LP/56/2007

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – modification – covenants restricting development to one dwelling per plot and further restriction (to open space on part of land) under section 37 of the Town and Country Planning Act 1962 – proposal to erect three dwellinghouses within grounds of existing property – whether proposed use reasonable – whether practical benefits of substantial value or advantage secured by the restrictions – whether modification would cause injury – application granted and modifications ordered - Law of Property Act 1925, section 84(1)(aa) and (c)

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

BY

GPB CONSTRUCTION LIMITED

Re: Rest Harrow, 14 The Combe, Ratton, Eastbourne,
East Sussex BN20 9DB

Before: P R Francis FRICS

Sitting at: Lewes Combined Court Centre,
182 High Street, Lewes, E Sussex BN7 1YB
on
29 & 30 January 2009

Adam Rosenthal, instructed by DMH Stallard, solicitors of Crawley, for the applicant
Paul Ashwell, instructed by Hillman Smart Spicer, solicitors of Eastbourne, for the objectors

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The following case was referred to in argument:
re: Dolphin's Conveyance [1970] 1 Ch. 654

The following cases are referred to in the conclusions:
re: Bass Limited's Application (1973) 26 P & CR 156

DECISION

Introduction

1. The applicant in this case, GPB Construction Limited, seeks the modification of restrictive covenants burdening land at Rest Harrow, 14 The Combe, Ratton, Eastbourne BN20 9DB (the application land) so as to allow for the construction of three detached dwellings within the grounds of that property in accordance with outline planning consent granted, on appeal (ref: APP/T1410/A/05/1196369), on 29 June 2006. The property, which was originally the subject of two separate transfers, is burdened by covenants (details of which are set out fully below) and a planning Agreement with Eastbourne Borough Council under s.37 of the Town and Country Planning Act 1962. The restrictions broadly serve to limit the number of dwellinghouses on each plot to one, and to prevent any building whatsoever on the part of the land affected by the s.37 restriction. An application was made to this Tribunal on 7 September 2007 and, following the Registrar's order of 17 October 2007, the applicant's solicitors confirmed that the requisite steps had been taken in respect of a Publicity Notice under Rule 14(4) of the Lands Tribunal Rules 1996. A notice was posted upon the application land, an advertisement was placed in the local newspaper on 26 October 2007, and the approved publicity notice was hand delivered to 42 properties on the Ratton Estate (including all those in the Combe) where it was thought that the owners may have the benefit of the restrictions.

2. Six formal notices of objection were received within the specified time limit, and those were all admitted. The objectors are:

1. Brian Higgins, 3 The Combe
2. Ray Mason, 2 The Combe
3. Clive Miles, 4 The Combe
4. Trevor Roberts, 6 The Combe
5. P T R Olliviere, 8 The Combe
6. Eastbourne Borough Council

3. Mr Adam Rosenthal of counsel appeared for the applicant, and called Mr Geoffrey David Bevans FRICS, MCI Arb, C Dip AF, FEWI, a chartered surveyor and sole practitioner of Bournemouth, Dorset who gave expert evidence. Mr Paul Ashwell of counsel appeared for the objectors and called Mr Geoffrey Clifton Streddon Pearce MA (Cantab), FRICS, MB Eng, a chartered building surveyor and sole practitioner of Friston, Eastbourne who had been appointed by the objectors 1 – 5 ("the residential objectors") to provide expert evidence. At the hearing, and as a result of the late agreement in respect of who was entitled to the benefit of the various restrictions (see below), he accepted instructions to act also for the council, and thus gave evidence on behalf of all the objectors. Following applications from the solicitors acting for the residential objectors, and from the council, made on 22 January 2009 for the late admission of witness statements (which despite objections from the applicant, I accepted), Mr Ashwell also called Mr Geoffrey Alan Johnson, a solicitor with Eastbourne Borough Council, Mr Brian Higgins, Mr Clive Miles, Mr Trevor Roberts and Mr P Olliviere who all gave evidence of fact.

4. A further application had been made on 22 January for leave for the objectors to adduce in evidence letters of support (included in a supplementary bundle) from a number of residents of The Combe and other nearby roads who, whilst possibly entitled to the benefit of either or both of the 1967 and 1968 restrictions, had not formally objected in response to the publicity notice. A number of those letters had been sent to the Tribunal previously, and there were also 6 other letters that had been appended as support to the council's original notice of objection. I determined that I was not prepared to admit or consider the letters from the residents who had chosen not to respond to the publicity notice, but would give due weight to those that had been attached to the council's notice of objection as they could be considered to form part of the support and background to its case.

5. On 28 January 2009, I carried out an accompanied inspection of the application land, its immediate surroundings and, from the highway, external inspections of three properties on the Ratton Estate where discharge or modification of restrictive covenants had occurred. At the commencement of the hearing, the experts produced a brief statement of agreed facts.

The application land and surroundings

6. The Combe is a quiet residential cul de sac on the edge of the Ratton Estate, a large and sprawling low-density development of houses and bungalows that was commenced on the site of the former Ratton Manor in the 1930s and was completed (apart from a small number of infill plots) in the 1960s. Part of the estate forms one of Eastbourne's Conservation Areas, and the head of the cul de sac (which itself is within the Built-up Area as defined in the adopted Local Plan) abuts an extensive tract of woodland known as Babylon Down, which is part of the Sussex Downs Area of Outstanding Natural Beauty (AONB). Eastbourne town centre and the sea front are about two miles to the south east. The Combe rises steeply from its junction with Upper Ratton Drive (one of the principal spine roads of the estate) towards a hammerhead at the top. Driving up The Combe, in a westerly direction, the AONB forms a backdrop as the woodland area beyond the development continues to rise steeply in the form of a "bowl". The vista from the top of The Combe in an easterly direction is over Eastbourne and the English Channel beyond.

7. The application land, which is formed out of two of the original estate building plots, fronts the hammerhead, is approached over a driveway off the right-hand spur, and its rear (west) and side (north) boundaries back on to the AONB. There is private gated access to a public footpath that runs immediately behind the west boundary (and behind the rear boundary of the adjacent property to the south, 21 The Combe), that path forming part of an established footpath network through and across Babylon Down. Rest Harrow comprises a detached, traditionally built two-storey dwelling house that straddles the two plots, and the total site area extends to approximately 0.72 ha (1.78 acres). The house faces north/south and its principal rooms look south over the undeveloped area of garden (about 0.73 acre) which is subject to the s.37 Agreement requiring that area to be retained as open land.

8. The part of Rest Harrow's plot upon which the applicant proposes to construct three houses is L-shaped and lies to the south of Rest Harrow (with a shared driveway to be accessed off the hammerhead), and to the west, and has a development area extending to approximately 0.52ha (1.28 acres). Plot 1, closest to the hammerhead and facing east down The Combe, will

lie between the Rest Harrow dwelling and the adjacent number 21. Plot 2 will be to the rear of plot 1 towards the south west corner of the site, and plot 3 will occupy the north west corner, immediately to the west of Rest Harrow, between it and the western boundary onto the AONB. The whole of the s.37 part of the application land would, therefore, be developed.

The restrictive covenants

9. The land to which the application relates is:

(1) 14 The Combe, Ratton BN20 9DB, registered at HM Land Registry under title number EB22802 in a transfer dated 5 April 1967 between Ratton Estate (Eastbourne) Limited (1), Lesley Benton (2) and Diana Aubrey Benton (3) **("the first plot"**); and

(2) Land on the west side of The Combe, Ratton, registered at HM Land Registry under title number EB24074 in a transfer dated 18 September 1968 between Ratton Estate (Eastbourne) Limited (1), and Dorothy Eileen Barr (2) **("the second plot"**)

10. As to the first plot, the restrictions are contained in the Third Schedule of the transfer (**"the 1967 restrictions"**):

> "(3) Not to erect more than one house with the usual garage and outbuildings on the building plot hereby transferred. No building shall be erected within five feet of any boundary of the building plot comprised herein
>
> (4) Not to erect any house or buildings upon the building plot hereby transferred or make any alterations to any house or buildings now or hereafter erected thereon until the plans sections and elevations of the same and the position of such house or buildings and a specification of the materials texture and external colouring of such house or buildings shall have been approved by the Transferor and a fee of ten guineas shall be paid to the Transferor when such plans and colour specification are submitted for approval
>
> (7) Not to erect any house or building or part of any house or building in front of the building line marked on the said plan"

As to the second plot, the restrictions (**"the 1968 restrictions"**) are again set out in the Third schedule of the transfer and are, to all intents and purposes, in the same terms as those incorporated in the 1967 transfer.

11. An agreement dated 1 August 1969, under section 37 of the Town and Country Planning Act 1962, between Dorothy Eileen Barr (as freehold owner of the second plot) and Eastbourne Borough Council, contained, in the Second Schedule, the following material covenants (**"the 1969 restrictions"**):

"1. That part of the Second Plot which is unhatched on the plan shall not be used or permitted to be used by the owner for any purpose other than as open land

2. The part of the property which is hatched blue on the plan may be planted with trees and shrubs

3. The owner shall not carry out any development of the property within the meaning of that expression in the Town and Country Planning Act 1962 or otherwise permit the erection thereon of any structure or advertisement. Provided that the owner may erect a fence of a height and type to be approved by the Council's Borough Surveyor along the northerly and westerly boundaries of that part of the property which is hatched blue on the plan

4. The owner shall keep the property or cause it to be kept in a neat and tidy condition to the reasonable satisfaction of the council and shall not apart from the aforesaid carry out thereon any works or operations which will alter the present character or appearance".

The statutory provisions

12. The grounds upon which the application was made are set out in section 84(1)(aa) and (c) of the Law of Property Act 1925 which provide:

"84-(1) The Lands 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 -

(aa) that (in a case falling within subsection (1A) below) the continued existence [of the covenant] would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified impede such user;

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

Subsection (1A) provides:

"(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 Lands 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 ad-vantage 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".

Under section 37 of the Town and Country Planning Act 1962 (now replaced by section 106 of the Town and Country Planning Act 1990) a local planning authority was empowered to "enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement."

Applicant's case

13. Mr Rosenthal opened the case for the applicant by saying that, whilst all of the 5 individual residential objectors had been admitted following acceptance of their valid notices of objection, it transpired that none of them has the benefit of the covenants in the 1968 conveyance (the second plot). This is due to the fact that the land held by each of them was originally sold by the common vendor, Ratton Estate, (Eastbourne), Ltd before the 1968 conveyance of the second plot. Clause 3 of all the conveyances contains a declaration that nothing in the conveyances is intended to create a building scheme. He explained that the existence of a building scheme was dependent upon the intentions of the parties, whether express or inferred (see *re: Dolphin's Conveyance* [1970] 1 Ch. 654), and an expression of contrary intention, therefore, must prevent a building scheme from arising. Since the benefit of the covenants could only be annexed to land retained by the common vendor at the date of the relevant conveyance, objectors who are unable to show that they hold land that was retained by the Ratton Estate at the date of the 1968 conveyance are not able to enforce the covenants contained in that conveyance. Furthermore, he said that for the same reasons, Mr Mason of 2 The Combe was neither able to enforce the covenants under the 1967 conveyance (the first plot) as his property had first been transferred by the Ratton Estate before the date of that conveyance.

14. It therefore follows, Mr Rosenthal said, that none of the residential objectors were entitled to claim the benefit of the restrictions as they apply to the second plot (which is the one that is to all intents and purposes currently undeveloped, apart from the corner of the Rest Harrow dwelling). He accepted that the letter to each of the objectors from the applicant's solicitors dated 25 February 2008 confirmed that they were admitted, and that this was wrong in respect of the second plot (and indeed, both plots as far as Mr Mason was concerned). However, he said that that letter simply admitted the parties to the proceedings, beyond which it was for the individual objectors to make out their cases.

15. Mr Ashwell pointed out that it was not until he received Mr Rosenthal's skeleton argument the day before the hearing, that he was aware of the applicant's stance in respect of the objectors' entitlements to ther benefits. At no time, he said, had the applicant either made an application (to the Tribunal) to withdraw the admissions, or written to the objectors in this regard. It was ludicrous, he said, for Mr Rosenthal to suggest that the onus was upon the objectors, the five of whom were affected by this situation being lay people, to make out cases against their own interests. If the matter had been dealt with properly, there would have been a hearing convened before a legal Member of the Tribunal under section 84(3A) to determine the question. Mr Ashwell said that it was not possible for him to respond properly to the case in the light of these late submissions, as his preparation (and skeleton argument) had been prepared on the basis that all the objectors were admitted in respect of both the 1967 and 1968 restrictions.

16. In the light of these developments, I agreed to adjourn the hearing until the following day, at which time Mr Ashwell advised that the applicant's position was accepted as to Mr Mason (both restrictions) and the other four residential objectors (the 1968 restrictions). As it was acknowledged that the council did have the benefit of both the 1967 and 1968 restrictions, and the s.37 Agreement, it was considered right to proceed on the basis of the expert evidence that had been prepared, and that Mr Pearce's remit as expert should now extend to the council. It would be for the Tribunal to consider the evidence upon this revised basis, and to interpret it accordingly in the light of the reduced benefits to the 4 remaining residential objectors under the the 1967 restrictions only. Mr Ashwell pointed out that the actions of the applicant in regard to these issues had serious implications as to costs, and said that this would be an important factor to be considered when that question came to be determined. The hearing thus proceeded on this revised basis.

17. Mr Bevans is a chartered surveyor, and a founder member and fellow of the Expert Witness Institute, who has been practising on his own account on the south coast since 2003, having formerly been a partner in the Bournemouth firm of Cowling and West. His specialisms include residential and commercial valuation, leasehold reform and section 84 matters. He was chairman of the RICS working group that prepared and published the Practice Statement for Surveyors acting as Expert Witnesses, and currently chairs the panel charged with updating it. He said that in formulating his opinions in respect of the grounds upon which the application had been made, and upon the nature of the objections, he had taken into consideration the comments made by the planning inspector in the 2006 appeal decision, together with what he had assumed to be the planning officer's report and recommendation prior to the local planning authority's refusal of the three dwelling proposal in 2005.

18. Following the residential objectors' acceptance that none of them enjoyed the benefits of the 1968 restrictions over the second plot, Mr Bevans said that, comparing the applicant's proposed site layout plan with the plan attached to the council's 1969 restriction, the applicant's proposed plot 3 could in fact actually be constructed on the second plot without encroaching onto indicated open space area. There was just enough room for a driveway to be formed over the first plot (immediately to the south of the existing Rest Harrow dwelling), but in real terms, as Rest Harrow would have to be demolished and rebuilt so that it was wholly on the first plot, this would have serious consequences in economic terms. The fact that, by doing this, one additional dwelling could be constructed without breaching either of the 1967 or 1968 covenants or the provisions of the 1969 restriction, meant that it was the proposed plots 1 and 2 that would be erected on the land that was subject to those restrictions that was the key consideration under grounds (aa) and (c), and it was of course only the council that had the benefit of that restriction.

19. As his original and supplemental reports had been prepared on the basis that the residential objectors had the benefit of the 1968 restrictions (where plots 1 and 2 would effectively be located), much of Mr Bevans' evidence became superfluous in terms of the affects upon visual amenity from their houses (and from the half width of road that formed part of their demises). It had been agreed with the objectors' surveyor, in any event, that in terms of the question as to whether any of the 1967 or 1968 restrictions secured to the residential objectors practical benefits of substantial value or advantage, it was only 6 The Combe (Mr Roberts' property) where there might be any potential impact on views (and that would be by the construction of plots 1 and 2 on the second plot). None of the residential objectors' views

would be affected by the construction of plot 3. In his own opinion, Mr Bevans said, either from no. 6 or for that matter, from anywhere in The Combe, the eye was naturally drawn towards the woodland beyond (at a higher level) and the new properties (particularly plot 1) would make little material difference to those views.

20. It had also been agreed that the proposed development would have no material impact upon the value of any of the objectors' properties and, despite the residents' expressed concerns, the experts had agreed that the additional traffic generated by the initial housing would not be significant. Whilst it was accepted that there would be inconvenience and noise from building works and heavy construction traffic during the construction period, it was agreed that the impact of this could be covered under planning conditions. Mr Bevans explained that the residents' concerns about additional wear and tear to the private road were in his view unfounded, and he was sure that clauses would be inserted into the transfers of the new properties to ensure that they contributed equitable proportions to the ongoing maintenance and repair costs.

21. As to concerns over the density of the development, Mr Bevans said that the average size of each of the three new plots would be 0.173ha (0.427 acre) which was larger than each of the plots at nos. 1-13 and 15 The Combe, and similar to or slightly smaller than those at nos. 17, 19 and 21. Whilst the overall density [of development on The Combe] would, by the provision of 3 additional properties be increased, the plot sizes were clearly no smaller than average plot sizes in the vicinity, and, apart from the land forming the rear garden of no. 21, there were no other properties where the plots were large enough to permit similar development to occur. He also referred to the officer report to the council dated 1 November 2005 where it was stated:

> "..the dwellings would occupy substantial plots which would be in keeping with the character of the area, although well below the density sought by central government guidelines and borough plan policy."

22. Regarding No. 21 The Combe, (which adjoins Rest Harrow) to the south, it was agreed that, in terms of the risk of a precedent being set ("the thin end of the wedge"), that was the only property in The Combe that had sufficient land to allow an additional plot. However, due to the shape of the plot, and the position of the property upon it, it would not be possible to develop the garden without gaining access from the Rest Harrow site, or demolishing and re-siting the existing property.

23. Mr Bevans said that he agreed with Mr Johnson that the circumstances surrounding the discharge or modification of similar restrictions imposed in transfers of other properties on the Ratton Estate, that had lead to the building of additional properties at 11 The Parkway, 50 Upper Ratton Drive and 4/6 Walnut Walk were different, two of them being small corner plots at road junctions and another where special circumstances applied. None of those developments, he accepted, set a precedent sufficient to support an argument on precedent in this case.

24. Turning to Eastbourne Borough Council's objections, Mr Bevans said that as they were the title holders to some 24 acres of the Babylon Down AONB, including the area immediately adjacent to the application land, one had to consider the impact of the development on the

views from that land, rather than from The Combe. The public footpath runs immediately behind the high beech hedge that separates Rest Harrow from the AONB, and any views over the open area subject to the 1969 restriction from it were thus severely restricted. It was pointed out to him that when the restriction was imposed, it included a provision that no hedge should be planted along that boundary (between points shown on the plan as A-B). The fact was, he said, that there was a hedge there and no enforcement action had ever been taken for its removal. However, if the hedge were not there, he accepted that the development of the new houses would restrict any views that there might have been. He also acknowledged that the development would, marginally, restrict the views from the path where it rose to a higher level each side of the application land, but from there the eye tended to be drawn to the distant vista towards the sea, rather than down towards the houses in The Combe.

25. Mr Bevans referred to the inspector's decision of 29 June 2006 where she said:

> "13. The proposed dwellings would be visible from the public footpath that adjoins the rear boundary of the site. However, I consider that the space between the dwellings and the retention of the bank to the rear of the site [the two uppermost plots to be set slightly down into the rising ground] would assimilate the houses into the surrounding residential development and they would not harm any views from the public footpath.
>
> 14. The appeal proposal would result in the loss of an area of open land. This land is privately owned and surrounding residents have no access to it…..The AONB would still be visible over and between the proposed dwellings and remain prominent within views from The Combe. For the reasons outlined above, I consider that the proposal would not significantly harm residential, visual or environmental amenity.
>
> 15. Overall, I conclude that the proposal would not harm the character and appearance of the surrounding residential area and the AONB…"

Mr Bevans concurred, and said that there was nothing to support an argument that the restrictions secured to the council practical benefits of substantial value or advantage.

26. Finally in respect of ground (c), Mr Bevans said that in his view none of the six objectors would be injured by the proposed modifications to any of the three restrictions.

27. In cross-examination, Mr Bevans accepted that apart from one example of the proposed elevations shown in a cross-section provided by the applicant, it was necessary for him (and for others) to form a picture in one's mind of the impact that the development of the three houses would have upon the views both from The Combe, and from the public footpath. He said it was quite possible to do this. He accepted that the original intention of the 1969 restriction could well have been to retain a "view corridor" from The Combe into the AONB, but said that equally it could have been for the benefit of Rest Harrow, which has its principal rooms facing over that area. He also reiterated that apart from the aspect from the kitchen and first floor corner bedroom windows in 12 The Combe (which was not one properties from which an objection had been received), the views from The Combe itself and the objectors properties into and over the application land was restricted almost completely be the line of mature conifers between the front boundaries of nos. 10 and 12. There was also a very high line of Cypress trees along the front boundary of no. 21 and the line of conifers to the front of the

application land that served to restrict views both of the application land itself, and the AONB beyond.

28. Mr Rosenthal, in submissions, pointed out that it should not be forgotten that the council itself granted planning permission for development upon the application land, but it is that same council that is now resisting it.

Objectors' case

29. Mr Pearce is a chartered building surveyor based in Eastbourne and has practised in the area and East Sussex generally for 19 years. He said he was familiar with the Ratton Estate and had considered all the relevant documentation relating to the application including the objections and witness statements of all the residential objectors. Following a meeting with Mr Bevans, he had agreed that a number of issues that had been of concern to the residential objectors particularly in respect of the impact on visual amenity, density, and traffic generation were not sufficient to sustain an objection under ground (aa). However, he said that the impact of the proposed modifications needed to be considered in the wider context of the Ratton Estate as a whole. In his view, there was a considerable risk that modification in this instance would create a precedent that could lead to other similar developments in the area. In particular, he said, the objectors had raised concerns that the owner of 21 The Combe may seek to have additional development at the rear of his own property. He accepted that access would be difficult, but there was nothing to stop the applicant buying no.21 and incorporating it into his proposed development. Whilst he accepted that the 3 properties referred to by Mr Bevans and Mr Johnson were not strictly comparable in terms of setting a precedent, it remained a risk that approval of the proposed backland development on the application land could well set a precedent for similar developments elsewhere on the Ratton Estate. Also in the wider context, there was no doubt that there would be a considerable impact to the views from two of the principal rooms at 12 The Combe which directly looked out over the land that was subject to the 1968 and 1969 restrictions. Whilst the owners were not objectors as such, the principal reason having been the untimely death of the occupier, Dr Saddiq, the impact on that property should carry weight in the Tribunal's deliberations. There could be no doubt, he said, that in the wider context, the risk of a precedent being set for further applications would, if the modifications were granted, injure the objectors under ground (c).

30. As to the council's case, Mr Pearce said that the proposed development would cause considerable visual impact across the application land towards the east from the footpath. He disagreed with the planning inspector's remarks on this issue. It was clear that the original intention behind the imposition of the 1967 restriction was to provide for the retention of an open view from The Combe into the AONB beyond. The trees along the front of that part of the application land (separating the second plot from The Combe) that presently screen that through-vista are suffering from die-back that could be exacerbated by the salt winds off the sea, and this would make the proposed plot 1 on the development highly visible from The Combe.

31. In cross-examination, Mr Pearce said that he had no evidence as to the intentions of the owner of 21 The Combe, and accepted that any further development on that property would not realistically be possible, and certainly would not be economically viable, unless it was incorporated into the development proposed for the application land.

32. Mr Johnson is a solicitor currently working, on a part-time basis, for Eastbourne District Council, dealing with regulatory and litigation matters that include advice to the planning committee and attendance at its meetings. In response to the applicant's arguments under ground (a) (that the restrictions were obsolete) which, he accepted was no longer being pursued, he pointed out that the view of the council was that the purpose of the 1969 restriction was to restrict the use and development of that land. There is no mention in the s.37 agreement of "views of the Downland", and it simply requires the use of the land to be for no other purpose than as "open land". That purpose, he said, still subsists. As to precedent, whilst accepting that there were three other instances where restrictions had been modified or relaxed, they were all small-scale single plot developments that were well away from the sensitive boundary between the built area and the Downland. They were all very different from the substantial development that was proposed by the applicant in this case.

33. Under section (aa), Mr Johnson said that the area in which the application land lies is of the highest quality in terms of residential amenity, and that that quality derives both from the views and aspects from The Combe across the s.37 land towards the AONB, and from the public footpath along the rear boundary in an easterly direction. The scale of the envisaged development would serve to enclose the end of The Combe, (as pointed out by the inspector in her 2006 appeal decision) and remove the current open aspect. That was precisely what the s.37 restriction was designed to avoid. Mr Johnson said that there was no doubt in his mind that modification of the restrictions would remove the substantial benefits that both the council and the residents currently enjoy, and that the loss of such benefits could not adequately be compensated in monetary terms. Modification to permit the development would also injure the objectors, that being obvious from the extent and nature of the residents' objections. In all the circumstances, he said, it was both the council's and the residents' case that the application should be dismissed.

34. As to the council's decision to object to this application, he said that it was taken following consideration of a detailed report to the planning committee on 6 February 2007 prepared by Alice Rowland, a senior lawyer with the council. He said that he had discussed the report with her prior to this hearing. In cross examination, he accepted that the recommendation in the report was "that Members allow the covenants/agreement to be discharged". Mr Rosenthal pointed out that para 12 of the report (relating to the s.37 agreement) said:

> "They [the prospective developers] also refer to the report to committee (dated 1 November 2005) which acknowledges that the purpose of the Agreement was to provide an open space to protect the views of the Downland and escarpment. The report acknowledges that the openness of the property has been diluted by the planting of trees along the front boundary. The developers argue that these trees have obscured the views across the property from The Combe for probably well over 30 years. They completely screen the property and would have been at a mature height by 7 years after planting. It is clear from the photographs that these trees do prevent views of the Downs to a large

> extent from The Combe. It is arguable that the trees themselves breach the covenant to keep the land open but if they have been there for that long it is likely that the Council has acquiesced to that breach and therefore could not enforce the benefit of it and insist on the removal of those trees."

35. He also pointed out that the report said, at para 19:

> "My view is that they are likely to be successful if they apply to the Land[s] Tribunal. In reaching this conclusion I have considered the photographs of the trees which mean in effect that the public do not currently benefit from the restrictions."

And at para 21:

> "I understand that the council has previously released restrictive covenants in the surrounding area. The Council could potentially open itself up to judicial review of its decision not to in this case."

And concluded at para 25:

> "It would not be in the Council's interests to allow this case to go to the Lands Tribunal as we would be likely to lose and would then, in all likelihood, have to pay the developers costs, which are at the Tribunal's discretion but are potentially significant."

36. Asked why the council had chosen not to follow its officer's advice, Mr Johnson said that it was the committee's view that the 1969 restriction was imposed for a special reason (to enhance the transition between the built environment and the Downland AONB) and it was important that this benefit was maintained. They thought that, under the criteria of s.84, there was scope to succeed in preventing the development. It should be noted, Mr Johnson said, that in determining whether or not to grant planning consent, the considerations were different to those that came into play under s.84.

37. Mr Miles (4 The Combe) had calculated that the provision of 3 new dwellings at the top of The Combe would result in an increase in traffic past his property of 25%. There are no footpaths in the cul-de-sac and such an increase would create considerable additional risk to pedestrians. The concrete road surface was of a type which generates high noise levels as vehicles pass, and with the increased traffic this would be detrimental to his quiet enjoyment of his property. He said that a key feature of The Combe is the view of the AONB, which he can enjoy from his front garden (and from the part of the road that is also within his ownership). That is a unique selling point for properties in this street, which sets it apart from other culs-de-sac on the Ratton Estate.

38. Mr Miles also expressed concern that the development might set a precedent for further building in the area, especially at 21 The Combe and two other properties on the estate whose plots were sufficiently large to accommodate an additional dwelling. He was also worried about the disturbance that would be caused during the construction process, and the possible effects upon drainage and services.

39. Mr Roberts (6 The Combe) stated his concerns in respect of the increased density (16.66%) that the three proposed properties would create, the increase in traffic past his property (27.3%) and the affect on views towards the AONB. Plot 2 would, according to the developer's plan, effectively be 3 storeys high, and its impact would be considerable. He also expressed similar concerns to Mr Miles about precedent. The possibility of increased storm water run off, overloading of drains and detrimental effects upon water pressure to existing properties were worrying, but accepted that most of those concerns would be covered by the planning conditions imposed by the council.

40. Mr Higgins (3 The Combe) said that the level of opposition to the proposed modifications was considerable, as evidenced by the letters from the Old Ratton Residents' Association, the Babylon Way (Unadopted) Residents' Association and many of the local residents. Owners of properties on the estate had historically respected the one property per plot principle, but it was unfortunate that a property developer had now come along who, having no intention to occupy Rest Harrow, appeared to have no regard for maintaining the character and visual aspect of The Combe. In addition to voicing similar concerns to the other residents, he said of Mr Bevans' report that he did not agree there would be little impact by increased traffic, or to the views of the AONB. The fact that Mr Bevans was able to state that the neighbourhood appeared to have changed little since the restrictions were imposed, was due, he said, to residents having been committed to ensuring that covenants continued to be enforced. As to the impact on views from the public footpath across the s.37 land, Mr Higgins said that the hedge along the rear boundary used to be regularly pruned and kept low, but since the applicant had bought Rest Harrow, it had been neglected, thus allowing it grow in height and thicken up.

41. Mr Olliviere (8 The Combe) said that the potential increase in traffic past his property (being that much further up The Combe) would be no less than 33% which was a significant increase. He referred to his concerns that, with no objection having been made by the owner of 21 The Combe, which was a mere 7 metres from the side of the proposed plot 1, he may well be awaiting the outcome of this application before submitting one of his own. He also suspected that given a positive response from the Lands Tribunal in respect of this application, the developer may well seek further relaxation to allow for the demolition of the existing Rest Harrow dwelling, and its replacement with two houses. In terms of the trees along the front boundary of plot 2 (onto the hammerhead), Mr Olliviere pointed out that there was a clause in the 3rd Schedule of the 1968 conveyance that prohibited their planting. This was an indication that he land was intended to remain open to view.

42. Mr Olliviere also requested that the Tribunal be sympathetic to the position of Dr Saddiq's widow at 12 The Combe – she herself now suffering serious medical problems and being unable to attend the hearing or take positive action in respect of the proposals. No. 12, he said, is immediately adjacent to the application land and views from the kitchen and front bedroom would be very seriously affected, as they look directly onto the second plot.

Conclusions

43. The original application had included ground (a) – obsoleteness, but this was not pursued at the hearing. The principal ground upon which the applicant relied was (aa) and in this

regard, there are 3 main questions for the Tribunal to consider – see *re: Bass Limited's Application* (1973) 26 P & CR 156. Firstly, is the proposed user reasonable and if so, would refusal to modify the covenant impede such use? There appeared to be no dispute between the experts in this regard, and although counsel for the objectors took the point in his skeleton argument, I really do not think there can be any question that the proposed residential development on the land would be a reasonable use of it, and that the continued existence of the restrictions would impede it. Indeed, Mr Ashwell acknowledged that the existence of planning permission is directly relevant to establishing that the proposed user is reasonable, and that (as Mr Stuart Daniel QC said in *re: Bass*): "planning permissions are very persuasive in this connection", although he had qualified that statement by saying that he would not like it to be thought that this question could always be concluded in the affirmative by the production of a planning consent.

44. Mr Ashwell said that this is one of those rare cases where the existence of planning permission should not be determinative, and referred to the fact that the appeal inspector in respect of the 2005 application for 4 dwellings had rejected it, and that his decision letter suggested strongly that he might well have refused the 2006 appeal for three units. Having said that, it was possible from the views expressed in her letter that the second inspector might just as well have allowed the first appeal. Their different subjective views undermined, Mr Ashwell said, any suggestion that the positive second decision letter is conclusive on the question of reasonable user. Furthermore, it was clear that the council had maintained a Chinese wall between planning and other local government functions, as the Legal Services department had said at the outset that even if planning consent were granted, they might not be prepared to release the covenants. It was right, therefore, that the existence of planning consent should not affect the council's assessment of the value of the legal agreement, particularly as the permission was not granted by the council, but by the Secretary of State on appeal.

45. I do not find Mr Ashwells argument persuasive, and as I have said, I am satisfied that the proposed use is reasonable.

46. The second question is: in impeding the proposed use, do the restrictions secure to the objectors practical benefits of substantial value or advantage? In that regard, the residential objectors argued principally that there would be detrimental affects to visual amenity - their enjoyment of views towards the AONB, and the council said that the vista from the AONB over The Combe towards the English Channel would be seriously interrupted by the building of 3 houses. The residential objectors' secondary arguments were based upon maintenance of the original purpose for which the 1967 and 1968 restrictions had been imposed, and (with the council) upon the assumed reason for which the s.37 agreement had been made, together with precedent, increased traffic and noise (both permanent and temporary), affects on services and, in general, preservation of the character of the estate.

47. In determining whether such practical or valuable benefits are secured by the restrictions, it seems to me that the visual amenity aspect was potentially the strongest argument in the objectors' favour, but the fact that it has now been established that none of the residential objectors have the benefit of the 1968 restrictions (which affects the part of the land upon which the whole of plots 1 & 2, and part of plot 3 are proposed to be built, and where the impact might therefore be greatest), has substantially weakened their cases. Having said that,

on the basis of the evidence before me, and from my site inspection, I have concluded that any impact upon views towards the AONB caused by the construction of the three properties would not be significant in overall terms. I agree that, when looking westwards up The Combe, the eye is drawn towards the woodland beyond the existing residential properties, and although there would undoubtedly be some interruption to the views, the effect would not, in my judgment, be sufficient to find that a benefit of substantial value or advantage had been compromised. So, in terms of the effects on visual amenity, even if the residential objectors had had the benefit of the 1968 restrictions, I would not be able to conclude that their objection on that particular aspect had been made out, particularly as it was agreed in any event that the only one of the residential objectors' properties that might have its views materially affected was no. 6 The Combe.

48. As far as the council is concerned, there was much argument (and detailed subsequent submissions in closing) regarding the original purpose of the 1969 agreement, and whether or not the hedge that separated the western boundary between the application land and the public footpath, or the Cypress trees on the front boundary should have been there, and whether by never having taken action for their removal over a period that exceeds 30 years, the council had acquiesced in the breach. In this regard, I note the views of the council's legal officer as set out in paras 33 and 34 above, although I note that that refers only to the trees rather than the hedge. The applicant says that the council would not be entitled to an injunction to require either the trees or the hedge to be removed given the acquiescence and long delay since the breach occurred. Also, there is no evidence that the council has any intention of seeking an injunction, even though it has been aware of the breach since at least 2004 when the first planning application was made.

49. Whatever the original intent of the 1969 agreement (and there is no evidence to confirm that it was to provide an open link between the estate and the AONB), the applicant submits, the fact is that the land the subject of the section 37 restriction now forms part of the private garden of Rest Harrow. The owner of the property will wish to retain his privacy, and if he were forced to open up the land at front and rear he would have serious concerns. I agree, and would add that, in my view, there would also be legitimate concerns over security, especially as there is a public footpath right behind Rest Harrow. There is no public access from the Combe over the s.37 land to the AONB and whilst it is clear from the agreement that it was intended the land should remain open, it seems to me to be wholly unrealistic to expect that, bearing in mind the current position, the council would take action to revert to the original situation. The fact is that the land is currently enclosed, and has been so for very many years. The views that the residents have enjoyed are those which prevent the s.37 land from being seen from The Combe, and are principally over the trees to the woodland at a higher level beyond.

50. The eastward views from the footpath, where it passes immediately behind Rest Harrow, are currently shielded by the hedge and if it was not there (and neither were the trees on the front boundary), it is true that walkers would have a clear view down The Combe. However, this is only a very short section of an extensive network of footpaths across Babylon Down, and at each end of the western boundary of Rest Harrow it also rises up steeply so that there are distant views towards the sea from those points. It is undoubtedly a fact that if the new houses are built as proposed, there will be some limited impact upon views, hedge or no hedge, along this short section of path. However, in the overall scheme of things, I have to consider whether

these views are of substantial value or advantage to the benefited land (the 24 acres owned by the council), and on balance I do not think that they are. In coming to that conclusion, I am also mindful of the fact that the two rear plots will be set down into the existing site to some extent, and that, as the inspector said in her 2006 decision letter, views will still be available over and between the proposed properties.

51. The residential objectors complain that the character of the area will be changed it the modification is allowed. I do not agree. I accept Mr Bevans' evidence regarding the size of the proposed plots in comparison with those that already exist, and see no reason to suppose that the marginal increase in density will have any marked effect upon this pleasant and attractive residential location. I also reject the arguments concerning the thin end of the wedge, and the fears that a precedent for future applications will be set. It was agreed by the experts, and by Mr Johnson, that the three properties where modifications have previously been made were not strictly comparable. In any event, only one of them was in the immediate vicinity of the Combe, with the other two being too far away to be of any major import in this argument. As to the fact that it would be physically possible to create an additional plot at the rear of 21 The Combe, I accept Mr Bevans' argument that it was unlikely to be economically viable to demolish no.21 in order to create an access for such an additional plot, and thus the only way in would be as a part of an extended proposal for the application land. Even if that were on the cards (and any speculation in that regard must be just that), it would mean reconfiguring the existing proposed site layout, with the resultant reduction in average plot sizes, and furthermore the additional plot would be a clear example of backland development that would not, I suspect, find favour in planning terms.

52. Turning to the effects of traffic, I agree with the experts (despite the residents' genuinely felt concerns) that any increases are unlikely to have a significantly detrimental impact upon the quiet enjoyment of the location, or in respect of potential hazards to pedestrians. As far as the objectors' worries about the effects on services are concerned, I agree with the experts that these matters should be adequately catered for in terms of planning conditions.

53. From what I have said, it follows that a conclusion on the arguments about whether it would be possible to build one property on the second plot without encroaching on the s.37 land (roughly in the position of plot 3 on the applicant's proposed site layout plan) without impacting upon any of the restrictions, is not required. Nevertheless I would say that whilst in practical terms that would be physically possible, it would, in order to comply, involve the demolition and rebuilding of the existing Rest Harrow dwelling wholly on the first plot, and that would not, realistically, be an economically viable proposition in my view.

54. I refer finally to the submissions regarding 12 The Combe, and the affects upon visual amenity that would be suffered by that property. Whilst I have sympathy with the situation in which the current owner of that property finds herself, and appreciate the efforts made by some of the residential objectors on Mrs Saddiq's behalf, I cannot take such concerns into account. Firstly, it has not been established whether or not she has the benefit of either or both the 1967 and 1968 restrictions, but as I said at the beginning of this decision, I was not prepared to consider letters or correspondence from those who had not formally objected. Nevertheless, it did seem to me, from my site inspection and from the photographs that were provided by Mr Pearce, that the outlook from the kitchen and front bedroom was likely to be compromised to some extent, especially during the winter months, by the construction of plots 1 and 2 on the

second plot. I do not, in the circumstances, need to decide whether that particular aspect of the property's visual amenity constitutes a practical benefit of substantial value or advantage. However, as the line of mature conifers trees that separates the front garden of no.12 from the hammerhead and entrance to the application land provides an effective barrier to any views of the application land other than from the 2 rooms mentioned above, I would say that if such a determination had to be made, I would conclude that it did not.

55. It follows from the above that I do not consider that the restrictions secure practical benefits of substantial value or advantage to any of the objectors, and the application under ground (aa) is thus made out.

56. The third question to be considered is whether impeding the proposed user would be contrary to the public interest. The matter was not argued, and it is agreed that the issue does not arise in this case.

57. Although it was suggested in counsel for the objectors' closing submissions that some of the residential objectors were seeking compensation, none of them had sought it in their witness statements or oral evidence. As I do not consider that any of the objectors will suffer material disadvantage, I make no such award.

58. In respect of the application under ground (c), although the objectors argued that modification of the restrictions would cause injury, I do not believe, on the basis of my findings above, that they would. The application is therefore also made out under this ground.

59. Adopting the discretion afforded to me under the Act, I therefore determine that the restrictive covenants and the s.37 agreement should be modified so as to permit the applicant's proposed development of 3 dwellings upon the application land, in accordance with permission granted on appeal on 29 June 2006 under ref: APP/T1410/A/05/1196369. The applicant is invited to submit proposed revisions to the wording of the relevant restrictions for incorporation into an appropriate order.

60. The decision determines the substantive issues in this application, and will become final when the question of costs is decided. A letter accompanying this decision sets out the procedure for making submissions on costs.

DATED 20 February 2009

P R Francis FRICS