

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**

**Neutral Citation Number: [2018] UKUT 368 (LC)  
Case No: LP/41/2017**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RESTRICTIVE COVENANTS – ENTITLEMENT TO BENEFIT – modification - practical benefit of substantial value or advantage – injury – annexation to small strip of land at rear of objector’s house – whether any practical benefit to objector’s house relevant – s.84(1)(aa) and (c), Law of Property Act 1925 – application allowed***

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

**BETWEEN:**

**DAVID COLE**

**Applicant**

**- and -**

**GRAHAME LAURENCE WARDELL**

**Respondent**

**Re: Land adjacent to 29 St Margaret’s Place  
Stradishall  
Suffolk**

**Martin Rodger QC, Deputy Chamber President**

**Decision on written representations**

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The following cases are referred to in this decision:

*Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594

*Gilbert v Spoor* [1983] Ch 27

*Lamble v Buttaci* [2018] UKUT 175 (LC)

## **Introduction**

1. This decision is made under sections 84(1) and 84(3A) of the Law of Property Act 1925 and concerns the entitlement of the respondent, Mr Wardall, to object to an application by the applicant, Mr Cole, for the modification of a restriction on the use of land adjacent to 29 St Margaret's Place, Stradishall in Suffolk ("the application land").

2. The application land is the last undeveloped plot in a small residential development comprising numbers 1 to 8 Cricket Meadow, Stradishall. The applicant has entered into a conditional contract to purchase the application land on which he proposes to build a single house, for which planning permission has been granted.

3. The respondent is the owner of 1 Cricket Meadow, which is directly opposite and to the north east of the application land, and wishes to object to the modification of the restriction. The first issue I have to determine is whether he is entitled to the benefit of the restriction. If he is not, he will not be entitled to object to the proposed modification.

4. Both parties have agreed to the Tribunal determining the issue without a hearing on the basis of their written representations. They have also agreed that if the Tribunal finds that the respondent is entitled to object it may proceed to determine the application for modification without a hearing.

## **The restriction**

5. On 26 May 2000, Prospective Developments Ltd ("Prospective") purchased two contiguous parcels of then undeveloped land in Stradishall ("the Site") with a view to building eight houses. The vendor of the northern parcel was the local authority, St Edmundsbury Borough Council ("the Council"), while the vendor of the southern parcel was Greene King plc. The parcels were of approximately equivalent size, with the south-western boundary of the Council land partly adjoining the north-eastern boundary of the Greene King land.

6. To the east and south of the Site were houses and other properties fronting "The Street", the main road running through the village. To the west, there was a sports field, a church and open countryside. To the north was a housing development known as St Margaret's Place, comprising about 20 houses. The spine road through St Margaret's Place gives access to Cricket Meadow.

7. The application land is part of the land transferred to Prospective by the Council. It is currently owned by DBS Contracting Ltd which has contracted with the applicant to sell it to him. It occupies a large corner site on the estate road now known as Cricket Meadow. It is undeveloped, has not been landscaped and nobody is under any obligation to maintain it. Although the original scheme for the development of Cricket Meadow contemplated that it would be landscaped as a public amenity area this has never occurred. From photographs supplied by the applicant his description of it as "largely overgrown" is justified. On its

northern boundary it adjoins a narrow unsurfaced access road leading to a sports field to the west. On the other side of the access is a house at 29 St Margaret's Place.

8. The Transfers to Prospective by the Council and by Greene King were in similar form, with identical restrictions. The combined Site was referred to in each case as "the Property and the Transferee's Land" and in each case Prospective covenanted by clause 13.2.1 not to use either parcel of land for any purpose other than for the construction of residential dwellings. It also covenanted by clause 13.2.2:

"not to construct on the Property and the Transferee's Land together any greater number of residential dwellings than eight".

9. The benefit of the restrictions was annexed in each case to the retained to land of the vendor. The land retained by the Council was shown edged green on the plan attached to the Transfer but no copy of that plan is now available. It is apparent from other documents supplied by the applicant that it was comprised in title number SK230921 and included the land on either side of St Margaret's Way to the north and the houses fronting The Street to the east of the Site.

10. The registered proprietor of the Council's retained land in title SK230921 is now the Havebury Housing Partnership which acquired the housing stock of the Council by a Transfer dated 24 June 2002. Confirmation that the land in that title was the Council's retained land shown edged green on the plan attached to the Transfer to Prospective in May 2000 is provided by a Deed of Variation dated 25 January 2016 between Havebury and Eaglechase Properties Ltd by which Havebury, as owner of the land in SK230921, agreed to vary the restriction imposed by the Transfer preventing the development of the application land by the construction of a ninth dwelling. The Deed of Variation was one of a number entered into by Eaglechase with the owners of land formerly belonging to Greene King or the Council who were entitled to the benefit of the restriction.

11. In January 2016, Eaglechase sold the application land to DBS Contracting Ltd, the intending vendor to the applicant. Eaglechase has confirmed that it consents to the making of the application but has played no active part in it.

### **The respondent's land**

12. The respondent is the owner of two parcels of land in the vicinity of the application land. The first is 1 Cricket Meadow, which he acquired in 2006 and where he lives. It was also part of the land transferred to Prospective by the Council. It is therefore burdened by the restriction and does not enjoy the benefit of it. In his capacity as owner of that land the respondent has no entitlement to enforce the restriction and cannot object to its modification.

13. The other parcel of land owned by the respondent is a narrow strip about a metre or two wide running the length of the rear (north eastern) boundary of 1 Cricket Meadow. The strip

originally separated the respondent's rear garden from the rear gardens of the houses which front The Street. It may once have been part of a footpath at the rear of Council's properties in The Street, but it has now been incorporated into and become part of the respondent's rear garden.

14. The respondent acquired the strip of land at the rear of his garden from Havebury by a Transfer made on 16 July 2014. At that time the strip was part of the land comprised in title SK23092, as is apparent from the Transfer itself and from Havebury's 18 July 2014 title plan which shows the strip as having been removed from the title and registered under title number SK354738.

15. In the May 2000 Transfer of the Council's land the restriction was given by Prospective "for the benefit of the Transferor and the Transferor's Retained Land". It is apparent that the strip of land at the rear of 1 Cricket Meadow was part of the land transferred to Havebury on 24 June 2002. There is nothing to suggest that it was acquired by the Council after May 2000. The only proper inference which can be drawn from the material before the Tribunal is that it was part of the Transferor's Land in May 2000 to which the benefit of the restriction was annexed.

16. If the benefit of a covenant is annexed to a covenantee's land, then it is taken to be annexed to the whole of the land and to each and every part of it unless the contrary clearly appears (see *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594 at 606). No such contrary indication appears from the May 2000 Transfer.

17. The strip of land was not affected by the Deed of Variation of 25 January 2016 between Havebury and Eaglechase by which the restriction was released to the extent required to enable the development of the application land. By the time of that arrangement the strip had already been transferred by Havebury to the respondent.

18. I therefore determine that the respondent is entitled to the benefit of the restriction in his capacity as owner of the strip of land at the rear of his garden registered under title SK354738.

### **The application**

19. The application is for the modification of the restriction imposed by clause 13.2.2 of the May 2000 Transfer by the Council to permit the construction of a single detached private dwelling house on the application land. The application is made under grounds (aa), (b) and (c) of section 84(1) of the 1925 Act.

20. The applicant has provided evidence that the owners of the remaining land with the benefit of the restriction entered into deeds of variation with Eaglechase to vary it in return for payments. No such agreement has of course been achieved with the respondent. For that reason the application under ground (b) must fail and I need say no more about it.

21. Ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction must impede some reasonable use of the land for public or private purposes. Satisfaction of subsection (1A) is also essential to a successful application based on ground (aa); it provides as follows:

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

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

(b) 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.

22. The Tribunal is required, when considering whether sub-section (1A) is satisfied and a restriction ought to be discharged or modified, to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area (section 84(1B)).

23. The Tribunal also has jurisdiction to make an order under ground (c) where it is satisfied that the proposed modification will not injure the person entitled to the benefit of the restriction.

24. Before considering whether either of these grounds is made out by the applicant it is necessary to refer to a question of principle which applies to each ground. That question is whether, when considering if the restriction secures any practical benefits of substantial value or advantage to the respondent for the purpose of ground (aa), or if the proposed modification will cause injury to the respondent for the purpose of ground (c), it is permissible to take into account benefits the respondent may enjoy or injury he may sustain in his capacity as owner of 1 Cricket Meadow, to which the benefit of the covenant is not annexed, or whether the only benefits or injury which are relevant are those enjoyed or sustained in his capacity as owner of the strip of land at the rear of his garden which does have the benefit of the restrictions?

25. Neither party is represented and neither has made any submissions going to that question. It has, however, recently been the subject of consideration by the Tribunal in *Lamble v Buttaci* [2018] UKUT 0175 (LC).

26. In *Lamble's* case there were two sets of restrictions some of which were annexed to the whole of the land belonging to the objectors, Mr and Mrs Buttaci, while others were annexed only to land to the rear of their house and garden, and not to the house and garden themselves. It was argued on behalf of the claimant that when considering whether the covenants secured practical benefits to the objectors the question was whether they secured such benefits to them in their

capacity as owners of the particular parcel of land with which the benefit of the restrictions was enjoyed.

27. The contrary submission on behalf of the objectors was that it was not a requirement of ground (aa) that the benefit in question must be enjoyed from a particular piece of land; the only qualification in the statute was that the objectors must be “persons entitled to the benefit of” the restriction. That submission was supported by reference to the decision of the Court of Appeal in *Gilbert v Spoor* [1983] Ch 27, in which a scheme of mutual covenants prevented the construction of more than one house on the applicant’s plot. The Lands Tribunal had found that the additional houses which the applicant wished to build on his land would not be visible from the objectors’ land, but would interrupt the view which the objectors could enjoy from a viewing point a short distance from their home (and not on their own property), and from the road leading to the objectors’ properties. The interruption of this view was the basis of the Lands Tribunal’s refusal to modify the scheme of covenants. The Court of Appeal held that the Tribunal had been entitled to have regard to the loss of the view. Eveleigh LJ said, at page 32H -33A:

“In my judgment the tribunal was entitled to hold that the view was a benefit whether or not that benefit could be said to touch and concern the land. However, I am also of the view that the land of the objectors is, in each case, touched and concerned by the covenant. The covenant is intended to preserve the amenity or standard of the neighbourhood generally.”

28. As the Tribunal recorded in *Lamble* at paragraph 72, in closing submissions the claimant’s highly experienced counsel accepted that a practical benefit was capable of being secured to a person having the benefit of a covenant by reference to a wider area than that to which the benefit was strictly annexed; the existence and extent of the benefit would be a question of fact in each case. The Tribunal also accepted the submission on behalf of the objectors and held that they were entitled to rely on the impact which the claimant’s proposal to build would have on any part of their land and not simply on the land which had the benefit of the restriction.

29. *Gilbert v Spoor* and *Lamble* were both decisions on ground (aa), but I can see no reason why the reasoning of the Court of Appeal should not equally apply to an application under ground (c). The respondent is therefore entitled to rely on any benefit which the restriction secures to him in his capacity as owner of 1 Cricket Meadow, and on any injury he may experience as a result of the proposed modification.

30. The applicant submits that the proposed use of the application land for the construction of a single private dwelling is a reasonable use, and he relies on the grant of planning permission by the Council on 27 November 2015 in support of that proposition. I agree that the proposed use is a reasonable one, being the construction of a house on a substantial plot of land in a residential area within the settlement boundary for which planning permission has already been obtained. I agree also that the restriction impedes that use.

31. When he made his application the applicant assumed that all of those with the benefit of the covenant had agreed to vary the restriction to permit the proposed development. For that reason he made no submissions on the question whether the restriction secured any benefit to

the respondent. Since being served with the respondent's statement of objection the applicant's representations have focussed on the question of his entitlement to object which I have now resolved. The applicant's suggestion that the respondent was not entitled to provide the material on which I have based my conclusion that he has the benefit of the restriction is misconceived. Time ran from the Tribunal's direction of 30 June, with which the respondent complied on 10 July.

32. In his notice of objection filed on 23 March 2018 the respondent's main complaint is of the failure of the application land ever to be utilised and maintained as public amenity land. He suggests that the original planning permission required Prospective, as the developer, to cultivate and lay out the application land as an amenity area. The applicant acknowledges in his application that when the houses in Cricket Meadow were being built the application land was shown on plans as open land which was to be maintained in that condition. He notes, however, that in the planning officer's report recommending approval of the application for planning permission he commented that the original development did not include an enforceable obligation to maintain the land as amenity space, nor was there any management plan for the land moreover, "the Local Authority is not currently maintaining it or likely to adopt it."

33. I do not consider that a potential alternative use of the application land for amenity purposes is relevant to this application. The reservation does not secure such a use, and nobody is in a position to insist on it. On the evidence provided to me there is no realistic prospect of it being implemented.

34. The only benefit which might be said to be secured to the respondent by the restriction is the prevention of another dwelling being built in Cricket Meadow on the land opposite his own property. There is very little in his notice of objection concerning the issue of practical benefit other than the statement that his home is closer than other houses in Cricket Meadow to the application land "and also the most affected as all of our main living rooms directly face the proposed building". The Tribunal is left to speculate what that effect may be. There will no doubt be the additional domestic activity, noise and traffic generated by a single new dwelling, but they will be insignificant in this locality, the respondent's property already being surrounded on all sides by houses. The respondent's property will neither overlook nor be overlooked from the new dwelling. The suggestion that the respondent's main living rooms "directly face" the proposed new dwelling is not substantiated by the Land Registry and planning permission plans. These show that the respondent's house enjoys an oblique view of the application land, and that the new dwelling will be offset to one side of any direct line of sight. The respondent may lose some distant view from the upper floor of his house over the playing fields which adjoin the application land but this is already obscured by mature and semi-mature trees and a hedge line and the respondent has not mentioned it in his notice of objection.

35. On the basis of the material supplied by the parties it is not possible for me to conclude that the restriction secures any practical benefit of substantial value or advantage to the respondent. Any loss or disadvantage which the respondent may suffer from the modification



of the restriction will be insignificant and no injury to him will result from it. The Tribunal's standard form notice of objection provides an opportunity for an objector to claim compensation if an application is successful, but in this case the respondent made no such claim.

36. In those circumstances I will allow the application and modify the restriction to permit the construction on the application land of the dwelling for which planning permission was granted by St Edmundsbury Borough Council on 27 November 2015 (Application No: DC/15/1337/FUL) or any modification or re-grant of that permission in substantially the same form. I make no award of compensation, none having been claimed or proven.

Martin Rodger QC,  
Deputy Chamber President  
5 November 2018