IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 243 (LC)
Case No: LP/15/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – consent restriction – replacement house built without objector's prior approval – density restriction – whether practical benefits of substantial value or advantage – effect of proposed new houses on the view from objector's property – applicant planting Leylandii trees to obstruct view – exercise of discretion – application allowed under s.84(1)(aa), Law of Property Act 1925 – compensation assessed at £21,000

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

BETWEEN:

MRS PAULINE ANNE HENNESSEY

Applicant

- and -

GARY MARK KENT

Objector

Re: High View, Church Street,
Great Maplestead,
Halstead,
Essex
CO9 2RG

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Martin Rodger QC, Deputy Chamber President and A J Trott FRICS

Royal Courts of Justice, London WC2A 2LL

31 May 2017

Andrew Bruce, instructed by Holmes & Hills LLP, for the applicant
Rupert Higgins, instructed by Birkett Long LLP, for the objector

The following cases are referred to in this decision:

89 Holland Park (Management) Limited v Hicks [2013] EWHC 391 (Ch)

Re Pottier's Application [2010] UKUT 206 (LC)

Shephard v Turner [2006] EWCA Civ 8

Re Rae's Application [2016] UKUT 0552 (LC)

Re Perkins' Application [2012] UKUT 300 (LC)

Re Fairclough Homes Ltd's Application (2004) LP/30/2001

Re Diggins' Application [2001] 2 EGLR 163

C & G Homes Ltd v Secretary of State for Health [1991] Ch 365

Re George Wimpey Bristol Limited's Application [2011] UKUT 91 (LC)

Introduction

1. Mrs Pauline Hennessey (the applicant) is the joint freehold owner of land at Church Street, Great Maplestead, Halstead CO9 2RG which was formerly the site of a substantial house known as Treeways ("the application land"). The applicant purchased Treeways in 2006 but the house was largely destroyed by fire in 2011. On 23 December 2015 detailed planning permission was granted for a replacement dwelling (named High View) and for two further detached houses in what had previously been the garden of Treeways.

2. The application land is subject to a restrictive covenant imposed by a conveyance dated 3 November 1971 between a Mr and Mrs Weight, as Vendors, and A R Clarke (Builders) Limited, as purchaser, referred to in the conveyance as "the Company". The land comprised in the conveyance included the application land and other land shown edged pink on the conveyance plan. So far as is material, the Company covenanted with the Vendors as follows:

> " … that the Company and those deriving title under it will not at any time erect on the said land hereby conveyed more buildings than one dwellinghouse on that part of the said land as is hatched pink on the said plan and one dwellinghouse on the remaining part of the said land and no such dwellinghouse shall be erected otherwise than in accordance with plans (including site plans indicating the proposed position of the said dwellinghouse on the land hereby conveyed) and elevations and of materials previously approved by the Vendors or their successors in title and no building shall be commenced upon the land hereby conveyed until the Vendors shall have given a certificate in writing of such approval."

The application land was the "remaining part" of the land referred to in this extract and we will refer to the prohibition on the erection of more than a single dwellinghouse on it as "the density restriction"; the requirement to obtain the prior approval of the Vendors to the plans of that house will be referred to as "the consent restriction".

3. The land hatched pink on the conveyance plan, which was conveyed in 1971 but does not form part of the application land, was subsequently developed by the erection of a single house known as Linden Grove. The land edged blue, formerly belonging to the Vendors and which has the benefit of the restrictive covenants, adjoins the south eastern boundary of the application land. Since 1971 it has been divided into two separate ownerships: the first, a chalet bungalow known as Piperbrook, now owned by Mr Gary Kent, and the second, a small engineering workshop and office known as The Oak, owned by Mr Allyn Weight.

4. On 31 May 2016 Mrs Hennessey applied for the discharge, or alternatively the modification of the restrictive covenant under section 84(1), Law of Property Act 1925, relying on grounds (a), (aa) and (c). Both Mr Kent and Mr Weight objected to the application although shortly before the commencement of the hearing Mr Weight withdrew his objection and took no further part in the proceedings. At the hearing the applicant amended her application, abandoning reliance on ground (a) and requesting only the modification of the covenant rather than its discharge.

5. Mr Andrew Bruce of counsel appeared for the applicant and called Mrs Hennessey as a witness of fact and Mr Jeremy Zeid MRICS, FAAV, FCIArb, a consultant with Whirledge & Nott Chartered Surveyors, as an expert witness.

6. Mr Rupert Higgins of counsel appeared for the objector and called Mr Kent as a witness of fact and Mr Peter Riches BSc (Hons), FRICS, a partner with Morley Riches & Ablewhite LLP, as an expert witness.

7. We undertook an accompanied inspection of the application land and Piperbrook on 30 May 2017.

The application land, Piperbrook and The Oaks

8. The application land is located to the north west of Great Maplestead, a small village in north Essex close to the Suffolk border. It has a site area of approximately 0.55 hectares and the sole access is by means of a long narrow driveway leading to Church Street, close to its junction with Monks Lodge Road.

9. Between the application land and Church Street lies the land edged blue on the 1971 Conveyance plan now comprising Piperbrook, fronting Church Street, and The Oak, which is sandwiched between Piperbrook and the application land. The vehicular access to The Oak is a driveway running between the rear garden of Piperbrook and the driveway leading to the application land. The two driveways are parallel and separated by a hedge as they run from Church Street alongside the southern boundary of Piperbrook for approximately 50 metres before turning 90 degrees to the north and running alongside Piperbrook's western boundary. At this point the access to The Oak is bounded on both sides by two metre high close boarded wooden fences separating it from the application land on one side and the garden of Piperbrook on the other. These access arrangements mean the application land is located at the rear of properties in Church Street and Monks Lodge Road and is surrounded on three sides by residential development, with an open aspect to the west.

10. One of the houses in Monks Lodge Road, backing on to the application land, is Library Cottage. This is the applicant's current home.

11. Before its destruction in 2011 Treeways was situated at the northern end of the application land, close to Linden Grove and other properties in Monks Lodge Road. The applicant has commenced implementation of the 2015 planning permission by demolishing the burned out remains of Treeways and building the structural shell of its replacement, High View. By the time of our inspection only the external walls, roof, floors, stairs and internal partitions had been completed, and there were no windows, doors or finishes of any kind. Construction had been suspended and the building is not occupied.

12. High View is not a replica of Treeways and does not share the same footprint, although it has been constructed in approximately the same position. Whereas the former house had both

single and two storey elements, its replacement is predominantly two storey. A triple garage block is also proposed for High View which will be located at the north east corner of the application land close to Library Cottage. The garage block is over 20 metres from the main house and is shown on the approved plans as having a separate entrance to the first floor. There are no details of the proposed use of the first floor but the plans show two dormer windows and a chimney.

13. The application land slopes down from north to south and High View stands at the higher, northern end. The other two houses authorised by the 2015 planning permission (which have not yet been built) will be in the centre and at the southern end of the site and will be approximately 1.5m (Plot 2) and 3m (Plot 1) lower than High View.

14. Plots 1 and 2 are each four bedroom detached houses. Between the two plots there will be a garage block serving both properties, and providing two double garages separated by staircases leading to a first floor. There are no plans of this upper accommodation but the elevations show large windows at the east and west ends of the block and high level Velux windows on the other two elevations.

15. The approved plans for Plot 1 show the day room and kitchen (ground floor) and bedroom 3 (first floor) with windows (including a Juliette balcony) facing Piperbrook. Bedroom 1 is also on this elevation but has high level Velux windows. The east elevation of Plot 2 obliquely faces Piperbrook. At ground floor level this comprises the main entrance, kitchen and living room and at first floor level bedrooms 2, 3 and 4.

16. The house at Plot 1 is 23m from the boundary of Piperbrook at its closest point and 52m from the chalet bungalow. The corresponding distances for the house at Plot 2 are approximately 35m and 60m. The ridge height of Plots 1 and 2 is 9m and that of the garage block between them 6.5m. The ridge height of High View is 10m.

17. The Piperbrook chalet bungalow was built in 1972 and purchased by Mr Kent in 2011. The ground floor accommodation comprises a lounge, kitchen, sun lounge, dining room, utility room, study and two bedrooms. The outlook from the lounge and sun lounge is over the rear garden towards the application land. Above the living accommodation a loft space runs the length of the building and is accessed at present by a fitted loft ladder in the inner hall. The floor of the loft is fully boarded but the area is currently used only for limited storage. There are windows in the loft, one in each gable end, and one of these overlooks the application land. This window was present at the time Mr Kent purchased Piperbrook. There is a gated drive leading to Church Street.

18. Adjoining Piperbrook to the north, and also on Church Street, is the village primary school.

19. A number of established trees and groups of trees along the eastern boundary of the application land adjoining The Oak are visible from the ground floor rooms and garden of Piperbrook. These include a large Eucalyptus tree and a row of Leylandii trees positioned in the line of sight towards the open countryside lying beyond the application land, with Castle

Hedingham in the distance to the west. The Leylandii trees were not there when Mr Kent purchased Piperbrook but were planted by Mrs Hennessey in 2012.

20. The proposed garage block for Plots 1 and 2 is also located directly in the line of sight from the rear of Piperbrook towards the west. The rear boundary of Piperbrook is approximately 2.5m and 1m above the ground level of Plots 1 and 2 respectively.

Disputed facts

21. Two disputed questions of fact are relied on by each party and can conveniently be mentioned here.

22. The first concerns an approach made by Mrs Hennessey to Mr Kent after the destruction of Treeways when she was first considering developing additional houses on the application land and her motive thereafter in planting the screen of Leylandii trees on the eastern boundary of the application land and in the direct line of sight from Piperbrook to Castle Hedingham. In 2012 Mrs Hennessey had visited Piperbrook to discuss her plans and had been shown the view from the conservatory (but not the loft space). Mr Kent had expressed concern that the view would be obscured by her proposed development and, according to Mrs Hennessey, had said that he would "rather see tree tops than roof tops". Mrs Hennessey told us that she had planted the Leylandii screen in the light of Mr Kent's comment and that it was intended as a "goodwill gesture" (as she had described it in a letter to Mr Kent on 24 August 2012). She claimed to have expected that Mr Kent would be pleased not to have to overlook a building site, and pointed out that he had not complained or said anything in the four years after the trees were planted.

23. Having considered Mrs Hennessey's oral evidence and the contemporaneous correspondence we have no hesitation in rejecting her account of her own motives for obscuring the view from Piperbrook. Her evidence in this regard was disingenuous and untruthful. A photograph taken from the first floor and included in the sales particulars at the time of Mr Kent's purchase showed a clear view over the countryside to the west that had now been deliberately blocked by the planting of the Leylandii trees. In a letter dated 16 July 2012, before the conifer screen had been planted, Mrs Hennessey acknowledged the attraction of the views, which she had shared while living at Treeways. She informed Mr Kent that if he continued to refuse his consent to her plan to build two new houses she would rebuild Treeways in the centre of the application land so that it enjoyed "a much improved view, giving me centre line views of the Castle." The same view was enjoyed at the time by Mr Kent and would have been blocked out by the relocation of Treeways as Mrs Hennessey threatened. Mrs Hennessey's position was therefore quite clear: it was her intention to use the view, which Mr Kent valued, as a negotiating lever to persuade him to consent to her proposals. Seen in that light, far from being a demonstration of goodwill, her "gesture" in planting the trees sent an entirely different message.

24. When asked by the Tribunal whether she would trim the Leylandii trees Mrs Hennessey said that it was not Mr Kent's hedge and that she was "not prepared to trim it at this time". When referred to a letter written by Mr Kent's solicitors in May 2016 complaining about the planting of the conifers Mrs Hennessey said that the neighbourly thing to have done would have been for Mr

Kent to speak to her in person. Mrs Hennessey is in no position to complain about un-neighbourly conduct and we accept Mr Kent's explanation for his not having contacted her personally after she had made her intentions clear in 2012: there would have been no point in doing so since nothing Mr Kent could have said or done would have induced her to behave in a reasonable manner.

25. The second disputed question of fact concerns Mrs Hennessey's intended use of High View. It was suggested to her in cross examination that she wished to use High View as a small care home and it was pointed out that the architect's plans included some unusual features for a private house, including a lift to the first floor and a second kitchen at the same upper level. Mrs Hennessey acknowledged that she had previously been involved in the business of running care homes but she dismissed as "village gossip" the suggestion that she had any such use in mind for High View and assured the Tribunal that she intended to occupy it as her own home.

26. We do not know what Mrs Hennessey's intentions are concerning the future use of High View. We have only her own evidence of those intentions and, having regard to her evidence concerning the conifers, we do not accept that she is a reliable witness. We therefore leave the issue of her ultimate intentions unresolved.

The Tribunal's jurisdiction

27. Section 84 of the 1925 Act gives the Tribunal power to discharge or modify restrictive covenants affecting land where certain grounds in section 84(1) are made out. The grounds relied in this application are grounds (aa) and (c).

28. So far as is material ground (aa) requires that, in a case falling within subsection (1A), the Tribunal must be satisfied that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes. Satisfaction of subsection (1A) is therefore essential to a successful claim on this ground; it provides as follows:

> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either —
>
> > (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
> >
> > (b) is contrary to the public interest;
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

29. Ground (c), on which Mr Bruce also relied, is available where the Tribunal is satisfied that the proposed modification will not injure the persons entitled to the benefit of the restriction.

30. Where the Tribunal makes an order discharging or modifying a restriction under section 84(1), it may direct the applicant to pay to any person entitled to the benefit of the restriction such sum as the Tribunal may think it just to award to make up for the loss or disadvantage suffered by that person in consequence of the discharge or modification.

The issues

31. The issues for determination in this application are the following:

(1) Whether the proposed use of the application land is reasonable.

(2) Whether the restrictions impede that use.

(3) Whether, in impeding the proposed use, the restrictions secure practical benefits of substantial value or advantage for the objector.

(4) Whether money would adequately compensate the objector for the loss of any practical benefits which are not of substantial value.

(5) Whether, if all other issues are determined in the applicant's favour, the Tribunal should exercise its discretion to modify the covenants and, if so, whether it should do so on terms as to compensation or otherwise.

Issue 1: Is the proposed use of the application land reasonable?

32. The applicant's case was that the proposed development was a reasonable use of the land because full detailed planning permission had been obtained. Mr Bruce also referred to the planning officer's report which had concluded that there would be no detrimental impact on Piperbrook.

33. On behalf of the objector Mr Higgins said that the mere fact of planning permission did not establish the reasonableness of the proposed user. The planning officer had not visited Piperbrook and had applied different criteria to her judgment, which was therefore irrelevant. In his evidence Mr Riches conflated the question of whether the proposed development was a reasonable use of the land with a consideration of whether the covenant secured practical benefits of substantial advantage.

34. We will assess the impact of the proposed development on Piperbrook later. At this stage we need say only that we are satisfied that the use of land within the village boundary for the construction of houses, when that land is already surrounded on three sides by houses and was formerly the garden of one of them, is a reasonable use of the application land.

Issue 2: Do the restrictions impede the proposed use?

35. The density restriction prevents the use of the application land for more than one house and, given the presence of High View, it plainly impedes the development of additional houses on Plots 1 and 2.

36. Whether the consent restriction impedes the proposed use of the land was the subject of some inconclusive debate.

37. It appeared not to be disputed that a covenant allowing a vendor a right of approval over the plans, design and materials of any building to be constructed on land sold is subject to an implied condition that such approval must not be unreasonably withheld. Reference was made in submissions to *89 Holland Park (Management) Limited v Hicks* [2013] EWHC 391 (Ch), but the relevant authorities are discussed in *Lewison: The Interpretation of Contracts* (5th ed) 2011 at para 10.14 and it may be that the more appropriate implication is a narrower one, namely, that the power of approval may not be used capriciously.

38. There is no dispute that the applicant asked Mr Kent for approval of her proposed plans and elevations (by letter dated 11 January 2016) and that he refused to give it (by letter dated 1 March 2016) or that the applicant proceeded to develop High View in any event. The applicant's case was that the refusal was unreasonable. This was denied by the objector and Mr Higgins suggested the issue was not a matter for determination by the Tribunal. That also seemed to be common ground as neither counsel addressed us in detail on the entitlement of Mr Kent to refuse his approval in the circumstances, or as to the consequences if his reasons for refusal were not compliant with the implied condition.

39. Mr Higgins suggested that in any event the application (in which it was said that the consent restriction does not apply in these circumstances) and Mrs Hennessey's actions in proceeding to construct High View, were both consistent with the view that the consent restriction did not impede the proposed use. It was hard to see how the applicant could argue that she could not re-build Treeways while the consent restriction remained in force when that was what she had already done. The Tribunal should conclude, Mr Higgins suggested, that the covenant did not impede the construction of High View and therefore it could not be modified under ground (aa).

40. The application itself is for the modification of both the consent and density restrictions (albeit the applicant said, provisionally, in her statement of case that the consent restriction "does not apply in the circumstances of this application"). It would be unsatisfactory to leave part of the application unresolved, even if it does overlap with a potential entitlement to damages which may only be pursued elsewhere. A decision of the Tribunal modifying a restriction would not have retrospective effect and would not deprive the objector of any cause of action he may have for a breach committed before the application commenced.

41. We are satisfied that, in principle, a covenant requiring the prior approval of plans and specifications is capable of impeding an intended use of land for building. The owner's ability to use the land as she wishes is inhibited by the need to obtain consent and, subject to the breach of

any implied condition, is prevented altogether by a refusal of consent. Where consent was withheld unreasonably (or capriciously if that be the correct test) the condition to which the restriction is subject would not be satisfied and the restriction itself would cease to apply and would not prevent the particular use for which application had been made.

42. The objector initially gave no specific reasons for his refusal of consent for the construction of High View. In his solicitor's letter of 1 March 2016 Mr Kent's main concern appeared to be to protect his view to the west and to retain the density restriction rather than to oppose the replacement of the existing house. On 7 July 2016 his solicitors suggested that he may be prepared to give consent for High View (which was then under construction) in return for the removal of the conifer screen and a satisfactory assurance that his view would not be similarly interrupted in the future. In his evidence to the Tribunal Mr Riches suggested that High View has substantially more first floor accommodation than Treeways and "a greater propensity" to overlook, and be visible from, Piperbrook. Mr Riches said High View was an imposing building not typical of properties found close to a village centre.

43. The absence, at the time of the refusal of consent, of any reasoned objection to the proposal to construct High View supports our conclusion that there were no grounds on which Mr Kent could reasonably have withheld his approval of its design or siting (assuming that to be the relevant question). Having seen the new building we are satisfied that the consent restriction did not impede its construction, and did not secure to the objector any practical benefit. It is located in substantially the same position as Treeways and although its built form is apparently greater in terms of first floor accommodation, it does not directly overlook Piperbrook and does not obstruct the view to the west. Its appearance is unobjectionable and, moreover, it is hidden in part by the existing vegetation on the application land.

44. As there are no grounds on which the objector could reasonably have refused consent, and as the applicant has proceeded without consent, the consent restriction cannot be said to have impeded the use of the application land for the construction of High View.

45. The basis of Mr Kent's objection to the proposed new houses on plots 1 and 2 is more obvious. At the very least the double garage block was liable to interrupt the attractive view to the open countryside to the west, and an objection based on the preservation of that view would be neither unreasonable nor capricious. Mr Kent would have been entitled to take the view that the presence of the conifer hedge was not necessarily a permanent obstruction to the view and that a more accommodating neighbour than Mrs Hennessey might in future be persuaded to remove or reduce it. The prospect of being able to recover the view in future would also arguably (which would be enough for this purpose) provide grounds for refusing consent to the garage block.

46. We are therefore satisfied that the consent restriction is an impediment to the proposed use, at least in relation to plots 1 and 2.

Issue 3: By impeding the proposed use, do the restrictions secure for the objector practical benefits of substantial value or advantage?

47. Although strictly they may be separate questions, it is convenient to consider the existence and the substantiality of any advantage conferred on the objector by the restriction together, but to leave the issue of the adequacy of money as compensation until the next stage of the assessment. We were reminded by Mr Bruce that in this context the word "substantial" has been said to mean "considerable, solid, big" (see *Shephard v Turner* [2006] EWCA Civ 8, *per* Carnwath LJ at paragraphs 19 to 23).

48. Mr Kent's case, supported by Mr Riches, was that the restrictions secure him practical benefits of substantial value by protecting the view from Piperbrook, preventing overlooking from the new houses on Plots 1 and 2, the preservation of peace and quiet and the continued absence of light pollution. Piperbrook enjoyed a location at the edge of the village with open land beyond. Its views and setting were protected by the restrictions with the result that Piperbrook enjoyed tranquillity and a feeling of spaciousness which would be lost if the application land was developed.

49. The applicant's case, supported by the evidence of Mr Zeid, was that the proposed development would not interfere with the outlook from Piperbrook due to the presence of the close boarded fence around its garden and the implementation of an approved landscaping scheme as a condition of the planning permission. Piperbrook is a long way from the proposed development and has The Oak, an unsightly commercial builder's yard, between its boundary fence and the application land. The house known as Woodcote, located to the south west of Piperbrook, is about the same distance as Plots 1 and 2, but it had caused no problems to Mr Kent in terms of overlooking and had not deterred him from purchasing Piperbrook.

50. Nor, in the applicant's view, did the covenant secure any practical benefits of significance in terms of light, privacy or quiet. Plots 1 and 2 and the garage block will be on lower ground than Piperbrook and only their roofs and first floors would be visible from Piperbrook at ground level. Although Mr Zeid conceded there would be some increase in light and traffic noise from the proposed development he did not think this would be material given the degree of separation of the two properties and the presence between them of a commercial yard and workshop.

51. Mr Kent told the Tribunal that he purchased Piperbrook in 2011 to move out of London and to enjoy the peace and quiet of a rural location. The covenant was a key factor in his decision to buy since it protected the unobstructed views towards Castle Hedingham and ensured that his privacy would be maintained. Mr Kent valued the absence of development to the west as it meant there was a minimum of light interference with his hobby of star gazing. The development would generate additional noise and traffic in what was currently a peaceful rural area and Piperbrook would be overlooked by Plots 1 and 2. He said that the commercial yard at The Oak was a very small scale operation which did not affect his enjoyment of Piperbrook. That part of The Oak which lay between his garden and the application land was only a driveway and it did not interfere with the view. Nor was his enjoyment of the property adversely affected by the presence of a small primary school next door.

52. Mr Kent said the proposed development would spoil the view from the first floor of Piperbrook which he intended to develop as his master bedroom. The proposed loft conversion would increase the usable floor space of Piperbrook by about 25% and turn the property into a four/five bedroom house and Mr Kent said he had been planning it since he bought Piperbrook. It would be permitted development for which no planning permission would be required and he would undertake the work himself at a cost which he estimated at £40,000. He had delayed the start of the work because the legal costs he had incurred in objecting to the application meant he currently had insufficient funds.

53. Mr Riches also considered that the covenant conferred practical benefits of substantial advantage to Mr Kent. The land beyond the application land to the west was open countryside and outside the settlement boundary, so only the development of the application land could threaten the existing view. High View and especially the proposed houses on Plots 1 and 2 would block the view. Although the new houses on Plots 1 and 2 would be 2 to 3m lower than High View their roofs and upper parts would be clearly visible from Piperbrook at ground level and they would have a "greater propensity" to overlook Piperbrook than Treeways had had. The visual impact of High View would be less at ground floor level but much greater at first floor level. The first floor windows of the new houses would overlook the garden and first floor window of Piperbrook.

54. Mr Riches did not place great weight on noise or light issues. The proposal might lead to a marginal increase in noise but Piperbrook had some existing noise issues from The Oak and the neighbouring school. Traffic movement would increase along the driveway to the application land but the impact of this was likely to be marginal given Piperbrook was already well screened from the access. The impact of increased light from the proposed development was "difficult to assess" but there were no street lights in the village and more domestic light could be significant for people such as Mr Kent who wanted a rural retreat and whose hobby of stargazing might be directly affected.

55. In closing submissions Mr Bruce submitted that the preservation of the view from Piperbrook across the application land to the west was Mr Kent's main concern and that the real issue was the location of the upper storey of the garage block. The view was of little significance at ground floor level and comprised only a narrow arc through an existing tree screen. It would be unaffected by the proposed development and when the local planning authority had considered the possible impact of the proposed development on the amenity of its neighbours it decided it would cause no problems. As for the view from the upper floor, Mr Kent had taken no steps towards converting the loft space during the six years he had lived at Piperbrook and did not presently have the funds to proceed with the work. Mr Bruce therefore suggested that it was inappropriate for the Tribunal to take account of improvements that had not taken place and that the effect of the proposed development should be considered by reference to Piperbrook as it is presently configured, i.e. as a single storey bungalow and not a two storey house.

56. The photograph taken from the first floor window of Piperbrook at the time Mr Kent purchased the property in 2011 shows an unobstructed view, albeit of limited arc, of the countryside to the west. The extent of the view is restricted and framed by existing trees on the application land. Those trees have grown since that time but the equivalent photograph taken

recently by Mr Riches shows that the remaining arc of view has now been obstructed by the row of Leylandii trees planted in 2012. We are satisfied that those trees were planted either to punish Mr Kent for his lack of cooperation or to weaken the argument available to him that, by protecting the view, the restrictions secured a practical benefit to him. In either case that was an unattractive strategy, made even less appealing by Mrs Hennessey's blunt refusal at the hearing to consider reducing the height of the trees whatever the outcome of the application.

57. On behalf of Mr Kent, Mr Higgins invited the Tribunal to assess the benefit of the covenants on the assumption that Piperbrook still enjoyed clear views over the countryside to the west despite the fact that those views had been deliberately blocked by the planting of the Leylandii trees. He criticised the applicant's conduct as cynical and self-serving and said that it should not be accepted as grounds for finding that the covenant secured no substantial practical benefits. In any event, the *sense* of privacy was established not just by the absence of overlooking; it also depended upon the absence of other houses and occupants nearby, as was recognised by the Tribunal in *Re Diggins' Application* [2001] 2 EGLR 163 at paragraph 75.

58. In support of his argument Mr Higgins referred to *Re Fairclough Homes Ltd's Application* (2004) LP/30/2001, and to the approach which the Tribunal would usually take where it was said a covenant did not secure practical benefits because far worse things than the proposed user could be done without breaching the restrictions. The Tribunal (George Bartlett QC, President) said that if other development having adverse effects could be carried out without breaching the covenant, the practical benefits secured by the covenant might not be of substantial value or advantage, but whether they were or not was likely to depend on the degree of probability of such other development being carried out and how bad, in comparison with the applicant's scheme, the effects of that development would be.

59. We had difficulty in understanding the assistance Mr Higgins hoped to derive from the *Fairclough Homes* approach. In this case there is no need to assess the likelihood of the objector being disadvantaged by some theoretical course of action which the applicant would be entitled to take; Mrs Hennessey has already planted the Leylandii trees and they now obscure the view from Piperbrook. The Tribunal cannot disregard the presence of the trees, or any other of the facts on the ground, when considering whether the density restriction secures practical benefits of substantial value or advantage. At most the Tribunal might consider the possibility that a more sympathetic owner of the application land might, in future, be prepared to remove the trees, but we cannot overlook that the benefit of a view is by its nature liable to be interfered with by a neighbour's perfectly lawful use of her own land. Whether we should take Mrs Hennessey's conduct into consideration when deciding whether or not to exercise our discretion in her favour (which was Mr Higgins' alternative submission) is something we will refer to later.

60. Mr. Higgins also submitted that Mrs Hennessey's true purpose in building the "monumental structure" at High View was to open a small care home. To modify the restriction to allow the construction of High View, he suggested, would be the thin end of a wedge leading to a more intensive use (although nothing was said by the objector about the consequences of such a use upon his enjoyment of Piperbrook).

61. The restriction prevents the construction of more than one "dwellinghouse" on the application land. Any restriction on the use of a building constructed on the land is only implicit and we received no substantive submissions on whether the restriction on building would prevent the subsequent use of High View as a residential care home. There is certainly room for argument on that question (see *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365), but as that argument was not developed before us we do not accept Mr Higgins' invitation to speculate about future uses when considering whether the covenant secures practical benefits for Mr Kent.

62. In our opinion the proposed houses at Plots 1 and 2 would not materially obstruct the limited arc of view from the first floor at Piperbrook. The garage block, although not as high as the houses, would be located in the direct line of view and would, at least to some extent, obstruct it were the Leylandii trees not already doing so. The view of the countryside from the first floor window before the Leylandii were planted was not available at ground floor level, as is clear from the 2011 photographs and from our site inspection. In our judgment the beneficial view from Piperbrook is, and has always been, limited to the one first floor window facing west which, at present, is in the loft and is little used.

63. We have no reason to doubt that it is Mr Kent's intention to convert the loft into habitable accommodation with a master bedroom to the rear overlooking the application land. The fact that the intention has not yet been realised or that it depends upon the availability of funding do not diminish the benefit which the restriction secures in preserving the view which would be enjoyed from such a room if it is ever built, but they are material to an assessment of the substantiality of that benefit. The view that would be lost would be that from a single bedroom window and, in our judgment, is of less significance than if a similar view was enjoyed from the sun lounge or the garden. It is also, of course, a view which is currently obscured.

64. In our opinion by impeding the reasonable user the density restriction secures the practical benefit to the objector of protecting a view of distant countryside from one window in the loft (which may potentially become a bedroom); but we do not consider that benefit to be substantial.

65. We turn next to the suggested invasion of the objector's privacy and outlook as a result of the garden and the western elevation of Piperbrook being directly overlooked.

66. The change in outlook and the extent of overlooking by the proposed houses on Plots 1 and 2 are illustrated by two drawings prepared for the applicant showing a three dimensional representation of the houses first as they would appear today, and then as they would look in two years time after the growth of screening trees and shrubs (including the existing Leylandii trees). The new houses would be visible from the ground and first floors of Piperbrook, but the degree of overlooking is limited by a number of factors: (i) the proposed houses would be at a lower ground level than Piperbrook; (ii) the existing fences between Piperbrook and The Oak and between The Oak and the application land would screen the ground floor windows of the proposed houses; (iii) the existing trees on the application land and The Oak form a partial visual barrier that is likely to become more effective over time; (iv) Piperbrook and the proposed houses would be a long way apart (more than 50 metres); and (v) the house at Plot 2 would not look directly towards Piperbrook, being angled more towards The Oak. Although we consider the preservation of

outlook and the prevention of overlooking to be practical benefits secured by the density restriction we do not think they are substantial.

67. We agree with Mr Riches that any increase in noise from the addition of two new private houses is likely to be marginal, and we take the same view of the risk of "light pollution" i.e. the additional light created by two new houses. We do not consider such practical benefits to be substantial.

68. We therefore find that, considered individually and collectively, although the density restriction secures practical benefits to the objector those benefits are not of substantial value or advantage. Nor is there anything in the restrictions that gives special weight to the short term disturbance that is inherent in any building project.

Issue 4: Would money provide adequate compensation for the loss of the practical advantages secured by the restrictions?

69. Although we have not assessed their value to be substantial, the benefits secured by the restrictions are not negligible. In our judgment the presence of additional houses to the west will reduce the attraction of Piperbrook, limiting the sense of privacy and relative seclusion which the current comparatively open aspect provides. The additional use of the driveway will have the same effect. We are satisfied, however, that these practical benefits are not substantial and that their loss can be adequately compensated in money.

70. Mr Riches considered that the value of Piperbrook would be reduced by 10% if the application is allowed and the proposed development proceeds. Mr Zeid believed there would be no effect on value, but Mr Bruce submitted that the loss of any practical benefits was limited at most to the diminution in value attributable to the loss of a view. If, despite Mr Zeid's evidence, the Tribunal was minded to attribute value to such a loss Mr Bruce said it should not exceed 1% of the value of Piperbrook, i.e. £4,000 according to Mr Zeid's valuation. That was consistent with the level of compensation awarded in similar cases involving the loss of a view; e.g. *Re Pottier's Application* (2.5%); *Re Rae's Application* [2016] UKUT 0552 (LC) (awards of £5,000 and £2,000, being less than 2% of the value of the objectors' properties); and *Re Perkins' Application* [2012] UKUT 300 (LC) (£2,000).

71. We are satisfied there would be a diminution in the value of Piperbrook and we do not accept Mr Zeid's "before and after" valuation which seems to us to be nothing more than an assertion of no value change. Mr Riches accepted in cross-examination that his figure of 10% reflected the fear of the unknown and that the effect on value might be less once the development was completed. In our judgment the value of Piperbrook would be diminished by 5% due to the loss of the practical benefits.

72. The experts did not agree the present value of Piperbrook because they adopted different approaches to (i) the valuation of the loft space and its potential for conversion to habitable accommodation; and (ii) the measurement of the property. Both experts based their valuations

upon rough estimates of the cost of converting the loft and we do not place confidence in either approach.

73. Mr. Riches valued the existing accommodation, which he took to be 1,413 sq ft, at £285 per sq ft to give £402,770. He then valued the additional floor space to be created by the loft conversion (483 sq ft) at the same rate to give £137,734 and deducted £37,734 for costs to give an uplift of £100,000. He said that as not all prospective purchasers would be interested in such a conversion this uplift should be reduced by 50% to £50,000. This gave a (rounded) open market value for Piperbrook of £450,000.

74. Mr Zeid conceded that there were potential buyers who would drop out once they knew about the proposed development, but nevertheless considered that the value, which he put at £400,000, would be unaffected.

75. The range of value was therefore £400,000 (Mr. Zeid) to £450,000 (Mr Riches) but the comparable evidence was thin and not clearly analysed. Doing the best we can with the available evidence we value Piperbrook at £420,000. 5% of this figure is £21,000.

76. It follows from our conclusion on this and the previous issue that the application under ground (c) must be dismissed as we are satisfied that the objector will be injured, to an extent which we quantify in the sum of £21,000, by the modification of the restrictions.

Issue 5: Should the Tribunal exercise its discretion to modify the restrictions and, if so, on what terms, if any?

77. The Tribunal has the power to modify the restrictions upon being satisfied that one of the statutory grounds has been established. The Tribunal therefore has discretion whether to modify a restriction even if it is satisfied that a ground of application has been established. Its discretion also includes power to add such further provisions restricting the use or the building on the application land as appear to it to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicant (section 84 (1C)). In this case the objector submits that the discretion should not be exercised in favour of the applicant because of her conduct in deliberately obstructing his view of distant countryside by planting the screen of Leylandii trees.

78. Mr Higgins relied upon *Re George Wimpey Bristol Limited's Application* [2011] UKUT 91 (LC) at paragraph 35 where the Tribunal (Mr N J Rose FRICS) said it was unlikely, had ground (aa) been made out, that he would have exercised his discretion to modify the covenant because the applicant had adopted a deliberate strategy to force through the development in knowing breach of the restriction in order to change the character and appearance of the site and thereby persuade the Tribunal to allow it to continue with the development. This is not such a case.

79. In the present application Mrs Hennessey did not flout any legal obligation by planting the screen of trees that she knew would obstruct Mr Kent's view of the countryside beyond. It was an unneighbourly act but the objector has no right to a view and she was entitled to do it. Although

Mrs Hennessey proceeded with the construction of High View without the prior consent of Mr Kent, and therefore arguably in breach of the consent restriction, we have explained why we consider there were no grounds on which he could reasonably object (or at least none which he has yet identified). On balance we are not persuaded that Mrs Hennessey's actions in this matter are such that, being satisfied ground (aa) is made out, we should not exercise our discretion to modify the covenants.

80. We appreciate the objector's concerns regarding the possible use of High View as a residential care home. In the light of Mrs Hennessey's evidence that she has no intention to use the house except as a single private residence for herself we have made our assessment of the impact of the proposed development on the assumption that no part of the application land will be in commercial use. Nevertheless, we have already explained our doubts about the truthfulness of Mrs Hennessey's evidence, which call into question her assurances about the future use of High View. The use of High View as a care home would have the potential for a much greater impact on the amenity of Piperbrook, which we have not sought to quantify or value. In those circumstances we consider it both reasonable and necessary that the future use of High View should be restricted to use as a single private residence, and that its use as a residential care home should be expressly prohibited by the introduction of a further provision under the power conferred by section 84 (1C). If this provision is not accepted by the applicant the application will be refused.

Determination

81. For these reasons we allow the application and the following order shall be made:

The restrictions in clause 3 of the conveyance dated 3 November 1971 shall be modified under section 84(1)(aa), Law of Property Act 1925 by the insertion of the following words at the end of that clause:

> "PROVIDED that the development permitted under planning permission reference 15/00914/FUL granted by Braintree District Council on 23 December 2015 may be implemented in accordance with the terms, details and approved drawings referred to therein AND PROVIDED FURTHER that no dwellinghouse constructed on the remaining part of the said land under that planning permission shall be used as a residential care home or otherwise than as a single private residence. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached to such permission.

82. An order modifying the restrictions shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have:

(i) signified her acceptance of the proposed modification to the restrictions in clause 3 of the conveyance dated 3 November 1971; and

(ii) paid the sum of £21,000 to the objector.

83. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

23 August 2017

Addendum on costs

84. Mrs Hennessey says her application was successful. She accepts that absent unreasonable conduct by Mr Kent she is not entitled to recover her costs from him (see paragraph 12.5(3) of the Tribunal's Practice Directions, 2010). Mrs Hennessey does not assert that Mr Kent's conduct was such as to justify an order that he should pay any part of her costs.

85. Mr Kent says the applicant failed on ground (a) (which she withdrew at the hearing) and ground (c). He says Mrs Hennessey "was possibly successful" under ground (aa) although she withdrew her application for the discharge of the restrictive covenant at a late stage. Mr Kent was awarded £21,000 in compensation which he says is not negligible and is substantially more than the sum of £500 previously offered by the applicant. Mr Kent seeks full recovery of his costs which he says is supported by the Tribunal's criticism of Mrs Hennessey's conduct and evidence.

86. It is not necessary for an applicant to succeed on each of the pleaded grounds and this application was successful under ground (aa). If an additional ground has added significantly to the costs incurred, by prolonging the hearing or requiring consideration of much extra evidence that would be a relevant consideration, but this is not such a case.

87. The parties will usually be liable for their own costs where an application has succeeded. In this case, however, the objector invites us to exercise our discretion to award him his costs because of what he describes as the applicant's unreasonable conduct. That conduct relates mainly to the planting by Mrs Hennessey of Leylandii trees in the objector's line of view. We considered this to be an unattractive strategy and an unneighbourly act by Mrs Hennessey but she did not flout any legal obligation and she was entitled to plant the trees where she did. It did not constitute unreasonable conduct.

88. We do not consider the applicant's conduct to be such as to justify the exercise of our discretion in favour of Mr Kent. We therefore make no award as to costs.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)

29 September 2017