LP/55/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – discharge or modification – application to permit residential development – practical benefits of substantial value or advantage - effect upon visual amenity of benefited properties – Law of Property Act 1925 section 84 ground (aa)- application refused

IN THE MATTER of an APPLICATION under
SECTION 84 of the LAW OF PROPERTY ACT 1925

BY

JEREMY DAVID MICHAEL CASE **Applicant**

Re: Land at Cae Hir (OS 634), Fron Bache, Llangollen, Denbigh

Before: P R Francis FRICS

Sitting at: Wrexham County Court, 2nd floor, Crown Buildings,
31 Chester Street, Wrexham LL13 8XN
on
16 & 17 April 2008

James Fryer-Spedding, instructed by Jeremy Case (solicitor and applicant) for the applicant
Richard Oughton, instructed by Allingham Hughes, solicitors of Wrexham, for the objectors

The following cases are referred to in this decision:
Re Bass Limited's Application (1973) 26 P & CR 156
Gilbert v Spoor [1983] Ch. 27
Re North's Application (1997) 75 P & CR 117
Re Fairclough Homes Application (2004) LT ref LP/30/2001 (Unreported)
Re Gossip's Application (1972)25 P&CR 215
Re Bushell's Application (1987) 54 P&CR 386
Re Duffield's Application (2007) LT ref LP/36/2006 (Unreported)
Shepherd and Others v Turner [2006] EWCA Civ 8
Re St Albans Investment Limited's Application (1958) 9 P & CR 536

DECISION

1. Mr Case made an application to the Lands Tribunal under section 84 of the Law of Property Act 1925 on 24 October 2006, relying solely upon ground (aa), for the discharge or modification of a restrictive covenant to permit 0.47ha (1.16 acres) of pasture land at Cae Hir, Fron Bache, Llangollen (the application land) to be developed with 6 detached residential properties. There are 8 objectors.

2. The covenant was imposed under a Deed of Gift dated 25 September 1973 made between Sara Corwena Magdelena Pugh-Jones (1) (referred to hereafter as Miss Pugh-Jones) and Albert Jones, Hugh Rowland Hughes and Leo Gordon Sherratt (2). The covenant states:

> "2. The Donees to the intent and so as to bind (so far as is practicable) the property hereby transferred and each and every part thereof into whosoever hands the same may come and to benefit and protect the adjoining and neighbouring land belonging to the Grantor and each and every part thereof hereby jointly and severally covenant with the Grantor that neither the Donees or any of them nor those deriving title under them will erect any building or other erection on the said property nor will allow it to be used for residential or business purposes or any purpose other than pastoral purposes so that the said land shall remain for ever hereafter open ground."

Two of the Donees subsequently died, leaving Mr Sherratt as the sole owner of Cae Hir. Title to the application land, and the burden of the covenant, was then transferred to the applicant in consideration of the sum of £150,000 on 18 November 2004.

3. James Fryer-Spedding of counsel appeared for the applicant, calling him as a witness of fact along with Leo Gordon Sherratt, the previous owner. Expert evidence was given by John Philip Horden BA (Hons) Arch Dip Arch RIBA, an architect who had been instructed to provide indicative layout and cross-sectional plans together with a brief design impact statement for the applicant's proposed development, and David Roy Jones BSc FRICS FAAV of Bowen Son and Watson, Chartered Surveyors of Oswestry who gave valuation evidence.

4. Richard Oughton of counsel appeared for the eight objectors (listed below), each of whom had produced witness statements and were called to speak to them. Christopher Douglas Parrott, FNAEA of Wingetts Estate Agents, Llangollen gave expert valuation evidence. The objectors, all of whom were admitted, were:

Timothy Reynolds	1 Bryn Dedwydd, Fron Bache, Llangollen
Annie Thomas	2 Bryn Dedwydd, Fron Bache, Llangollen
Mr & Mrs J Marjoram	1 Fron Castell, Llangollen
Mr & Mrs P Jones	2 Fron Castell, Llangollen
Mr & Mrs M Law	3 Fron Castell, Llangollen
Mrs P Ballamy	4 Fron Castell, Llangollen

Mr & Mrs W Shaw	5 Fron Castell, Llangollen
Mr & Mrs C Smith	6 Fron Castell, Llangollen

5. I made an accompanied inspection of the application land on 15 April 2008, and also viewed it from each of the objectors' properties.

Facts

6. The parties produced a statement of agreed facts from which, together with the evidence and my inspection, I find the following facts. Cae Hir consists of a rectangular shaped field that forms a narrow strip of open space between mature residential dwellings and a large, modern residential estate, and the Fron Castell development of 6 houses on the southern edge of Llangollen. The land, currently used as pasture and subject to an agricultural tenancy, extends to 0.47 ha (1.16 acres), has a north/south aspect and has a downwards slope from its steepest point on the southern boundary towards Fron Bache, a narrow lane to the north that gives access to the town centre, and to the field. The road frontage of approximately 16 metres is onto a sharp bend immediately adjacent to the entrance of Fron Castell. There is also a downward slope from west (the boundary onto Fron Castell) to east. There is a public footpath running centrally through the field, from the northern boundary of Fron Bache, to the south-western corner, where it rejoins Fron Bache, that road having curved round the beyond the western side of Fron Castell, and other properties, in a horseshoe pattern.

7. All of the 2 storey houses that comprise the residential cul-de-sac development of Fron Castell, which lies along the whole of the western boundary of Cae Hir and is at a higher level, were completed in the 1980s, and have their principal accommodation orientated towards the northeast, east or southeast, to take advantage of the extensive views over Llangollen towards the mountains and Castell Dinas Bray, a ruined castle and local landmark. There is mature hedging of varying heights separating 3, 4 and 5 Fron Castell from the application land, and that boundary also contains a substantial oak tree just which is the subject of a Tree Preservation Order (TPO), to the north of the northeast corner of 3 Fron Castell's plot.

8. Miss Pugh-Jones, the original covenantor, lived from 1925 to her death in 1988 in Bryn Dedwydd which was then a detached, period house fronting the western section of Fron Bache, with its rear (eastern) boundary forming part of what is now the western boundary of Fron Castell. It has now been converted into two dwellings, owned by the first and second objectors respectively. The land upon which Fron Castell was built, OS nos 600 and 633, also belonged to Miss Pugh-Jones and, just prior to the execution of the Deed of Gift on the application land, she contracted to sell those fields to her godson (on 15 August 1973). That sale was also subject to restrictive covenants, in somewhat different terms, and although it was due to complete on 12 September 1973, prior to the Deed of Gift, completion was delayed until 10 December 1973. The restriction in the sale of OS nos 600 and 633 provided:

> " (a) Not to develop by the erection of any buildings or the construction of any road the field numbered 600 shown on the plan annexed hereto until the expiry of a period of

eight years after the date hereof or until after the death of the Vendor whichever is the sooner;

(b) Not to develop by the erecting of buildings the field numbered 633 on the said plan during the lifetime of the Vendor."

Those covenants were subsequently, on 30 October 1985, released by Miss Pugh-Jones on a sale of the land by her godson to Rees Jones (Developments) Ltd in return for a payment of £1,500 and the granting of an easement allowing access from what eventually became Fron Castell to Bryn Dedwydd.

9. On 29 October 2004, the applicant submitted an application for outline planning permission for residential development on the application land but this was refused by Denbighshire County Council on 24 March 2005. A successful appeal was lodged, and outline consent for the erection of 5 houses was granted on 25 October 2005, subject to an agreement under section 106 of the Town and Country Planning Act 1990 relating to affordable housing. Following the application to this Tribunal in August 2006, the applicant appointed John Horden of JPH Architects, Rhyl, to prepare a revised scheme for 6 detached properties, two of them to constitute affordable housing to accord with planning policies.

The modification sought

10. If the Tribunal finds that discharge of the restriction is inappropriate, the applicant seeks modification of the covenant set out in para 2 above in the following terms:

That the words "otherwise than in accordance with the outline planning permission granted on 25 October 2005 on the application ref 03/2004/1427/PO dated the 29 October 2004 or in accordance with any future planning permission" should be added to the restriction after the words "any building or other erection on the said property"; and

That the words "residential or" be deleted; and

That the remainder of the words following "business purposes" be deleted.

The case for the applicant

Evidence

11. Mr Fryer-Spedding introduced the applicants' case by explaining that it was somewhat fortuitous that the residents of Fron Castell were in a position to object. If it had not been for the fact that completion of the sale of OS nos 600 and 633 was delayed until after the Deed of Gift had been completed on the application land, they would not have had the benefit. Their present opposition to the proposed development should be understood in the light of the fact that their houses were only built after the release of similar covenants. This was an important issue, as under section (1B), the Tribunal is required to take into account the overall context of the application.

12. Mr Horden is the senior partner of JPH Architects, of Rhyl. He explained that he had considered the inspector's report and appeal decision in respect of Mr Case's application for outline consent for 5 dwellings on the site, and had prepared an indicative site plan and cross-sectional drawing for a scheme of 6 dwellings, accessed over a private road that would be built to adoptable standard, off Fron Bache. He said the density would be in keeping with that established at Fron Castell and the development would comprise 4 x 3 bedroom and 2 x 2 bedroom dormer style detached houses with separate garages. They would, he said, be constructed in such a way as to respect visual amenity from the existing properties in Fron Castell, by ensuring they had "minimum vertical emphasis", ie ridge heights would be kept as low as practicable and "stimulating and interesting roof-scapes would be created." Ground levels would be reduced to allow finished ground floor levels to be as low as possible. Windows in first floor elevations would mainly be facing east rather than towards the Fron Castell houses, and any that were on the west facing elevations would be for secondary accommodation and have opaque glass. The dwellings would be individually sited so as to create the minimum impact from the principal windows of the houses on Fron Castell. Mr Horden said that he was satisfied that the design and layout he had produced would receive favourable consideration from the local planning authority in respect of the resolution of reserved matters.

13. In cross-examination, Mr Horden said that he had not been instructed to proceed with a formal application, and had only been commissioned to provide a conceptual scheme in respect of this section 84 application. He said he was of the view that any specific issues such as to rights of light and loss of privacy or visual amenity would be picked up on a reserved matters application. He accepted that his indicative layout failed to accurately depict the size and spread of the mature, protected, oak tree that would be on the rear boundary between his plots 1 and 2, but said that adjustments to the site layout could easily be made. As to visual impact, he said the hedge that separated Cae Hir from the Fron Castell houses had been measured at spot intervals and averaged two to three metres in height, although it was considerably higher towards the southern end. He was convinced that the objectors' properties would not be overlooked from the ground floor accommodation in the proposed houses, due to the significant difference in finished levels, although he accepted that there would be some visual impact especially to 3 and 4 Fron Castell, the more so in the winter months when 1 Fron Castell would also be affected. He also acknowledged that plot 6 on the proposed development would be at a high level, and the views from 5 Fron Castell would be affected, although he said that the siting of the new dwellings accorded, in terms of minimum separation distances, with planning requirements. The question of visual amenity was a subjective one, he said, and it was his opinion that the applicant's proposed scheme would, in fact, enhance the view from the objectors' properties.

14. Mr Jones is senior partner of Bowen Son and Watson, Chartered Surveyors of Oswestry. Although his firm had only recently opened an office in Llangollen, he said he had 32 years experience in the valuation and sale of residential property in the area, and was conversant with the market in this particular location. The application land, he said, had residential properties virtually all around it (apart from the south eastern section that gave onto more pasture land), and it was mainly at a significantly lower level than Fron Castell. Having inspected the land from the road that serves the Fron Castell properties, he said that most of them had elevated views over and across Cae Hir, over the valley of Llangollen towards the Eglwyseg Mountains. He said it is this wider context view which is the prime consideration and the hedgerows and

tree screening between Fron Castell and Cae Hir limit views onto that field. As the proposed houses are to be constructed at a lower level, and when viewing the site from Fron Castell the eye is naturally drawn to the long distance views, Mr Jones said it was his opinion that the impact in valuation terms would be minimal.

15. As to Mr Parrott's assessment of diminution in values, he said he considered it to have been entirely subjective, and it was wrong of him to have applied a global reduction. If there were to be any effect in valuation terms, individual properties would be affected in different ways, and it would have been more appropriate, therefore, to make individual adjustments, and even to provide a range of values. He accepted as a fact that 3 and 4 Fron Castell were the closest to the proposed development, and that 5 and 6 had "upside down" accommodation and balconies to take advantage of the views. Whilst he acknowledged that immediate views onto Cae Hir would be particularly affected from those properties, he said that the original proposed development of 5 units that he had considered, and the revised scheme, appeared to be well planned and the plots would have broad gaps between them which would serve to decrease the affect. Mr Jones said that he did not consider increased traffic over the narrow lane (Fron Bache) leading to the site would create problems, as drivers were naturally careful due to the nature of the road in this location – that road being no different from many other village roads.

16. Mr Case said that he had acquired the application land from his friend, Mr Sherratt, in November 2004 after a proposed sale to a builder had fallen through. He said his application for outline planning permission for a development of 5 detached properties, submitted in October 2004 and against which there had been a significant level of local opposition, was refused. Much of that opposition, he said, related to Miss Pugh-Jones' apparent wish that Cae Hir should be retained as a public open space – for ever, as mentioned in a letter from Mr Law, Chairman of the Cae Hir Action Group, published in the Llangollen News, and that it had historically been known as 'Sara's sledging field' where local people sledged and skiied in the winter months. Also, it was alleged to have been used for camping by local children, and even for keep fit classes. Mr Sherratt, he said, could speak to the history of the field more than he could. However, the fact that Miss Pugh-Jones released the covenants preventing development on the other two parcels of land (which now forms the Fron Castell development) must bring the strength of her alleged wishes into question.

17. Following the refusal, Mr Case said he appointed Capita Symonds Ltd to prepare an appeal. In their statement of case they referred to the topography of the site, and the fact that due to its lower level it would not be seriously overlooked by the Fron Castell properties or the Bryn Dedwydd cottages. They also pointed out, in highways terms, that the nature of the access to the site was such that traffic was naturally slowed down, and accident statistics indicated that it was not a serious issue. That appeal was successful. He said that, in retrospect, he should have applied for 6 units rather than 5, as he was considering having one of the properties for himself. He said he did not know whether or not, if this application was successful, he would develop the site himself, or whether he would sell it on to a builder.

18. Mr Sherratt said that as a former owner of Cae Hir (not Sara's sledging field) he wished to correct the misunderstanding of Miss Pugh-Jones motives that Mr Law, as chairman of the Cae Hir Action Group, had when he submitted the letter that had appeared in the Llangollen News, and to which Mr Case had referred. As one of the executors of her will, Mr Sherratt

said it had not been made until well after the field had been gifted to him and two others. It was true to say that the Deed of Gift did include a covenant precluding development, but it made no reference to anyone's right to sledge or ski. The land was to be used for agricultural purposes. Nobody has, he said, ever objected to the public footpath being used, provided dogs are kept under control, and children have never been discouraged from using the field for sledging but it needs to be remembered that Cae Hir was never meant to be a playing field, and there is no given right for people to deviate from the footpath.

19. Although it was sad when any pleasant open space such as Cae Hir was lost to development, Mr Sherratt said, its fate was sealed when the land now occupied by the Fron Castell houses was developed. Miss Pugh-Jones had incorporated restrictions in the transfer of that land to preclude development during her lifetime, as it was her intention to protect the view from Bryn Dedwydd, where she lived. However, due to Mr Basil Thomas's financial circumstances, she had been put under considerable pressure and had been persuaded to release those restrictions so that he could sell the land for residential development. This, he said, caused Miss Pugh-Jones considerable distress and was possibly a contributory factor in bringing on a heart attack just as the Fron Castell development was commenced. The primary purpose of all the covenants, on both the Fron Castell land, and Cae Hir, was to protect the environment of Bryn Dedwydd and its valuable view, but the damage has already been done by the erection of the 6 houses on Fron Castell.

20. As to why he sold the land at Cae Hir to someone whom he knew intended to develop it, Mr Sherratt said he did have some reservations, and felt he might be letting Miss Pugh-Jones down. However, there had been a number of irritants that had made him decide he wanted to dispose of the land, and it was a fact that, even if he had retained it, whoever inherited it might have less sentiment than he did, and would be quite likely to achieve its development value. In cross-examination, Mr Sherratt admitted that it had been Miss Pugh-Jones true wish that the application land should remain undeveloped forever, and the reason it had been gifted to him and his two, now deceased, relations was to make sure the land stayed as it was.

Submissions

21. Mr Fryer-Spedding said that as the applicant relied solely upon ground 84(1)(aa), it was appropriate to consider the series of questions adopted by the Tribunal in *Re Bass Limited's Application* (1973) 26 P & CR 156:

1. Is the proposed user reasonable?
2. Does the restriction impede the proposed user?
3. Does impeding the user secure to the objector practical benefits?
4. Are those benefits of substantial value or advantage?
5. Is impeding the proposed user contrary to the public interest?
6. Will money be adequate compensation?

22. As to question 1, Mr Fryer-Spedding said there was no doubt that the user would be reasonable, proof if it were needed being the obtaining of planning consent for development. It was common ground that the covenant impeded that user (question 2) and that the question of public interest (question 5) was not relevant to this case. He said questions 3 and 4 were usually taken together, and that was the applicant's approach in this case. The objectors' principal claim to benefits secured by the covenant related to views, associated with privacy and overlooking and, to a lesser degree, the open aspect of the area and potential traffic problems.

23. Mr Fryer-Spedding said that in principle it was right that preservation of a view could, on the right facts, be a practical benefit of substantial value or advantage – see *Gilbert v Spoor* [1983] Ch. 27 and *Re North's Application* (1997) 75 P & CR 117. Privacy, sense of openness and [lack of] overlooking were also accepted to be, in principle, benefits, but it was a question of fact and degree; each case turned on its own merits and the question of whether or not they were of substantial value or advantage had to be considered. It was the applicant's case that the views from the objectors' homes will not be significantly affected due to the sympathetic design and layout of the proposed development. The principal views enjoyed by the objectors' houses are over Cae Hir rather than directly on to it, towards the Vale of Llangollen and beyond to the ruin of Castell Dinas Bray and the Eglwyseg Mountains. It was those long views that were a valuable attribute, not the view of the application land. Views are, in any event, already impeded by other properties on Fron Castell, the sight of many other houses in the immediate vicinity, and the hedges and trees that divide Fron Castell from Cae Hir. The planning inspector's own conclusion in his appeal decision was that "the eye is drawn to the longer distance views." In this particular regard, the decision in *Re Banks' Application* (1997) 33 P & CR 138 was instructive. In that case, the fact that the "short view" would be affected by the construction of a bungalow in front of a row of cottages was not fatal to the application. The valuable view was the long view out to sea, and the application succeeded under ground (aa), subject to compensation being payable, and certain other conditions being complied with.

24. In the circumstances, it was submitted that any effect that the development may have on the view from the objectors' homes would not be substantial. As to amenity/open space and privacy issues, Mr Fryer-Spedding said that whatever Miss Pugh-Jones' alleged intentions may have been – those intentions being the major factor upon which the objectors made their case, it was a fact that any public rights across the application land were limited to the use of the footpath which currently runs across the middle of Cae Hir and which, if the application is successful, will be diverted along the new access road. There are no greater public rights than this. The fact that a footpath exists, and is used on a regular basis by local people, must affect the privacy of the Fron Castell properties. The loss of open space would not be substantial, and, as the inspector said in the appeal decision, "when considered against the wider context of the surrounding area, its [Cae Hir's] contribution to the provision of visual relief is…of limited significance." He also said that the field was not identified as an area of protected recreational open space in the UDP, and concluded that he was satisfied that the proposal would not result in the unacceptable loss of open space. The objectors' arguments that their properties would be overlooked by the new properties did not bear scrutiny, Mr Fryer-Spedding said, due to their positioning, layout and design and, in any event, most of the objectors' houses were already overlooked to some degree.

25. Regarding the anticipated traffic problems, it was submitted that the objectors' case was exaggerated as there would be only a small number of additional vehicles and, as the inspector said, he did not consider the limited extra traffic serving 5 houses (as per the original proposal) would unacceptably affect the safe and free flow of traffic. Final details of the access from Fron Bache would be the subject of reserved matters approval.

26. Even if I find against the applicant, and conclude that the restriction does afford benefits of substantial value or advantage, it is only then that the question of compensation falls to be considered. In that regard, it was submitted that Mr Jones' evidence should be preferred and in determining "a sum to make up for any loss or disadvantage suffered in consequence of the discharge or modification", as there was no material diminution in value to the properties, compensation should be nil.

27. It was necessary, Mr Fryer-Spedding said, for me to consider the context in which the restriction was created in accordance with s 84(1B). It was a fact that Miss Pugh-Jones released the covenants on OS nos. 600 and 633 following the transfer of them to her Godson, and it was only the fact that completion of that transfer was delayed until after the date of the Deed of Gift of the application land that meant the purchasers of the Fron Castell properties obtained the benefit of the restriction. Accordingly, it was submitted that it was fortuitous that the owners of the Fron Castell houses had any benefit at all, and their present opposition to development should be understood in the light of the fact that their houses were only built after the release of a similar restrictive covenant.

28. Mr Fryer-Spedding said that I had a wide discretion under section 84(1C) and could impose conditions as had been the case in *Banks.* For instance I could limit the number of properties from 6 to 5, and could determine rules regarding the finished ground levels, ridge heights and location of windows. I could also restrict the wording of the proposed modification to omit "or any other planning permission."

29. Finally, it was submitted that I should consider whether or not the benefits claimed as being of substantial value or advantage were, indeed, secured by the restrictive covenant in any event. Whilst it was clearly intended to prevent residential development, there is no guarantee that the land would continue to be used, as it currently is, for inoffensive pastoral purposes. It could, for instance, be used for pig farming or other quasi agricultural uses that could cause disturbance to neighbouring properties. The question was considered in *Re Fairclough Homes Application* (2004) LT ref LP/30/2001 (Unreported) where the President, George Bartlett QC said, at para 30:

> "In a case such as this, the provision, it seems to me, operates in this way. By preventing development that would have an adverse effect on the persons entitled to its benefit the restriction may be said to secure practical benefits to them. But, if other development having adverse effects could be carried out without breaching the covenant, these practical benefits may not be of substantial value or advantage. Whether they are of substantial value or advantage is likely to depend on the degree of probability of such other development being carried out, and how bad, in comparison to the applicant's scheme, the effects of that development would be."

It was for the Tribunal to decide, Mr Fryer-Spedding said, the degree of probability of the land continuing to be used in the way it currently is.

The case for the objectors

Evidence

30. Mr Parrott is a director of Wingetts Ltd, Estate Agents and Auctioneers of Llangollen and Wrexham, is a Fellow of the National Association of Estate Agents, and has been practising in the area since 1970. He said he lives in Llangollen, about 300 yards from the application land, and is thus entirely familiar with the property and surroundings. He said that his firm has approximately 60% of the residential sales market in Llangollen, and that he had been instructed by Mr Law, as chairman of the Cae Hir Action Group, to assess the value of each of the objectors' properties and to assess any diminution in value should the proposed development proceed. Following his initial report, dated October 2007, he produced a brief supplementary statement in response to Mr Jones's report, and also provided at the hearing an updated schedule of values, and a revised opinion of diminution in value reflecting the then current state of the market which, he said, had dropped about 10% during the intervening 6 months. Mr Parrott said that he had formed his opinions, and provided schedules showing likely diminution in value for each of the properties based upon the original 5 house scheme for which planning permission had been obtained, and that he had not seen Mr Horden's indicative scheme for 6 units until the hearing commenced. However, he said, that did not cause him to revise his opinions which he accepted had to be subjective, and might need to be revised once the impact of the development, assuming it proceeded, was actually known. In his view there was likely to be an overall 9% reduction in value, although individual properties would be higher, and others less.

31. It was his opinion that 3 and 4 Fron Castell would be the most seriously affected properties due to their close proximity to the boundary with the application land, together with nos. 5 & 6. In assessing before and after values, Mr Parrott said there was no recent transactional evidence from Fron Castell itself, other than the purchase of no. 2 by Mr & Mrs Jones in December 2006 at £335,000. However, he had considered the sales of other properties in the vicinity. His revised assessments, as at the date of the hearing were:

Property	Existing Value	Value assuming development of Cae Hir
1 Bryn Dedwydd	£225,000	£200,000
2 Bryn Dedwydd	£250,000	£225,000
1 Fron Castell	£315,000	£285,000
2 Fron Castell	£306,000	£275,000
3 Fron Castell	£315,000	£270,000
4 Fron Castell	£295,000	£250,000
5 Fron Castell	£340,000	£290,000
6 Fron Castell	£340,000	£300,000

32. Whilst accepting that it was the long-distance views that were the key selling point in respect of all the properties, the existence of a new residential development on the application land, would be a distraction particularly to 5 and 6 Fron Castell which looked down the field. 3 & 4 would also be seriously overlooked, in his opinion. As to 1 & 2 Fron Castell, Mr Parrott accepted that they would be the least affected being set at a lower level than the rest of the properties, and also being shielded from Cae Hir by the highest section of hedge and the large oak tree. He accepted that a number of the properties on Fron Castell already overlooked each other, but the purchasers were aware of that when they bought their properties. It was the additional intrusion that they had not accounted for, and against which they thought they were protected by the restrictive covenant.

33. On the question of offensive uses to which the application land might be put without breaching the restriction, Mr Parrott accepted that houses, in certain circumstances, might be considered preferable to, say, an adjacent pig farm. He said that, as the property market continued to harden, an intrusive new development on the application land was likely to have an increasingly detrimental effect upon sale prospects and values.

34. Mr Law is the chairman of the Cae Hir Action Group which was formed in March 2005 to oppose the proposed development on the application land, and has acted as spokesman for the eight admitted beneficiaries of the restrictive covenant. In his witness statement he set out the background and history of the matter and emphasised his understanding of Miss Pugh-Jones' intentions for the field, her believed wishes that it should remain open "forever", and that it should never be built upon. He said she had been the town's librarian, editor of the local newspaper and was a local historian who had been conscious of the need to preserve the character of Llangollen through its green spaces. Cae Hir (which means "long field") had been used for walking, games, picnics and, in winter, for sledging.

35. He said that the semi-rural location of the Fron Castell properties (and 1 & 2 Bryn Dedwydd) was considered important to the residents in maintaining their nature and quality of life. The loss of Cae Hir to housing would clearly compromise this benefit. In cross-examination, Mr Law accepted that he had not referred specifically to loss of views or the potential for overlooking in his witness statement, but he said it was the intention of the covenant that the objectors were principally seeking to protect. Although it was acknowledged that the long distance views, particularly from the houses at the top of Fron Castell and from Bryn Dedwydd, were a key feature, Mr Law said that all of the objectors' properties, to a greater or lesser degree, looked down on Cae Hir, and their views would undoubtedly be compromised by the proposed development. As to his own house (3 Fron Castell), he said its rear elevation was very close to the hedge separating his garden from the application land, and his principal rear facing windows would look straight at the roofs of the new houses. There is a small patio immediately behind his kitchen, between the house and the hedge, which is regularly used as an eating area and the pleasant outlook over Cae Hir would be completely ruined. Whilst he acknowledged that some of his windows were already overlooked to some degree, he said that he was aware of that when the property was purchased, but further overlooking, or destruction of the current semi-rural outlook had not been contemplated, especially as, he stressed, being advised of the covenant, he never anticipated this situation would arise.

36. Mrs Ballamy (4 Fron Castell) said that when she and her late husband first viewed their property, one of the deciding factors in their decision to purchase was the information they gathered about the surroundings, and the fact that they understood the application land would never be built upon. The house, like no. 3, has all its principal rooms looking out over Cae Hir, and towards the mountains beyond. She accepted that the hedge along her rear boundary would shield the view of the new properties to a certain extent, but only from the ground floor windows. Mrs Ballamy accepted that her property was already overlooked to a certain extent, particularly from no.5, but said she and her husband were aware of that when they bought it.

37. Mr Shaw (5 Fron Castell) said that the main reason he and his wife bought their property new in 1988 was its superb all-round views, quiet peaceful surroundings and generally open aspect. The purchase price contained a significant premium over and above other properties they looked at to reflect these advantages. The house was designed and constructed to maximise the views and, he said, he and his wife were comforted by the existence of the restrictive covenant. Most of the year, as the house looks directly down Cae Hir, Mr Shaw said they are able to enjoy quiet solitude, with cows and sheep gently grazing, young lambs gambolling and just watching various animals living in their natural habitat. In the winter, there is real pleasure in watching local children career down the field on their sledges.

38. In cross-examination, Mr Shaw accepted that the houses on the far side of Cae Hir and beyond them a modern residential estate were visible but, he said, they are much further away and are shielded in the summer.

39. Mrs Marjoram (1 Fron Castell) said that she was from a local Llangollen family who had known Miss Pugh-Jones well. She was thus aware of the restrictive covenant before she and her husband purchased their house in 1994. The fact that the land was never intended to be built upon was, she said, an important consideration in their decision to purchase. She said that her family do use the footpath across Cae Hir, including for sledging when conditions allow. Mrs Marjoram accepted that views of the application land from her house were significantly restricted by the high hedge, and the oak tree. She said that, being located on the corner of Fron Castell and Fron Bache, she disputed the suggestion that vehicles drive slowly, and there had been a number of accidents and near-misses of which she was aware.

40. Mr Jones (2 Fron Castell) said that, as a relative newcomer, having purchased his house in December 2006, he was made aware of the proposal to build on the application land before he bought. However, knowing about the covenant was a comfort, and he felt sure that, despite the application, Miss Pugh-Jones' wishes would not be readily overturned. Mr Jones was also concerned about the access problems, was aware that a wall in Fron Bache had been damaged in an accident, and thought that the situation would be made worse during the construction phase, particularly as there would be no available parking for contractors' vehicles. Like Mrs Marjoram, he accepted that his views of the application land were impeded by the hedge and tree, especially in summer months.

41. Mr Smith (6 Fron Castell) made many similar points to those referred to by the other Fron Castell objectors and pointed to the selling agents particulars, from when he bought his house. They said "the development occupies a most attractive position, surrounded by pasture

and open countryside". It had "magnificent views" and "delightful country walks nearby". The house was purchased in the knowledge that Cae Hir was protected and, if the covenant were to be discharged or modified to permit the proposed development, Mr Smith said it would make a mockery of the system. He was also very concerned about the increases in traffic that would be generated. He said that he was carrying out major improvement and extension works to the house, designed to take advantage of the location, aspect and views, including an extension of the first floor balcony. The house had originally been built (as had no. 5) with the main living rooms on the first floor, with bedroom accommodation at ground level, precisely to get the very best from its location and views.

42. Mr Reynolds (1 Bryn Dedwydd) repeated many of the objections that had already been raised. He acknowledged that views of the application land from his particular property were limited.

43. Mrs Thomas (2 Bryn Dedwydd) said that Miss Pugh-Jones was the aunt of her late husband, and had stated quite categorically that on no account was there to be any building or development on Cae Hir. Although she had not personally been involved with any discussions with Miss Pugh-Jones, she knew that her husband had, and what her intentions were. Mrs Thomas said that the outhouse/gazebo had been converted to a summerhouse in 1991, and a sitting room/snug had been created on the upper floor, with a large balcony off, to take advantage of the views. Those views, she said, would be detrimentally affected by the proposed development.

Submissions

44. Mr Oughton said that an application for discharge of the restrictive covenant would mean that the objectors would lose all control over what occurred on Cae Hir, and such a decision would be most unusual in terms of what the Tribunal has historically decided in ground (aa) applications. Even if I were to opt for modification, if the applicant's proposed amendments to the wording were accepted, that would have virtually the same effect. The suggestion by Mr Case that the wording of the restriction should be varied to include:

> "…otherwise than in accordance with the planning permission granted on 25 October 2005…*or in accordance with any future planning permission"*

was so wide as to effectively give him (or whomsoever he sold the land to) carte blanche to carry out any form of development that might be permitted by the local planning authority. As it is, the scheme prepared by Mr Horden is for a more extensive development than that originally permitted (by the addition of an extra unit), it is purely conceptual and the plans are not sufficiently detailed for a formal submission for consent, or for the objectors to be able to see the precise effects to their visual amenity. Furthermore, even if a new application were to be made for planning permission on the basis of the site layout as currently envisaged, it is a fact that once reserved matters have been approved, developers often carry out minor infractions that whilst they may be acceptable to the planners, they might well have detrimental affects to the objectors' properties. The applicant has said that he does not know whether or not he will develop the site himself, or whether he will sell it on. It was submitted that this

uncertainty placed the objectors in a profoundly unsatisfactory position, which itself should be sufficient to have the application refused.

45. As to the suggestion that it was "fortuitous" that the residents of Cae Hir had the benefit of the restriction (there being no question that it was always intended Bryn Dedwydd should have the benefit), it was submitted that whilst Miss Pugh-Jones exact intentions could only be surmised, there was evidence that indicated that the objectors' understanding of her wishes was correct. On 27 February 1970, some 3 years before he purchased OS nos. 600 and 633, and whilst negotiations were proceeding, Miss Pugh-Jones' Godson, John Basil Thomas, wrote a letter to a Mr Havard of Ruthin. In it he said that he had heard from Miss Pugh-Jones who had said:

> "What I want to do with the field (Cae Hir 634) is to keep it as it is – a bit of rural land undeveloped." and "I do not think it would be feasible to take down the fences between the proposed two fields [OS nos. 600 and 633] being developed and field 634."

Mr Jones went on to say that he fully understood his aunt's wish that Cae Hir was to be left undeveloped.

46. Mr Oughton said that if, as has been suggested by counsel for the applicant, it was an error due to the timing of completion of the sale to Mr Thomas, that the benefit of the restriction passed to the purchasers of the Fron Castell properties, it was strange that there had never been an application for rectification. Under section 84(1B), Mr Oughton said that the Tribunal is obliged to consider the context in which the covenant was imposed, and whilst the evidence, like the existence of planning consent, could not be conclusive, in an overall determination, it weighed heavily in favour of the Tribunal exercising its discretion to refuse the application.

47. Turning to the 5 questions in *Re Bass*, it was common ground the proposed development would be a reasonable user of the land, and that the restriction impeded it. As to questions 3 and 4, Mr Oughton submitted that the advantages should be approached on a broad basis (see *Gilbert v Spoor*). Whilst it was accepted that the advantages of the foreground views over Cae Hir varied from property to property, all of them enjoyed the benefit to some degree, and the immediate semi-rural feel created by having a field right next to Fron Castell would be lost if the application were granted. In *Re Gossip's Application* (1972)25 P&CR 215, it was held that overlooking of houses and well kept gardens, and the closing in of the open character of the estate were practical benefits. Also, screening by a hawthorn hedge was "a poor substitute for a covenant". In *Re Bushell's Application* (1987) 54 P&CR 386, interference with a view, overlooking and "a serious loss in that air of spaciousness" were found to be practical benefits. Mr Oughton cited a long list of other cases where similar conclusions had been reached by the Tribunal, together with *Re Duffield's Application* (2007) LT ref LP/36/2006 (Unreported) where interference with a view, being overlooked and loss of privacy were held to be substantial benefits, even though the proposed property was a bungalow to be constructed at a lower level. It was incumbent upon the Tribunal to be consistent – see *Shepherd and Others v Turner* [2006] EWCA Civ 8 where Carnwath LJ said, at para 57:

> "In reviewing these decisions, it is important to keep in mind that tribunal decisions are not normally to be regarded as setting any precedent in respect of what must essentially

be a question of fact and degree. However, one of the functions of a specialist tribunal such as the Lands Tribunal (made explicit by section 4(1)(*b*) of the Lands Tribunal Act 1949) is to promote consistent practice in the application of the law to its specialist field. Unexplained inconsistency of approach may, in certain circumstances, amount to an error of law."

48. It was submitted that even if the applicant was considered to have satisfied the requirements of s84(1)(aa), the Tribunal should exercise its overriding discretion to refuse the application because: (a) the application and proposed modification are entirely open ended and (b) of the overwhelming body of evidence relating to Miss Pugh-Jones's original intentions. The preservation of Cae Hir as open and undeveloped land for the public benefit is a matter which can justify the Tribunal refusing to exercise its discretion in favour of the applicant, as evidenced in the closely analogous case of *Re St Albans Investment Limited's Application* (1958) 9 P & CR 536 which related to the preservation of a view from Richmond Hill.

49. Mr Oughton said that the highway considerations also constituted real benefits to the objectors in that the present entrance to Fron Castell is pleasant and uncluttered. The approach would be spoilt by the construction of new houses on the field that is currently visible right next to the entrance. Such a benefit was also alluded to in *Gilbert v Spoor.*

50. Finally, on the subject of compensation, it was submitted that whilst none of the objectors are motivated by money, if I were to find for the applicant, then Mr Parrott's opinion of the diminution in value averaging overall 9% per property should be preferred to Mr Jones's evidence which gave no valuations at all.

Conclusions

51. The questions to be determined in connection with an application under section 84(1)(aa) of the Act are whether the restriction impedes some reasonable user of the land; if so, whether in doing so it secures to the objectors any practical benefits; if so, whether those benefits are of substantial value or advantage to them; and, if not, whether money would be adequate compensation for any loss or disadvantage suffered; and, if so, how much should be awarded.

52. There is no dispute over the reasonable user of the land, and the fact that the restriction impedes it. In terms of practical benefits, both parties relied upon the tests in *Gilbert v Spoor* where Eveleigh LJ said at 32F:

"The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase 'any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression 'any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away

from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis."

53. The principal argument of the objectors was the loss of visual amenity, and having walked the application land, and, more importantly, viewed it from both within and without all the objectors' properties, I am satisfied that the present outlook over what is an attractive, undulating swathe of open pasture land is a practical benefit that would be seriously impeded if it were to be replaced by residential development. There can be no doubt that some of the houses would suffer more than others, with nos. 3, 4, 5 and 6 Fron Castell being the worst affected (no.5 in particular). 1 & 2 Fron Castell would have their visual amenity affected to a lesser degree and 1 Bryn Dedwydd would, in my judgment, be the least disturbed. Whilst I agree that the principal attraction of the location of all these properties is the long distance views over the vale of Llangollen towards the mountains and Castell Dinas Bray, I found when looking out of the east facing windows of the principal rooms in nos. 3, 4, 5 and 6 Fron Castell, and from 2 Bryn Dedwydd, that the eye is drawn downwards towards "the near view" of Cae Hir, the closer one gets to the window. This is particularly so from the main living room and bedroom in no.5, which is set at a high level, and looks straight down Cae Hir.

54. The applicant was at pains to stress how sympathetically the proposed properties had been situated upon the site on Mr Horden's plans, with large gaps between them at points that would enable through views to be maintained as much as possible. Furthermore, the houses were to be chalet style properties of only one and a half storeys in height, and would be set at as low a level as was possible to do so in the light of the topography of the site. However, I have the same concerns as the objectors over the fact that this was only a conceptual scheme. Mr Horden's statement in evidence that the development would enhance the views from the objectors' properties also suggests to me a certain element of partiality in the matter. Allowing a modification in the terms sought, even deleting the reference to "or any future planning permission" would not, it seems to me, offer the objectors any protection whatsoever. There is also the apparent uncertainty as to the applicant's future plans for the land which strengthens my view that to allow a modification of any description would, however tightly worded, leave the door open for a revised scheme that could affect the objectors' amenity even more than the current proposal would. Even though, under section (1C), I have the opportunity to amend the wording of the proposed revisions to the restrictive covenant, and to impose further provisions or restrictions in respect of the proposed development, it is my considered view that any form of residential development on the land, however sympathetically planned and constructed, would have a seriously detrimental effect upon the visual amenity, and general feeling of space and openness that is of such concern to the objectors.

55. I am required to determine this application in accordance with the ground upon which it was made (aa), and have come to the conclusion in the light of the evidence, and what I have said above, that the restriction unquestionably secures practical benefits to all of the objectors' properties and, in all but one of them (1 Bryn Dedwydd), those benefits are of substantial value or advantage. The circumstances in this case are such that, in terms of considering the question of "fact and degree" (see *Re North's Application*), it seems to me that the objectors' concerns are even more clear cut than they were in many of the cases cited by Mr Oughton where applications had also failed. I am satisfied that whilst the artistic licence contained within Mr

Shaw's witness statement –"the view of young lambs gambolling" etc – may be considered a little extreme, the loss of amenity and the general air of openness that the residents currently enjoy would be adversely affected to a considerable degree by the applicant's proposals.

56. It follows that, without even considering the concerns over additional traffic generation over Fron Bache, or the original wishes of Miss Pugh-Jones (which might be taken into account in terms of discretion), the application under ground (aa) is not made out. The question of compensation does not, therefore, fall to be considered although I would say that I did not find Mr Parrott's conclusions that there would be an overall reduction in values averaging 9% to be very helpful. It was clear to me that, in making the adjustments that he did during the course of the hearing to his original report, he had not really thought through the impact upon individual properties in any real depth.

57. As to Mr Fryer-Spedding's argument about whether the land could be expected to continue in use for inoffensive purposes, (the *Fairclough Homes* test) this was, I think, without real merit. The covenant states that the land shall not be used for "any purpose other than pastoral purposes so that the land shall remain forever hereafter open ground", and to my mind, pastoral means pasture and that means grazing. Furthermore, a public footpath crosses the land and it would be most improbable that the present tenant, or for that matter any future occupant, would entertain some form of use that could not only offend the objectors (and other local residents), but would create difficulties in connection with the, currently unfettered, public access.

58. The applicant has failed to establish the ground relied upon and the application is therefore refused. A letter on costs accompanies this decision which will take effect when, but not until, the question of costs is decided. The attention of the parties is drawn to paragraph 22.4 of the Lands Tribunal Practice Directions of 11 May 2006.

DATED: 9 June 2008

P R Francis FRICS