value, and he would therefore be awaiting the outcome of this application with interest. Mr Freeborn had said that in his professional opinion as a former developer, he could get significant development on Landseer's plot. Greystones, which is the largest remaining plot, also has considerable potential for further development.

68. It was submitted that money would not be adequate compensation for the loss of the protection that the restrictions give, and the objectors would all suffer injury (ground (c) if the application were granted.

69. It was acknowledged that, as the then President of the Lands Tribunal HHJ Bernard Marder QC said in *Re Snaith & Dolding's Application* (1995) 71 P&CR 104, any application under s.84(1) of the 1925 Act needs to be determined on the facts and merits of the case, and the Tribunal cannot bind itself to a particular course of action in the future in a case that is not before it. However, as the President went on to say, it is legitimate to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. Although that was a case where there was a building scheme, should the same principles not apply here?

70. It was submitted that *Re Zaineeb al Saeed's Application* (2002) LP/41/1999 (LT) bore many similarities to this case, although it also related to a building scheme. In it, the Member, Mr Peter Clarke FRICS said, at para 72:

> "As to the effect of the proposed house, I am not persuaded that in itself it would result in the loss of spaciousness on the Estate as a whole or even in Parkside Gardens. I do not think that, due to the screening by the rear brick wall and foliage, it will have an adverse effect upon the street scene. However, I think there is force in the objectors' argument, and this is the nub of their case, that this modification will be the thin end of the wedge and lead to further infill development in Parkside Gardens and possibly elsewhere on the estate, which will adversely affect density, the sense of spaciousness and the street scene."

Earlier, at paragraph 66 Mr Clarke had quoted from *Re Chandler* [1958] 9 P & CR 512 (which was not a case where there was a building scheme) thus:

> "the objectors are clearly entitled to ask for the enforcement of restrictions calculated to retain the status quo, and any action which would facilitate a change would deprive them of something which they value. In this connection, the injury envisaged in the section is not limited by statute to the effect on market value: it may be related to something entirely personal and, even if the general relaxation of the restrictions would in fact facilitate the sale of properties and enhance market values, if the personal convictions and wishes of the objectors are seen to be sincere and well founded, and their objections not tinged with ulterior motive, to reject them would be injurious within the terms of the section.

> I cannot in this case find anything unacceptable in the objectors' evidence. Any change would affect the character of the neighbourhood, they would resent it, and would be injured if it were allowed. It seems to me that the practical benefit which is secured to them is the power left in their hands to scrutinise and if necessary veto any proposals tending to alter the character of the neighbourhood, and I do not think the Tribunal's discretion extends to depriving them of that measure of control when objections to a proposal are practically unanimous and appear to be reasonable."

71. In *Re Zaineeb al Saeed* some houses had been built elsewhere on the estate in breach of the original covenants, but these either had consent orders from the Tribunal or agreement from the beneficiaries of the covenant. Despite this, the Tribunal accepted that the thin end of the wedge argument was a valid reason for refusing the application. This, it was submitted, was similar to the situation in River View Close and the construction of Orwell House and Montelimar on the lower section. Even if these arguments do not find favour with the Tribunal in this application, it was the objectors' case that the construction of these two properties has not changed the overall character of River View Close to such an extent as to negate the thin end of the wedge argument.

72. In all the circumstances, therefore, the objectors contend that neither ground (aa) nor (c) has been made out, and the application should therefore be dismissed.

Discussion

73. The Tribunal's role is to decide, upon the evidence, whether the grounds under which the application was made have been satisfied. The matters to be taken into account are clearly set out in section 84(1) of the 1925 Act. Whatever the applicants' intentions may have been when purchasing The Leasow, and whether as suggested by some of the objectors, they were developers or "opportunistic profiteers", I fail to see what relevance that should have to my determination of this matter. Nevertheless, I suspect that one of the reasons why there appears to have been so much acrimony between the applicants and at least some of the objectors, could be down to the fact that despite knowing they were intending to pursue a planning application (which was made in August 2014) and that there were restrictive covenants affecting their title (the precise details of which they say they did not know), the applicants did not instruct their solicitors to investigate until November 2014. That was a month after full planning permission was obtained, and six weeks after they had received Mrs Goodeve-Docker's letter of 2 October 2014 which explained the situation quite clearly.

74. It is unfortunate that Mr & Mrs Dean took so long to respond to Mrs Goodeve-Docker (even a simple acknowledgement or holding response would have been courteous), as it was not until 12 March 2015 that they wrote back to her. That letter was not written until 3 months after they had been made fully aware by their solicitors of the restrictions, and 5 months after Mrs Goodeve-Docker first made contact.

75. The letter, in suitably apologetic tone, set out the applicants' reasons, and summarised the position from their point of view. As to why others had not been consulted prior to the planning application having been made, the letter said:

> "We would like to take this opportunity of apologising to you for failing to contact you prior to our applying for planning permission but you will appreciate that before we carried out our recent investigations, as a result of your letter of 2 October 2014, the details and extent of the covenants and the identity of persons having the benefit of the same, were not known to us."

In response, Mrs Goodeve-Docker wrote on 1 April 2015 advising that she had looked at the proposals carefully and expressed her concerns over the size of the proposed house. She said:

> "While I have not yet made a final decision, I think it fair to say that I am unlikely to give consent."

From the copy correspondence between the parties provided to the Tribunal, it is clear that relationships between the parties subsequently deteriorated to a significant degree, hence the need for this application.

76. Considering first the arguments around ground (aa), I find it quite astonishing for Mr Smith to say that on the one hand, replacement of the swimming pool complex with additional accommodation as an adjunct and extension to The Leasow would be a reasonable user, but its replacement with another dwelling would not. Planning consent has been obtained for a new detached house; what has been permitted is clearly within the Development Plan and accords with the local Council's general policies as to appropriate residential development. What is proposed is not out of keeping with what has been permitted elsewhere within the vicinity and would not, in my judgment, be over large or overly dominant on a plot that is too small, as is suggested by Mrs Goodeve-Docker and others. The Council seem to have been careful in drafting the conditions to which the planning permission is subject, and I note that the applicants' landscaping plan for the site has already received Council approval.

77. That the proposed user is reasonable is in my judgment beyond question. The fact that the existence of the restriction impedes that reasonable use is common ground between the parties.

78. There is not a shadow of doubt in my mind that, in this case, in impeding the proposed user of the application land the restriction does not provide practical benefits of substantial value and advantage to the objectors.. I am satisfied that the benefitted land is so far away from the application land that there will be no adverse effect upon any of the objectors' houses. The fact that from certain positions within the objectors' properties one or two of the tops of The Leasow's gables might just be visible is of no practical consequence whatsoever. Any such glimpses will completely disappear during the summer months behind the leaves on the, predominantly, deciduous trees that lie between the properties especially along the rear boundary of Down End. With the tall screen of conifers separating the rear and side gardens of The Leasow from Landseer, the new building will not even be visible from the extra piece of land that is the only part of Landseer that has the benefit of the restrictions. In that regard, I accept Mr Dean's assurance that he does not have any intention of removing that conifer screen, which is on the boundary that the applicants own, and while a successor of his might take a different view, I think it unlikely.

79. I reject the suggestion that the proposed new house could have a substantially devaluing effect, or that the objectors' peace and tranquillity will be effectively shattered. Most of the objectors' houses are not even on the River View Close development, so there will be no effects on them of increased traffic, noise or other disturbance from the applicants' proposed development. That seems to have been accepted by the objectors.

80. It is clear that the objectors' real concern is that if this application is successful, it may set a precedent for further development in the "upper section" of River View Close – the so-called thin end of the wedge, or floodgates argument. On the question of differentiating between the upper and lower parts of the close for the purpose of considering this argument, I agree with Mr Jones submissions. The burdened land is the whole of River View Close (except for Filkins and Tilvenstre) as encompassed by the 1963 restrictions, and should be considered in its entirety. To do otherwise would, as he said, "effectively drive a coach and horses through the concept of the thin end of the wedge". His arguments, as summarised in paragraphs 38 to 40 above are apposite and I agree with them although I would add that I do think there might also be the prospect of one further unit on Birkdale as well. I cannot agree with the suggestions by both Mr Smith and the objectors that there should now be some form of artificial distinction between different parts of River View Close for the purposes of deciding what is reasonable in terms of user and in terms of what should and should not be permitted. I am satisfied that, as Mr Jones submitted, the Orwell House and Montelimar developments have clearly already destabilised the integrity of the protection which the restrictions afforded to the development as it was originally planned and constructed. It is of course a fact that it was not only Fairways that apparently had no reference to the 1963 transfer – that was the case also with The Leasow.

81. I am not persuaded by Mrs Goodeve-Docker's argument that the circumstances surrounding the development of Montelimar were so different as to make any comparison with the circumstances of this application unsustainable. I accept that the applicants do not intend to move from The Leasow into the new house, whereas the Fortunes' intention was to occupy Montelimar, but the other circumstances seem entirely familiar. The applicants are settled in Chilbolton and want to stay there as did the Fortunes. Mrs Goodeve-Docker's other distinctions, regarding the positioning of Montelimar on the lower section, and the applicants' proposal being on the higher section are again unpersuasive. The fact is that with Montelimar she permitted a similar development to the applicants' proposals in terms of house type, plot size and location and, in doing so, accepted the sort of change which the restriction was intended to prevent. As to Orwell House, the question over why there is reference in its title to the 1963 restrictions whereas the title from which it was believed to have been transferred was not so affected remained unresolved. That situation does not, however, affect my overall conclusions. I do attach some weight however, in arriving at my conclusions, to the fact that that the land upon which the proposed new house is to be situated is not virgin garden land and is already occupied by a not insignificant structure.

82. Mr Tibbatts pointed out there was no evidence to suggest that if this application were to be successful, other residents of River View Close would attempt to further develop their own plots. They had expressed vociferous opposition to the applicants' proposals. That is true but does not take into account the possible intentions of a subsequent purchaser of those properties, or indeed, what might be in the mind of the current occupiers if they decided to move away. They might well wish to maximise the capital value of their properties before

putting them on the market, and might thus consider applying for some form of additional development on their plots. It has been suggested that the owner of Birkdale might be contemplating just that, but that is obviously unconfirmed and cannot be attributed any weight as evidence. Undoubtedly, in my view, if Greystones and Landseer in particular were to be further developed there would clearly be a detrimental impact upon the objectors' properties, although the location on their plots of those existing two houses do not lend themselves to further development as the houses themselves would be devalued to a considerable degree. That is not, in my view, the case with The Leasow's proposed plot.

83. To allow the application for what I consider to be an inoffensive development adjacent to The Leasow will not, in reality I suspect, open the floodgates to further applications. Any such applications will have to be determined on their own merits and the beneficiaries of the restrictions will be able to rely on the principle, illustrated by *Re Forjacs* that allowing an application which does not cause injury to the objectors, should not be used in future to support an application that does cause injury.

84. I conclude therefore that the development as proposed will not detrimentally affect he character or ambience of River View Close or the neighbourhood in general and will most certainly not affect any of the benefitted land. Applying the test set out in *Re Snaith & Dolding's Application* (1995) 71 P&CR 104, I am satisfied that the application will not have the effect, if granted, of "opening a breach in a carefully maintained and outstandingly successful scheme of development."

85. For these reasons, in my judgment, the restrictions do not secure to the objectors any practical benefits of substantial value or advantage. The application therefore succeeds under ground (aa). The application was also made under ground (c). In the light of my findings above, I conclude that the modification sought will not injure any of the objectors and the application succeeds also under that ground.

Disposal

86. The grounds of the application having been made out, and exercising the discretion afforded to me under the 1925 Act, I determine that the restrictive covenants (set out in paragraph 3 above) shall be modified to permit the applicants' proposed development of one additional dwelling house upon the application land in accordance with the planning permission granted by Test Valley Borough Council on 23 October 2014 under reference: 14/01983/FULLN. Reference to that planning permission shall include any subsequent planning permission that is a renewal of that consent and any other matters approved in satisfaction of the conditions attached to such permission.

87. 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 accompanies this decision

Dated: 15 May 2017

Paul Francis FRICS

ADDENDUM ON COSTS

88. Submissions on costs have now been received from the parties. The applicants say that as they have been wholly successful in their application, they should be awarded their costs under Rule 10(6) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (as amended 6 April 2014), and in accordance with the Tribunal's Practice Direction of which at paragraph 12 deals with the Tribunal's discretion on costs. Paragraph 12.5 specifically relates to applications under section 84 of the Law of Property Act 1925, sections (1) and (3) being of key importance, and setting out a clear, overriding principle which guides the Tribunal when it exercises its discretion in relation to costs:

> "12.5(1) On an application to discharge or modify a restrictive covenant affecting land, the following principles will be applied in respect of the exercise of the Tribunal's discretion regarding liability for costs.
>
> (3) With regards to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably."

89. It was submitted that the objectors have acted unreasonably in this application and they should therefore be ordered to pay the applicants' costs from 18 February 2016 (that being 14 days after the date of the applicants' first offer of settlement), to be assessed, if not agreed, on the standard basis. Approximately £21,500 of costs incurred in respect of the application prior to that date were not sought, it being recognised that those costs would have been incurred in any event.

90. In determining whether or not the objectors have indeed been unreasonable, the Tribunal was urged to consider the guidance recently set out in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC). However, it was acknowledged that that was an appeal from a decision of the First-tier Tribunal and was concerned with the meaning and application of a different rule, although the substance of the rules was said to be the same. It was also accepted that the tribunal in *Willow Court* considered that they should not be over-zealous in detecting

unreasonable conduct. Nevertheless, the unreasonableness in this case is, it was submitted, readily apparent without unduly zealous investigation.

91. Counsel for the applicants then described the three-stage inquiry that was necessary to determine whether costs should be awarded to a party who has behaved unreasonably. Firstly to carry out an objective assessment of the standard of conduct adopted by the objectors based upon the facts of the case; secondly, if in the light of all relevant circumstances such conduct is deemed unreasonable, to determine as a matter of discretion whether an order for costs ought to be made and, thirdly, if so, what the terms of the order should be. The fact that the parties were unrepresented may be a relevant factor to be taken into account, but it was argued that in this case, the objectors did indeed seek and obtain legal advice and although they represented themselves at the hearing they did appoint an expert who advised them and who appeared on their behalf at the hearing.

92. The particular conduct alleged to be unreasonable was principally the objectors' rejection of the applicants' first offers dated 4 February 2016. Those offers, made in identical terms to each of the objectors were, it was submitted, "extremely generous". The offer letter cautioned that the applicants would at a later stage contend that rejection of the offers would be deemed unreasonable conduct with its associated costs consequences. The offer remained open for 14 days and none of the objectors accepted it.

93. Then, on 3 June 2016, the applicants' solicitors wrote to the objectors setting out the position as they saw it at that time and advising that there was a very high likelihood that the application would succeed. They invited the objectors to withdraw within 7 days and, referring expressly on the subject of costs to rule 12.5(3) of the Practice Directions, reiterated that if the objections were not withdrawn and if the application was indeed successful, costs would be sought on the basis that the objectors had acted unreasonably. In response, the objectors advised that they would be seeking legal advice (from counsel) and an extension of time was sought. This was granted to 28 July 2016, by which date all the objectors had then confirmed that their objections were withdrawn.

94. However, ostensibly as a result of a letter written to the objectors by the Tribunal on 22 August 2016, four of the original six objectors reinstated their objections and the matter thence proceeded to the hearing. That reinstatement was, it was submitted, "unjustified, opportunistic and unreasonable", as was the rejection of the second offer dated 15 September 2015, that offer reminding the objectors in "objective and unthreatening terms" of the costs implications if they should again choose not to accept. The objectors were also unreasonable, it was said, in not appointing their own expert until very late in the course of the proceedings.

95. For the he objectors, it was pointed out that they have not been represented by solicitors in connection with this application, and only used them to gain access to counsel, with whom a conference was held and which, it was said, proved inconclusive. The decision to withdraw the objections was not, Mrs Goodeve-Docker said in her response to the application for costs, made as a result of advice received from counsel. The advice that was received by the objectors has never been disclosed to the applicants, and the suggestion that the withdrawals were made on counsel's advice was speculative and incorrect. Counsel did not advise that the objectors would have to pay costs, or that their arguments were so weak that the question of unreasonableness

might arise. However, Mr & Mrs Nash said in their response that the consultation was "specifically to obtain advice about whether there was any possibility of the objectors being liable for costs if they continue with their objections."

96. The objectors insisted that despite the findings of the Tribunal in favour of the applicants, the actions they had taken in pursuing the objections were wholly reasonable and warranted. Indeed, as Mr & Mrs Ewer said in their submissions dated 3 June 2017:

> "We did the best that we could to prevent the removal of our property rights. We did not act unreasonably or without due consideration but as responsible, reasonable people who were acting to protect their rights."

The appropriate order, it was submitted, was that each party should bear its own costs and that no award should be made.

97. There is absolutely no question, in my mind, of the objectors' conduct having been unreasonable. Whatever advice was given to the objectors by counsel, prior to their mass withdrawal in July 2016, has no bearing on this issue. The applicants' principal, and only real, argument was that the objectors were unreasonable in refusing to accept any of the three offers that were made (and the compensation on each of the second and third occasions was reduced so that the last offer included no financial inducement whatsoever). There has been no suggestion of any other unreasonable behaviour by the objectors in relation to their conduct during the proceedings in acting to protect their property rights, apart from a rather lame attempt to criticise them for appointing their expert rather late in the day. There has been no indication to me that the objectors have been in any way vexatious, opportunistic or, as the applicants' solicitors inferred, indignant in attempting to protect their property rights.

98. It is clear from the copy correspondence made available to the Tribunal by the parties that the sole reason for the objectors' mass withdrawal was indeed a fear that they *might*, if unsuccessful, be landed with a very large bill for costs. However, as the Tribunal said in its letter to the applicants' solicitors on 22 August 2016, expressing its concern that the letters they sent to each objector on 27 July 2016 "may have given them the impression that if [they] were unsuccessful in their objections it is likely that they will be ordered to pay the applicants' costs of the application", it is highly unusual that the Tribunal would order the objectors to pay the applicants costs, and only then if the objectors have acted unreasonably.

99. As was pointed out in the letter, the objectors all have an admitted property right, namely the benefit of the covenant the subject of the application, and thereby the right to object to the proposed modification or discharge. The applicants are required by statute to satisfy the Tribunal that the objectors' property rights should be taken away or modified and they clearly have done so in this instance. However, there is absolutely nothing that suggests to me that the objectors' refusal to accept offers and inducements could in any way be described as unreasonable behaviour. In my judgment, an objector is entitled to rely upon their property right, and an unwillingness to bargain it away is not evidence of unreasonable conduct.

100. The problem here has been exacerbated, in my judgment, by the tone of the applicants' solicitor's letters which the objectors all found to be threatening and intimidating.

101. In all the circumstances, I determine that the objectors' conduct falls far short of being unreasonable, and I therefore make no order for costs.

Dated 3 July 2017

P R Francis FRICS