IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 411 (LC)
Case No: LP/46/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – OBSOLESCENCE – whether development on part of burdened land rendering covenant obsolete – whether original purpose of covenant still capable of being achieved - whether practical benefit of substantial value or advantage secured – no expert valuation evidence relied on - section 84(1)(a), (aa) and (c), Law of Property Act 1925 – application allowed

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

BETWEEN:

David Adams and Brenda Adams **Applicants**

and

(1) Mrs Mihaela Sherwood and Mr Kevin Sherwood
(2) Mr Michael O'Neill and Mrs Mary O'Neill
(3) Mr Kevin Wilkinson and Mrs Miranda Wilkinson **Objectors**
(4) Mr NA Brammer and Mrs MM Brammer

Re: Fermyn Wood,
Kings Croft,
Allestree,
Derby,
DE22 2FP

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

Derby Justice Centre
20 November 2018

Paul Letman, instructed by Actons, Solicitors, for the applicants
Mrs Mihaela Sherwood and Mr Michael O'Neill for themselves and fellow objectors

The following cases are referred to in this decision:

Re Truman Hanbury & Buxton & Co Ltd's Application [1956] 1 QB 261

The Alexander Devine Children's Cancer Trust v Millgate Developments Limited [2018] EWCA Civ 2679

Introduction

1. The northern suburbs of the City of Derby are the product of twentieth century urban expansion. By 1970 the former mill village of Darley Abbey and the small rural settlement of Allestree had merged into the expanding conurbation and become densely populated. In more recent years an intensification of development has seen much infilling of back-land and sacrificing of many generous gardens to satisfy the demands of the City's growing population.

2. A rare exception to this pattern of intensification of land use is provided by a large parcel of land in Allestree situated at the end of a narrow lane off the road now known as Kings Croft, where three substantial houses known as Merrieworth, Cranford, and Fermyn Wood stand on about two and three-quarter acres. The land once formed part of a large field belonging to Colonel Lionel Gisborne adjoining the Allestree village recreation ground. It was conveyed by Colonel Gisborne to a developer, Mr Corney, in 1928. The three houses which Mr Corney built in the 1920s and 1930s have been greatly enlarged since then, but it has not been possible for additional houses to be constructed in their substantial gardens because the 1928 conveyance by Colonel Gisbourne included a covenant prohibiting more than three houses on the land.

3. The land sold to Mr Corney in 1928 on which the three houses now stand was shown on the plan to the 1928 conveyance as part of a larger field numbered 110. At that time field 110 was approximately triangular in shape and extended to about 10 or 12 acres. Its southern boundary ran from west to east and was marked by a hedge or fence alongside which ran a footpath or track. At the eastern end of the field the track met what is now Kings Croft, then known as New Road, which runs north west and formed the northern boundary of the field. The land included in the 1928 conveyance was at the western end of field 110.

4. The 1928 conveyance plan shows that six houses had by that time been built on the other side of field 110, with frontages to Kings Croft. One of these belonged to a Mrs Milner who, in 1929, acquired an additional parcel of land running in a widening strip across field 110 to the boundary of Mr Corney's recently acquired land. The 1929 conveyance of this strip of land to Mrs Milner also included a covenant restricting its development. In 1932 Mrs Milner's land was divided and an area of approximately 0.4 acres closest to the boundary was conveyed to Mr Corney to be incorporated into the garden of the house known as Fermyn Wood which he had by then constructed. As a result, the garden of Fermyn Wood was subject to two separate sets of covenants restricting development.

5. After 1928 more houses were built along Kings Croft on the eastern side of field 110. The land to the south of field 110 was also developed to create Devonshire Avenue, with houses and gardens backing on to the field. By 1955 the land on two of the three sides of the field was more or less fully developed, but the land in the middle of the triangle and on the western side remained relatively open comprising the gardens of the Kings Croft properties, the garden of Fermyn Wood itself and the recreation ground beyond the boundary.

6. The house at 20 Devonshire Avenue was demolished in 2013 to provide access to the land in the centre of the triangle which until then had remained undeveloped except as the large gardens of houses in Kings Croft; some of those gardens were sold to enable a block of two acres to be assembled and developed. This back-land development has created a *cul de sac* known as Park Wood Close comprising 13 new detached houses completed in 2015; five of these new houses (Nos. 1, 3, 5, 7 and 9) have gardens backing on to the garden of Fermyn Wood. Parts of Park Wood Close, including No.9, are built on the land sold to Mrs Milner in 1929 which remains subject to the same covenants against development as continue to bind the part of the garden of Fermyn Wood acquired by Mr Corney in 1932.

7. The applicants, Mr and Mrs Adams, are the current owners of Fermyn Wood. In 2012 they obtained planning permission for the construction of three new detached houses at the southern end of their garden. Two of the proposed houses would be built on land burdened by the covenant in the 1928 conveyance to Mr Corney and would breach the maximum number of houses (three) permitted by that covenant. The third house would be on that part of the garden of Fermyn Wood burdened by the covenant in the 1929 conveyance of part of field 110 to Mrs Milner and would breach that covenant.

8. Mr and Mrs Adams have applied to the Tribunal under section 84(1) of the Law of Property Act 1925 ("the 1925 Act") for the discharge of the 1928 and 1929 covenants, or their modification to enable the planning permission to be fully implemented. We understand that the local planning authority has accepted that a sufficient start has already been made on the development to prevent the permission from expiring, although no works are visible on site.

9. The objectors are owners of houses in Park Wood Close which directly adjoin the garden of Fermyn Wood. They are Mr and Mrs Sherwood (No.3), Mr and Mrs O'Neill (No.5), Mr and Mrs Wilkinson (No.7), and Mr and Mrs Brammer (No.9). Other owners of homes in Park Wood Close filed notices of objection, as did one owner of a house in Devonshire Avenue and another in Kings Croft, but these objections were all withdrawn before the hearing of the application.

10. At the hearing the applicants were represented by Mr Paul Letman of counsel and relied on evidence given by Mr Adams himself and expert evidence given by Mr Jonathan Phipps BA, MSc, RIBA, MRTPI, a director of Lathams. Of the respondents, only Mrs Sherwood and Mr O'Neill were able to attend the hearing, and both gave evidence. On the following day we conducted a site visit of the application land, the objectors' houses and the surrounding area.

The covenants in more detail

11. The conveyance of part of field 110 by Colonel Gisborne to Mr Corney on 16 May 1928 contained a series of covenants in the Third Schedule including, at paragraph 3, the following restriction by which the purchaser, for himself and his successors, covenanted (so far as remains material):

> *'Not to erect more than three houses on the said property which houses shall be detached….'*

12. The first of the three houses permitted by the covenant (Cranford) is shown on a plan prepared in 1937, and the remaining houses, including Fermyn Wood, first appear on a 1938 Ordnance Survey plan. Two of the new houses for which planning permission has been obtained by Mr and Mrs Adams are on the land burdened by this restriction and cannot be built without breaching it. It is agreed that each of the objectors, as successors in title to the original covenantee, has the benefit of the 1928 covenant.

13. The second covenant in issue was imposed by paragraph 2 of the First Schedule to a conveyance dated September 1929 by which Captain William Gisborne sold land extending to 2,820 square yards (approximately 0.6 acre) for £60 to Mrs Julia Milner, the owner of what is now 15 Kings Croft. The land conveyed had boundaries on five sides, one of which adjoined what was later to become the garden of Fermyn Wood, while a shorter southern boundary adjoined the footpath or track running east to west along the southern edge of field 110.

14. The covenants in the First Schedule to the 1929 conveyance were given by the purchaser for herself and those deriving title under her, and so far as material provided as follows:

> *'BUILDINGS – No house or other buildings should be erected on the sd piece of land except those for use in connection with the adjoining house of the Purchaser unless the Southern boundary of the sd piece of land should have a frontage to a public road or street.'*

As can be seen, the covenant does not prohibit building absolutely. A house or other building is permitted if it is for use in connection with the house in Kings Croft which formerly belonged to Mrs Milner, or if a public street is created along the southern boundary of the parcel of land conveyed to her in 1929.

15. In practice neither of the contingencies mentioned in the 1929 covenant is likely now to be satisfied. On 23 May 1932 Mrs Milner sold part of the land, measuring 2,024 square yards (approximately 0.4 acres) to Mr Corney who proceeded to incorporate it within the gardens of Fermyn Wood. That land is the only part of the land conveyed in 1929 which has not yet been developed; it cannot now be developed for a use connected to Mrs Milner's former property because it is has been separated from it by Nos. 9, 11 and 13 Park Wood Close (which were built in 2013 on part of the land conveyed in 1929). Nor is there a public street immediately to the south of the 1929 land from which access satisfying the restriction could be obtained, since the short southern boundary of the land now borders the rear gardens of houses in Devonshire Avenue. Unless some significant change occurs the effect of the 1929 covenant is therefore that no house or building may be erected on the eastern section of the garden of Fermyn Wood.

16. It is common ground that the objectors other than Mr and Mrs Brammer have the benefit of the 1929 covenant. Mr and Mrs Brammer, as owners of 9 Park Wood Close, are subject to the burden of that covenant (their house being built on part of the land conveyed in 1929) and are not in a position to object to the development of the remainder of that land in breach of the 1929 covenant (on which the closest of the three new houses is proposed to be built). That fact does

not restrict their right to object to the construction of the other two new houses which would be in breach of the 1928 covenant.

The application land and the surrounding area

17. Allestree is an established residential suburb 3.5km north of Derby City Centre to the west of the A6. Kings Croft connects with the A6 at a roundabout to the south and runs north westerly until merging into Robin Croft Road just north of the private access road to Fermyn Wood, Cranfield and Merrieworth which adjoins the south-eastern boundary of Allestree Cricket Club.

18. The application land is identified as the whole of Mr and Mrs Adams' freehold title under Title No. DY29494 which includes that part of the land conveyed in 1928 which became Fermyn Wood; the private access road; that part of the land purchased by Mrs Milner in 1929 that she sold to Mr Corney in 1932; and a small triangular piece of land lying between the 1928 land and the land purchased in 1932 for which no ownership history was provided by the applicants.

19. Planning permission for the construction of three detached dwelling houses on the application land was granted on 31 August 2012. The houses would be built on the southern half of the rear garden of Fermyn Wood. Vehicular access would be from a new 4.5m wide access drive to the west of the existing house. The front of each new house would face north with rear gardens to the south. Units 1 (the furthest to the west) and 3 (the furthest to the east and therefore nearest to the objectors' houses) would have separate double garage blocks while Unit 2, the central and largest house, would have an integral double garage. All three houses are two-storey, pitched roof, four-bedroom properties with a chimney but each is of different design, size and layout. The houses have different ridge heights above ground level: 7.4m, 8.4m and 7.5m for Units 1 to 3 respectively. Units 1 and 2 occupy broadly rectangular plots whereas Unit 3 occupies a triangular plot with the hypotenuse forming the boundary with the rear gardens of the houses along the western side of Park Wood Close.

20. It was acknowledged by the applicants at the hearing that the approved plans contained several mistakes, particularly concerning the labelling of the elevations. For instance, what was shown as the north elevation of Unit 3 was in fact the east elevation while the west elevation (labelled south) showed a non-existent attached garage but not an external door to the utility room. However, it was established that none of the units' eastern elevations, which would face the objectors' properties most directly, had any windows at first floor level. On the ground floor eastern elevations Unit 1 had a utility room door, Unit 2 had no doors or windows and Unit 3 had a dining room window and a hall window.

21. There are numerous trees on the application land including along the boundary of Fermyn Wood with the objectors' properties. Seven individual trees and a small group of Lombardy Poplars would be cut down if the development proceeds. The Poplars and three other trees (two Weeping Willows and a Wild Cherry) are located at or near the boundary with the objectors. This boundary is formed from an unkempt mixed hedge and individual trees together with a chain link fence. In parts, for instance behind 7 Park Wood Close, the hedge has been removed.

22. The design and access statement submitted with the planning application stated that it was not proposed to introduce additional landscaping "[g]iven the extensive foliage on the periphery of the site", but condition 9 of the 2012 planning permission states that a landscaping scheme as shown on approved Plan No. HA/08 shall be carried out within 12 months of the completion of the works. That landscaping scheme shows a new 1.8m high close boarded fence and a planting scheme between the southern boundary of the house at Fermyn Wood and the proposed development, together with a strengthening of the existing hedge screen to the west along the boundary with Cranfield.

23. Condition 4 of the planning permission required approval of detailed plans showing the design, location and materials to be used on means of enclosure, including boundary fences. Mr Adams said that approval for the boundary treatment was given on 1 May 2015 in accordance with "the submitted drawing" and an email from Mr Brian Reid, the applicants' architect, dated 30 April 2015. This email was not submitted in evidence, but the boundary treatment plan, undated and unnumbered, shows the hedge to the south of the site (along the boundary of properties in Devonshire Avenue) being strengthened but the existing Leylandii and "native species" hedge along the boundary with Park Wood Close being retained, apparently without strengthening. Reference is made, without comment, to the "existing Privet hedge" behind 7 and 9 Park Wood Close. The boundary treatment plan also shows the 1.8m close boarded fence between the reconfigured rear garden of the house at Fermyn Wood and the new access road. It is not clear from the plan whether this is intended to continue southwards along the boundary with the houses in Park Wood Close and then westwards along the boundary with the houses in Devonshire Avenue. But in his opening submissions Mr Letman said that all boundary foliage would be retained and a 2m high close boarded fence would be constructed. Mr Adams said the same thing in examination in chief and Mr Phipps referred to the construction of a 1.8m high fence along the boundary with Park Wood Close during cross-examination.

24. The application land and the surrounding area are not flat. A contour map shows the junction of Park Wood Close with Devonshire Avenue at an elevation of approximately 92.5m and the upper end of the cul-de-sac at approximately 97.5m; a rise of 5m over a distance of some 115m. The land slopes more steeply from east to west, and the plot of 3 Park Wood Close (Mrs Sherwood's property) rises some 5m between the front and back boundaries, a distance of about 40m. Thus the application land is located well above the ground floor level of the objectors' properties; with the largest difference being at the southern end of Park Wood Close.

25. Unit 1 would be constructed entirely on land burdened by the 1928 restrictive covenant. Unit 2 would be mainly on that land but the eastern half of the integral garage appears to be situated on land burdened by the 1929 restrictive covenant. Unit 3 would be entirely on land burdened by the 1929 restrictive covenant.

The statutory grounds of application

26. 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. In this case the applicants rely on grounds (a), (aa) and (c). Although the application formally sought the discharge

of both the 1928 and the 1929 restrictions in their entirety, with modification as an alternative, we were invited at the hearing to discharge the restrictions to the extent that we were satisfied that ground (a) had successfully been made out, but otherwise to consider modification under grounds (aa) or (c) to the extent necessary to enable the applicants' planning permission to be implemented in full.

27. Ground (a) applies where the Tribunal is satisfied "that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete".

28. So far as is material, ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction must impede some reasonable use of the land for public or private purposes. The circumstances in subsection (1A) which must be demonstrated are 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. The Tribunal is required, when considering whether sub-section (1A) is satisfied and a restriction ought to be discharged or modified, to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area (section 84(1B)).

30. To succeed under ground (c), the applicants must demonstrate that the proposed discharge or modification of the restrictions would not cause injury to those entitled to the benefit of them.

31. We will begin by considering the case for discharge of the restrictions under ground (a).

Ground (a) - obsolescence

32. The primary focus of Mr Letman's argument on obsolescence was on the covenant in the 1929 conveyance of the land referred to during the hearing as "the blue land", the greater part of which now forms the eastern side of the garden of Fermyn Wood, with the remainder having been developed as part of Park Wood Close. Unit 3 is proposed to be constructed entirely on the blue land, where it would immediately adjoin the boundary with the objectors' homes in Park Wood Close and would be closer to them than Units 1 and 2. This plot was not part of the land conveyed in 1928 and is not subject to the covenant in the 1928 conveyance restricting the number of houses which could be built on the larger parcel to three only. It follows, therefore,

that if the 1929 covenant is found to have become obsolete, within the meaning of ground (a) of section 84(1), there will be nothing preventing the applicants from building Unit 3.

33. The leading authority on what is meant by "obsolete" in ground (a) remains the decision of the Court of Appeal in *Re Truman Hanbury & Buxton & Co Ltd's Application* [1956] 1 QB 261. That decision concerned a residential estate sold subject to covenants prohibiting the use of any of the land as licensed premises. A number of houses built on the estate had been converted into shops and it was contended on behalf of the applicant, a brewery which wished to open a pub on the estate, that the loss of the wholly residential character of the estate as a result of the erection of the shops had rendered the covenant obsolete within section 84(1)(a) so that it ought to be discharged or modified. The Lands Tribunal held that, although there had been a change in the character of the estate as a result of the opening of the shops, the change had not rendered the covenant against licensed premises obsolete, and the Tribunal considered that the objectors would be seriously injured if the covenant was discharged.

34. The brewery appealed to the Court of Appeal, and argued that, for a restriction to be obsolete it was not necessary for an applicant to prove that it was completely useless, and that a covenant could be discharged under ground (a) even if it still had some value to some of those entitled to benefit from it. If obsolete meant "of no value" ground (a) would overlap entirely with ground (c). The objectors argued that "obsolete" meant wholly or entirely out of date. It was against that background that Romer LJ explained the sense in which the word "obsolete" was used in ground (a), at pages 272-3; having said that the covenants had been imposed "for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them", he went on:

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in section 84 (1) (a).
>
> If the arbitrator did, in fact, ask himself whether the covenant had become absolutely valueless, it may be that he was applying rather too strict a test, but I doubt whether this criticism which was made is not in reality directed rather to the form of the matter than to the substance, for, if the original object of the covenant can no longer be achieved, it is difficult to see how the covenant can be of value to anyone."

Having reminded himself that the Lands Tribunal had concluded that the discharge or modification of the covenant to permit on-licensed premises on the land would seriously injure the objectors, Romer LJ added this:

> "If serious injury would result to the opponents and others if the covenant was discharged … I cannot see how, on any view, the covenant can be described as obsolete, because the object of the covenant is still capable of fulfilment, and the covenant still affords a real protection to those who are entitled to enforce it."

35. In determining whether the 1929 covenant can be discharged under ground (a) it is therefore necessary to consider a number of connected matters. It is first necessary to identify the purpose or object of the covenant, which may be stated in the instrument imposing the restriction or may be inferred from the nature of the restriction or from the known circumstances. Next it is necessary to ask whether the character of the property or the neighbourhood has changed since the covenant was imposed. Thirdly, whether the restriction has become obsolete by reason of those changes, in the sense that the object for which the restriction was imposed can no longer be achieved. Fourthly, and finally, whether some material circumstance other than a change in the character of the property or the neighbourhood has had that effect.

The purpose of the restrictions

36. As we have already described, the blue land comprised in the 1929 conveyance ran diagonally across field 110, in a long widening strip between the boundary of 15 Kings Croft (then owned by Mrs Milner) at one end and the boundary of the land conveyed in 1928 on which Fermyn Wood was later built by Mr Corney at the other. At the southern end the narrowest of the five sides of the land adjoined a track or footpath running west to east which now marks the northern boundary of the gardens of houses in Devonshire Avenue. The land having the benefit of the covenant comprised so much of the remainder of field 110 as was still in the ownership of Captain Gisbourne at the time of the 1929 conveyance which included the land now owned by the objectors.

37. The 1929 covenant did not impose an absolute prohibition on building on the blue land. Its effect was that no house or other building could be erected on the blue land unless the southern boundary of that land had a frontage to a public road; an exception was made which allowed other buildings to be erected for use in connection with "the adjoining house of the Purchaser" i.e. 15 Kings Croft.

38. The object of the 1929 covenant appears to have been to regulate and restrict the development of the blue land according to a particular principle, rather than to inhibit it completely. That principle permitted the development of the blue land for housing on condition that the southern boundary had a frontage to a public road, but did not otherwise seek to control the design or density of development. The purpose of the restriction may therefore have been to ensure that access to any new house or houses which might be built on the blue land was taken by a route which would not interfere with the remainder of field 110, in order to preserve its value. Alternatively, the intention may have been to avoid the creation of an additional access on to Kings Croft perhaps to avoid congestion or preserve the amenity of those parts of field 110 which fronted Kings Croft and remained undeveloped. Whatever the precise thinking behind the restriction, it was clearly not designed to prevent the construction of a house or houses on the blue land provided they could have access to a public road in a particular location. The only other sort of buildings which could be erected on the land were for use in connection with 15 Kings Croft.

39. The purpose of the 1928 restriction is more obvious, namely, to maintain low density development on the boundary of field 110. By restricting to only three the number of houses which could be built on an area of two and three-quarter acres, the covenant was designed to

ensure that each of the houses would be well separated from each other and have large gardens. The view to the west from field 110 would therefore be maintained with a relatively open aspect.

Changes in the character of the blue land and the neighbourhood since 1929

40. Detailed evidence concerning the changes in the general neighbourhood of Allestree and in the former field 110 since the beginning of the twentieth century was provided by the applicants' expert, Mr Phipps.

41. The gradual development of the area for housing was illustrated by a series of Ordnance Survey maps beginning in 1901. At that time the whole of the land south of Kings Croft and west of what is now the A38 Queensway was undeveloped and enclosed in large fields. No road or footpath is shown running along the southern boundary of field 110. The position was substantially the same in 1919, but by 1938 important changes had begun to appear. In particular, buildings are shown on both sides of Kings Croft, including in field 110. South of the southern boundary of the field Devonshire Avenue had been laid out and housing had appeared on both sides of the road. The ribbon of housing fronting Kings Croft and comprising seven large detached houses with long gardens is the only development shown in field 110 itself. Fermyn Wood and its two immediate neighbours are shown on the 1955 and 1979 maps, but otherwise the locality remains substantially as it was in 1938.

42. Mr Phipps explained that the low-density development around the fringes of field 110 began to be eroded in 2011 with the development of two detached houses and two bungalows to the rear of 17 and 19 Kings Croft. These were on much smaller plots than had previously been characteristic of the area, which were reached by a drive running between 17 and 19 and opening up the undeveloped western side of field 110.

43. Planning permission for 13 houses and flats at the junction of Devonshire Gardens and Kings Croft was granted in 2011, and these have subsequently been built as Devonshire Court.

44. Planning permission for the development of the 13 detached houses in Park Wood Close was granted in 2013. Access to the new development was made possible by the demolition of 20 Devonshire Gardens, enabling a road to be built in to the centre of field 110. The road is about 50 metres east of the southern boundary of the blue land (which adjoins the rear garden of 28 Devonshire Gardens).

45. No. 9 and part of 11 Park Wood Close are constructed on the part of the blue land retained by Mrs Milner in 1932. Access to these houses is over Park Wood Close itself, and not over the southern boundary of the blue land.

46. Mr Phipps noted that tree planting along garden boundaries had significantly changed the appearance of field 110; development densities had increased, with new houses being constructed on much smaller plots than those of the 1920s and 1930s; houses were closer to each other and to

the highway and lacked boundary features separating front gardens of adjoining properties. From our own inspection of the area we accept his assessment that the character of the locality has changed since 1928. The sole exception to that change is the land conveyed in 1928 to Mr Corney, which retains its character as the site of large detached houses, well separated from each other and standing in large gardens.

Have the changes rendered the restrictions obsolete?

47. Once it is recognised that the purpose of the 1929 covenant was not to prevent the construction of houses on the blue land, but rather was to ensure that any houses built on the land could obtain access to the public highway over the southern boundary, it is clear that the changes which have occurred since 1929 have significantly eroded the protection which the restriction was intended to achieve in three respects.

48. First, the construction of 9 Park Wood Close on the blue land at a time when the Southern boundary of the blue land does not "have a frontage to a public road or street" has disturbed the principle that any development should have access without the need for an additional road or drive outside the boundaries of the blue land itself (unless it was of buildings for use in connection with 15 Kings Croft). There is no evidence that anyone objected to the construction of 9 Park Wood Close, despite it being in clear breach of the restriction.

49. Secondly, the separation of 15 Kings Croft from the blue land by the construction of 13 and part of 11 Park Wood Close on what was formerly (in Mrs Milner's time) the rear garden of 15 Kings Croft, has made it practically impossible for the remainder of the blue land to be used for buildings in connection with the occupation of 15 Kings Croft, as was permitted by the 1929 covenant.

50. Thirdly, the laying out of Devonshire Avenue at a distance to the south of the southern boundary of the blue land, and the construction of houses between it and the southern boundary, has made it practically impossible for that boundary to have a frontage to a public road or street, as was contemplated in 1929.

51. The second and third of these changes obviously do not amount to a breach of the 1929 covenant so as to render it incapable of continued enforcement. The impossibility of satisfying the conditions under which the construction of houses or domestic buildings on the blue land was permissible would simply mean that the restriction became effectively absolute. What these changes do emphasise, however, is that the circumstances in which the covenant was imposed are radically different to the current circumstances in which it operates. It is in those radically different circumstances that the continued utility of the restriction must be judged.

52. The construction of 9 Park Wood Close was a significant breach of the 1929 covenant. It failed to respect the condition concerning the southern boundary of the blue land fronting a public street if it was to be developed independently of 15 Kings Croft. Any benefit which the remainder of field 110 could obtain from restricting the route of access was therefore lost when

access was provided for a distance of about 100 metres over the benefitted land itself. The purpose of the 1929 covenant, namely the imposition of a pattern of access to the blue land which is no longer possible, and which is no longer observed, can no longer be achieved. Development has occurred in breach of the covenant and according to a different pattern. In those circumstances we consider that the 1929 covenant can properly be deemed to be obsolete.

53. As far as the 1928 covenant is concerned we do not agree with Mr Letman's submission that this has been rendered obsolete. The purpose of the covenant was to restrict the density of housing on the land to the west of field 110 sold to the developer Mr Corney. That purpose has been achieved and no development inconsistent with the restriction has occurred since the covenant was imposed. It is true that substantial changes have occurred in the land benefitted by the restriction, but we are in no doubt that the restriction is still of some utility to the owners of the benefitted land. In particular, the restriction is of value to Nos. 3, 5 and 7 Park Wood Close, which have the longest and most attractive views across the garden of Fermyn Wood, especially from their upper windows.

54. Our conclusion under ground (a) is, therefore, that the 1929 restriction should be discharged, but that the 1928 covenant should remain in force.

Ground (aa)

55. In the light of our decision that the 1929 restriction is obsolete under ground (a) it is only necessary to consider ground (aa) in connection with the 1928 restriction. Mr Letman submitted that the proposed development was a reasonable use of the application land. It received planning permission in 2012 which was still extant and which Mr Phipps said complied with relevant national and local planning policy and reflected a pattern of high density residential development of the backland that was formerly field 110. In particular, Mr Phipps referred to the development of (i) four dwellings at the rear of 17-19 Kings Croft; (ii) Devonshire Court at the junction of Devonshire Avenue and Kings Croft; and (iii) Park Wood Close. We agree that the proposed development is a reasonable user of the application land.

56. The 1928 covenant impedes part of the proposed development, namely Units 1 and 2, but it does not impede the development of Unit 3 nearest to the objectors' houses in Park Wood Close. Unit 3 is not subject to the 1928 covenant and, for the reasons given above, is not impeded by the 1929 covenant which we have found to be obsolete. This means when considering whether, by impeding the proposed development, the 1928 covenant secures practical benefits of substantial value or advantage to the objectors, it is only the effect of Units 1 and 2 that are relevant and it may be assumed that Unit 3 can be constructed in accordance with the 2012 planning permission.

57. Mr Phipps emphasised that the proposed development satisfied all relevant planning criteria in respect of the preservation of the amenity of the objectors' houses. We reminded him that an application under section 84 of the 1925 Act falls within a different statutory jurisdiction to a planning application and that different considerations apply. What matters is whether the restriction secures substantial practical benefits to the objectors. The construction of Unit 3

would have the most significant impact of the three proposed houses upon the objectors' properties given its proximity, design, layout and its location on higher ground. We consider that it would adversely affect the amenity of the objectors' houses, but neither the 1928 nor (in view of our conclusion on ground (a)) the 1929 covenant impedes its development.

58. The view of Units 1 and 2 from 7 and 9 Park Wood Close would be substantially blocked by Unit 3 in the foreground even though Units 1 and 2 would be on slightly higher ground. The view from the rear of 5 Park Wood Close would be dominated by Unit 3 which it would look directly up at. The rear elevation of 3 Park Wood Close would look directly towards Unit 2 which would be about 40 metres away. The rear of Unit 2 would have an oblique view towards 3 Park Wood Close but no view over the other objectors' houses. Unit 1 would not overlook any of the objectors' houses and would be largely masked by the other proposed houses. It would be approximately 55m from the nearest objector at 3 Park Wood Close. There is also a substantial tree and hedge screen between the proposed development and Park Wood Close which would not be materially weakened by the proposed removal of several trees. This screen would be supplemented by the construction of a 1.8m close boarded fence along the length of the boundary between Unit 3 and the rear gardens in Park Wood Close. All the objectors would only have a boundary with Unit 3 and would not adjoin either Unit 1 or 2.

59. Mrs Sherwood thought that the development would interfere with sunlight and daylight at her property. Mr Phipps pointed out, correctly in our view, that the proposed houses all lay to the north of Mrs Sherwood's house and could not therefore block any sunlight reaching her property, since the sun would track to the south from east to west. Nor would the other objectors' houses, in our view, lose any significant sunlight or daylight because of the construction of Units 1 and 2. They would be a significant distance away and in the case of 5, 7 and 9 Park Wood Close they would be largely screened by Unit 3.

60. For these reasons we do not consider that by impeding the development of Units 1 and 2 the 1928 restriction secures to the objectors any practical benefits of substantial advantage.

61. We heard no expert evidence about whether the proposed development would devalue the objectors' properties. The objectors said in their notices of objection that if the application was successful they would claim compensation from the applicant. Only Mr and Mrs Brammer (9 Park Wood Close) quantified their claim (£75,000), although they did not support it with expert evidence. The other objectors said the amount of compensation was to be confirmed, but none of them said any more about it or produced evidence of a quantified claim. Mrs Sherwood (No.3) said in her witness statement that she hoped the development would not affect the value of her property but said the prospect of receiving compensation was not the reason for her objection. For their part the applicants did not rely upon expert valuation evidence. Mr Phipps is not an expert valuer and fairly said that he could not comment on the effect of the proposed development on the value of the objectors' houses.

62. We are not satisfied that the 1928 restriction secures practical benefits of substantial value to the objectors by preventing the development of Units 1 and 2 in circumstances where Unit 3

can be developed in any event, the effect of which on the value of the objectors' houses, particularly Nos. 7 and 9, is likely to be more significant. But, in our opinion, there would be a small additional effect on the value of Nos. 3 and 5 caused by the relative proximity and visibility of Units 1 and 2 which we do not consider would be masked by Unit 3, the remaining trees, the proposed fence or the topography of the application land. We consider that each property would be reduced in value by £7,500 and we award compensation accordingly.

63. In the light of this decision it is not necessary for us to consider in detail the applicants' alternative argument under ground (aa) that by impeding the proposed development the 1928 restriction was contrary to the public interest. In *The Alexander Devine Children's Cancer Trust v Millgate Developments Limited* [2018] EWCA Civ 2679 Sales LJ said at paragraph 47:

> "In my view, the statement by Douglas Frank QC as President of the Lands Tribunal in *Re Collins' Application* (1975) 30 P&CR 527, at 531, that for an application to succeed in reliance on the public interest ground in section 84(1A)(b) it must be shown that that interest is "so important and immediate as to justify the serious interference [which discharge or modification under section 84 would involve] with private rights and the sanctity of contract" remains the proper approach."

We do not consider that it would be contrary to the public interest for the 1928 restriction to impede the development of Units 1 and 2, the provision of which would not be made in a public interest that was sufficiently important or immediate to interfere with the objectors' rights. We would therefore refuse the alternative application made in reliance on section 84(1A)(b).

64. The application under ground (c) also fails since we have found that there is injury to 3 and 5 Park Wood Close for which compensation is payable.

Determination

65. We are satisfied that:

(i) The 1929 restriction is obsolete and should be discharged; and

(ii) The 1928 restriction should be modified under ground (aa) to allow the development of Units 1 and 2.

66. The following order shall therefore be made:

The restriction contained in paragraph 2 of the First Schedule to the conveyance dated September 1929 between William Guy Gisborne (the vendor) and Julia Milner (the purchaser) shall be discharged under section 84(1)(a) of the Law of Property Act 1925.

The restriction in paragraph 3 of the Third Schedule of the conveyance dated 16 May 1928 between Lionel Guy Gisborne (the vendor) and John William Corney (the purchaser) shall be modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words at the end of that paragraph:

"PROVIDED that nothing contained herein shall prohibit the development permitted under planning reference DER/05/12/00637/PRI granted by Derby City Council on 31 August 2012 in accordance with the terms, details and approved plans referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal or variation of that planning permission which does not materially affect the southern or eastern elevations of the permitted development and other matters approved in satisfaction of the conditions attached to such permission."

67. The Tribunal shall make the order provided the applicants, within three months of the date of this decision shall have:

(i) Signified their acceptance of the proposed modification to the restriction in paragraph 3 of the Third Schedule of the conveyance dated 16 May 1928; and

(ii) Paid the sum of £7,500 each to Mr and Mrs Sherwood (3 Park Wood Close) and Mr and Mrs O'Neill (5 Park Wood Close), i.e. total compensation of £15,000.

68. 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)

11 January 2019