UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – MODIFICATION – whether restrictions obsolete – whether proposed development of detached dwelling a reasonable use – whether objectors can take into account any practical benefit to house which is in common ownership and occupied together with benefited garden land – s.84(1)(a) and (aa) Law of Property Act 1925 – application refused

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

BY:

(1) JANE MARIE COPLESTON
(2) CHRISTOPHER JOHN NORTON

Re: Land adjacent to Gorsebrook,
Pembury Road,
Tunbridge Wells,
Kent,
TN2 3QN

Mr A J Trott FRICS

16 September 2020
Royal Courts of Justice

Edward Denehan, instructed by direct access, for the applicants
The objectors in person

The following cases are referred to in this decision:

Truman, Hanbury, Buxton and Co Limited's Application [1956] 1 QB 261
Re: Stanborough's Application [2012] UKUT 21 (LC)
Gilbert v Spoor [1983] Ch 27
Dobbin v Redpath [2007] EWCA Civ 570
Re: Lamble's Application [2018] UKUT 175 (LC)
Re: Cole's Application [2018] UKUT 368 (LC)

Introduction

1. Ms Jane Copleston and Mr Christopher Norton ("the applicants") are the freehold owners of a semi-detached dwelling known as Gorsebrook, Pembury Road, Tunbridge Wells, Kent, TN2 3QN.

2. The applicants obtained planning permission on appeal on 18 March 2016 for the construction of a new dwelling house in the garden of Gorsebrook, to the south west of the existing house. Following the successful appeal the applicants sought a variation to the planning permission to enable the construction of a larger house. The local planning authority granted conditional planning permission on 8 June 2016 and subsequently approved the details reserved by a number of conditions on 20 February 2019. On 19 May 2020 the local planning authority granted planning permission for the variation of the approved plans to allow the addition of an external door to the north east elevation together with changes to the access.

3. The applicants are prevented from developing the new house by the existence of restrictions imposed by a covenant contained in a conveyance dated 27 April 1960. Insofar as relevant the restrictions, which are contained in the First Schedule to the conveyance, state:

> "(a) not to erect any building upon the said land other than a garden shed summerhouse conservatory greenhouse or private garage to accommodate two cars but any such garage shall be for use in connection with the Purchaser's private house known as Gorsebrook and shall be sited in such position as the Vendor or other the owner for the time being of the land edged green on the plan shall approve in writing such approval not to be unreasonably withheld." ("the Building Restriction").
>
> "(b) Not to carry on any business upon the said land nor use it for any purpose other than a private garden and the site of any such garage as aforesaid." ("The User Restriction").

4. The land over which these restrictions apply ("the application land") comprises most, but not all, of that part of the applicants' freehold interest which formed the subject of the planning applications. In particular some of the car parking area at the front of the site is not subject to the restrictions.

5. The land edged green referred to in the Building Restriction is the land which has the benefit of the restrictions.

6. The applicants applied to the Tribunal on 18 November 2019 seeking the discharge, or alternatively the modification, of the restrictions on grounds (a) and (aa) of section 84(1) of the Law of Property Act 1925.

7. There were three objections to the application:

(i) Ms Sheree Batchelor, long leaseholder of the Courtyard, Pembury Road;

(ii) Mr Jonathan Piers-Hall and Mrs Frances Piers-Hall, joint freeholders of Little Chilston, Pembury Road; and

(iii) Mr Neil Harris and Mrs Trudy Harris, joint freeholders of The Old Bothy, Pembury Road.

8. The second objectors, Mr and Mrs Piers-Hall, wrote to the Tribunal on 6 March 2020 and said they no longer wished to pursue their objection. The Tribunal therefore treated their objection as having been withdrawn.

9. Only part of Mr and Mrs Harris' property, The Old Bothy, has the benefit of the restrictions. This is principally the garden and grounds to the south of the dwelling house. Most of the house itself does not have the benefit of the restrictions, although part of a recent extension was built on benefited land. Mr and Mrs Harris acquired a further small piece of land from Mr Piers-Hall in January 2011 which also has the benefit of the restrictions.

10. Mr Edward Denehan appeared for the applicants and called Ms Copleston and Mr Norton as witnesses of fact and Mr Peter Wright MRICS of Lambert & Foster Ltd as an expert witness.

11. Mr Harris and Ms Batchelor appeared in person.

12. I made an accompanied inspection of the application land and the objectors' properties on 15 September 2020.

The application land and the proposed development

13. Although the application land, Gorsebrook and the objectors' properties have addresses in Pembury Road they all obtain vehicular access from a private road (referred to on the approved drawings as Chilston Lane and by the applicants as the "Access Way") which joins the southern side of Pembury Road just to the west of the main entrance to Dunorlan Park, about a mile away from the town centre of Tunbridge Wells.

14. Chilston Lane is a cul-de-sac that ends at the entrance of Little Chilston, the property owned by Mr and Mrs Piers-Hall. It forms part of what was previously a crescent-shaped drive leading from Pembury Road to a mansion house known as Chilmark House. At some point in the past this property was divided into two dwellings, Chilston House and Little Chilston. The driveway was also divided by the construction of a wall across it.

15. Chilston Lane now serves a total of 22 dwellings, including Marnock Place, a block of 14 flats. The remaining dwellings are detached houses, apart from Gorsebrook, which is a semi-detached house with "Wildings", and Little Chilston which is part of, but divided

from, the original mansion house and Little Courtyard which is a lower ground floor flat which originally formed part of Little Chilston.

16. The application land is a rectangular site of 0.06 hectares and comprises the majority of the garden to the west of the house at Gorsebrook. The site slopes downwards from north west to south east. The front elevation of the proposed detached house is set back some 14m from the retaining wall to Chilston Lane which means the house is on higher ground (1.7m) than the objectors' properties on the opposite side of the road. The height of the front elevation is 7.1m. This is some 0.42m higher than the elevation as approved on appeal, although the upper storey is about 0.3m further away from the road.

17. The proposed accommodation comprises four bedrooms (one en-suite), a bathroom, kitchen/diner, sitting room, study, utility room and a cloakroom. Four of the rooms face the objectors' properties: the kitchen and a bedroom at ground floor level and two first floor bedrooms.

18. The proposed development has no garage, but off-street parking would be available in a parking bay for two cars at the front of the property. Most of this bay is situated on land outside the application land and not subject to the restrictions. The revised plans show a wider entrance for the parking bay with the curved retaining walls set back on a larger radius to improve the manoeuvrability for vehicles. At the rear of the parking bay are steps and a footpath leading up to the proposed house.

19. There is a well-established tree and hedge screen at the front of the application land between Chilston Lane and the proposed house. This will be affected by the proposed development with the removal of Lawson Cypress (T2) and Holly (T3) trees immediately to the rear and side of the proposed parking bay respectively. It is also possible that a large Spruce tree (T5) will not be able to be saved due to its proximity to the proposed parking bay. The construction of the parking bay will also involve the loss of some of the hedge at the front of the application land. The approved soft landscaping plan shows the remaining planting to the frontage being retained and enhanced with new planting between the parking bay and the house where tree T2 currently stands.

Ground (a)

20. Under section 84(1)(a) of the Law of Property Act 1925 the Tribunal may discharge or modify a restriction on being 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."

21. The applicants say there have been substantial changes in the character of the neighbourhood since the restrictions were imposed in 1960. The "neighbourhood" is said to comprise those residential plots which are accessed from Chilston Lane. The applicants say that in 1960 this neighbourhood comprised dwelling houses located along the lane on either side with relatively large plot sizes and occupied as single dwellings.

22. Since that time the applicants say there have been substantial changes in the character of the neighbourhood as described by Mr Wright in his expert report and illustrated by a series of aerial photographs.

23. In 1979 the house known as Wildings, which forms a semi-detached pair with Gorsebrook, was extended.

24. In 2007 a detached bungalow on a one acre site to the east of Chilston Lane near its junction with Pembury Road was demolished and redeveloped by a detached block of 14 flats and a garage court and parking spaces known as Marnock Place. This part of Chilston Lane was widened to improve access.

25. In 2012 the plot of Park View, the detached lodge at the entrance to Chilston Lane, was divided into two. The land between Park View and Marnock Place was developed by what Mr Wright described as an "ultra-modern dwelling house" called Greenhaven. This was visible from Chilston Lane after an established hedge was removed. Park View had also been extended.

26. Also in 2012 the Old Bothy Lodge, adjoining The Old Bothy to the east, was demolished and replaced with another "ultra-modern dwelling house" known as Bayhurst.

27. The Old Bothy has undergone substantial redevelopment and alteration since 2011, with extensions to the side (east) and rear (south) and the construction of a tall replacement brick boundary wall. The floor space was increased by some 150m^2.

28. Ms Copleston described the changes to the neighbourhood since she moved to Gorsebrook in 1999. She described the neighbourhood at that time as having "a distinctly verdant, private, quiet and quaint feel". She noted that in 1999 there were only eight dwellings in Chilston Lane with very little on-road car parking or commercial (delivery) traffic. Since that time there had been a material increase in the density of development along the lane, an "exponential" growth in traffic, the removal of a number of boundary hedges and the widening of the lane at its northern end.

29. Mr Denehan said that the residential character of the neighbourhood had not changed but submitted that the nature and extent of such use had altered with 22 residential units now compared to only seven houses in 1960. The lane had been widened and two strikingly modern houses had been constructed. Hedging and screening had been removed and the area had changed visually. It was more mixed now than in 1960.

30. Mr Denehan said the real issue was whether these changes in the character of the neighbourhood had made the restrictions obsolete. He submitted that a restriction will be obsolete under ground (a) if it cannot achieve its original purpose, see *Truman, Hanbury, Buxton and Co Limited's Application* [1956] 1 QB 261. He said the original purpose of the 1960 restrictions was to protect the amenity of the covenantee's home, Little Chilston, and its garden and grounds. Mr Wright thought the changes to the character of the neighbourhood had impacted on the benefited land to a far greater extent than would the proposed development and therefore it could not be said that the purpose of the 1960s

restrictions could still be achieved. Mr Denehan submitted that today the restrictions achieved nothing in terms of the amenity of the benefited land and were therefore obsolete.

31. The objectors argued that the "neighbourhood" in the context of the application should be more narrowly defined and restricted to the five dwellings at the western end of Chilston Lane. Mr and Mrs Harris distinguished the upper part of Chilston Lane, where they said the only building of any quality or historic character was the lodge house at the entrance (Park View), from the lower part which comprised a cluster of Victorian buildings sharing a historic relationship. The objectors did not dispute the identified changes to the upper part of the lane but said the character of the cluster of Victorian buildings centred around the original Chilmark House remained unchanged and clearly distinguishable.

32. The changes to the upper part of Chilston Lane had not made the restrictions obsolete. In fact, they were now more relevant and important in order to preserve the character of the remaining Victorian cluster which the objectors said lay at the heart of the conservation area.

Discussion

33. In my opinion the neighbourhood is most appropriately described, as the applicants argue, by reference to all the properties in Chilston Lane and not just those at the lower end of it as the objectors suggest. The cul-de-sac forms a discrete area of residential development all of which is connected by historical association with the former mansion known as Chilmark House.

34. It is not disputed that there have been changes in the character of at least part of this neighbourhood with a significant increase in the number of dwellings since 1960. Most of this increase is attributable to the construction of a block of flats at Marnock Place, although the form and design of this development resembles that of a large mansion with brick elevations, a varied pitched roof structure and large chimneys. But the essential residential character of the neighbourhood has not changed and I do not accept that the development which has taken place since 1960 has had the pronounced adverse impact on the amenity of the objectors' properties that the applicants suggest. The development, even the two modern style houses at Greenhaven and Bayhurst and the block of flats at Marnock Place, have been sensitively designed and do not obviously impact on the amenity of the properties at the lower end of Chilston Lane. Apart from the redevelopment of The Old Bothy Lodge into the house known as Bayhurst, development at the western (lower) end of Chilston Lane has been confined to extensions and alterations.

35. The imposition of the restrictions over the application land meant there would be no new residential development to the west of the boundary of Gorsebrook and therefore no closer to Little Chilston than the curtilage of the existing building. I do not accept Mr Denehan's submission that the restrictions now achieve nothing in terms of the amenity of the benefited land; they achieve what they always achieved in terms of protecting the amenity of Little Chilston from residential development any closer to it than the boundary of Gorsebrook. The fact that there has been other residential development further to the east is not to the point and does not make the restrictions obsolete. Chilston Lane remains a

residential neighbourhood although I accept it is now developed to a greater density and, in some cases, with modern style houses. But the restrictions are not to be deemed obsolete *by reason of* those changes in the character of the neighbourhood and I do not accept Mr Wright's contention that the changes in the character of the neighbourhood have impacted the benefited land far more than the proposed development would. The proposed development would be in the immediate vicinity of Little Chilston and The Old Bothy and would obviously affect them more directly than the other development further east in Chilston Lane.

36. I am not satisfied that the applicants have established ground (a) and I do not consider the restrictions to be obsolete.

Ground (aa)

37. Section 84(1)(aa) of the 1925 Act states:

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

Section 84(1A) provides that:

> "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 such person will suffer from the discharge or modification."

Section 84(1B) states:

> "In determining whether a case is one falling within sub-section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

38. Mr Denehan submitted that the use of the application land as part of the site of the extant planning permission for the erection of a single, modest dwelling house was a reasonable use of the application land. This reasonable use is impeded by the restrictions.

39. In deciding whether the restrictions secured any practical benefits to the objectors, Mr Wright considered their view (outlook), peace and quiet, light and the open character of the

neighbourhood. He concluded that, as the application land was hidden by the mature existing landscape of trees and shrubs, none of the objectors enjoyed a view that would be obstructed by the proposed new house. He also thought this landscaping screen would mask any noise arising from the use of the new house from disturbing the neighbours and would prevent any light pollution reaching the objectors' properties. Mr Wright said the current use of the application land as Gorsebrook's garden would potentially be as noisy as the proposed use and noted there was background noise from Pembury Road to the north in any event. Many more people used Chilston Lane today than when the restrictions were imposed in 1960. Lastly, he said the character of the neighbourhood was no longer an open one due to the construction of many more dwellings along Chilston Lane since the restrictions were imposed.

40. Mr Denehan noted that the restrictions did not act so as to prevent any building on the application land. The applicants were entitled to build a garage, garden shed, summerhouse, conservatory and/or a greenhouse.

41. Mr and Mrs Harris argued that the proposed development was not a reasonable use of the application lane since it was rejected in the first instance by the local planning authority and opposed by local residents. The scheme approved on appeal was a smaller development than the one for which planning permission was subsequently granted. They considered the applicants had behaved unreasonably throughout by not having consulted the neighbours: "no discussion, no engagement, no attempt at negotiation." Mr and Mrs Harris thought it unreasonable that a section 84 application should be used "as a club with which to beat into submission private contractual rights" where the applicants had not properly engaged with or addressed the objectors' legitimate concerns.

42. Mr and Mrs Harris understood the applicants' case under ground (aa) to be twofold with respect to The Old Bothy:

    (i) It was only the impact on the benefited land that mattered and this impact was limited because the benefited land mostly comprised garden land at the rear of The Old Bothy which was distant from the application land and not materially affected by the proposed development; and

    (ii) Regardless of (i) the impact of the proposed development on The Old Bothy and its owners was not in any case substantial.

43. Mr and Mrs Harris thought the approach taken under paragraph (i) above was too narrow. Section 84(1A)(a) referred to the Tribunal having to be satisfied that the restriction did "not secure to persons entitled to the benefit of it" substantial practical benefits. Consideration of the effect of the proposed development and use should not be restricted to the benefited land itself but should extend to the persons who enjoyed that benefit. The effect of the proposal was personal to the objectors and not an abstraction restricted to part of their landholding.

44. With regard to paragraph (ii) above Mr and Mrs Harris said the restrictions secured to them practical benefits of substantial advantage because the proposed development would:

(a) lead to a loss of amenity due to serious overlooking and loss of privacy;

(b) harm the character and appearance of the immediate neighbourhood (the conservation area) by (i) removing trees from the site; and (ii) developing the application land with an inappropriate modern house design in an elevated position among a group of Victorian buildings which were the focus of the conservation area; and

(c) create a serious hazard to others uses of Chilston Lane due to its substandard and inappropriate access and inadequate parking and turning space within the site which meant vehicles would have to manoeuvre in the road.

Such substantial loss and disadvantage should not be imposed upon the objectors in circumstances where the applicants were only concerned to enjoy a windfall gain of some £500,000 from selling their site for development.

45. Mr and Mrs Harris thought Mr Wright had placed insufficient weight on their concerns about amenity, particularly the damage the proposed development would cause to the character of the cluster of Victorian buildings and the loss of privacy through overlooking by constructing a house in an elevated position with windows facing south east towards The Old Bothy. Mr and Mrs Harris said they had very little confidence that the tree and plant screen at the front of the proposed house would survive given its proximity to the south east elevation of the development which would therefore be in the perpetual shadow of the trees marked on the approved plans as being retained. The removal of such trees would open up views of the proposed development and lead to overlooking of the objectors' property. They cited the example of Greenhaven which was originally subject to a planning condition requiring retention of a beech hedge but which was subsequently removed as a post-approval modification. They said "planting rarely materialises".

46. Ms Batchelor said there had been no new development to the north of Chilston Lane apart from an extension to Wildings. To allow the application would set a precedent for further development to the north which would change the character of the neighbourhood. She also considered the removal of hedges and shrubs at the front of the application land would adversely affect the character of the area.

47. Both Mr and Mrs Harris and Ms Batchelor were concerned at the problems likely to be caused by construction traffic and the building works. They queried how large lorries would be able to manoeuvre within the narrow lane and said there was a lack of parking space for builders'/trade vans both in the lane and on site. Mr and Mrs Harris argued that these problems meant the applicants would breach another restriction in the 1960 conveyance, namely "not to permit on the said land anything that will be or become a nuisance or annoyance to the owner or occupier for the time being of [the benefited land]." The objectors also considered the proposed development would diminish the value of their property.

Discussion

48. The proposed use of the application land has an extant planning permission and is in keeping with the residential character of the neighbourhood. There is a history of new dwellings being granted planning permission in Chilston Lane since the restrictions were imposed. In my judgment the proposed use is a reasonable use of the application land for the purposes of ground (aa) which is impeded by the restrictions.

49. Mr and Mrs Harris argue that the question of whether the restrictions secured to them substantial practical benefits should be considered by reference to the totality of their ownership of The Old Bothy and not just by reference to that part of it (mainly the rear garden) that has the benefit of the restrictions.

50. Mr Denehan submitted that section 84(1A)(a) was limited to consideration of the effect of the reasonable use on the benefited land and no other. Only those persons who, in law, have a right to enforce a restriction are "entitled to the benefit of it" under section 84(1A). If this were not so, it would be possible for a person to acquire a small part of the benefited land and then to argue that the effect of the proposed development should be considered by reference to other land held with the benefited land. The extent of the benefited land would thereby effectively be increased. That was an unnecessary extension of the scope of section 84(1A)(a) and would make the identification of the benefited land impossible since the benefit could then extend to non-benefiting land in common ownership. That was wrong as a matter of principle. The identification of the burdened and benefiting land should be clear cut and there was no policy reason or basis of statutory interpretation that supported Mr and Mrs Harris' argument on this point.

51. In *Re: Stanborough's Application* [2012] UKUT 21 (LC) the Tribunal, Mr AJ Trott FRICS, considered whether, in deciding if a restriction secured practical benefits to the objectors, it was possible to take into account the effect of the reasonable use upon the whole of their property ownership or just that part of it which had the benefit of the restriction.

52. In that case the objectors argued that, on the clear wording of section 84, the Tribunal was required to have regard to the practical benefits that were secured to the whole of the objectors' land ownership and not just those secured to the burdened land. They said that section 84(1A) referred to *any* substantial practical benefits that the restriction secured to *persons* entitled to the benefit of it. It was not restricted in terms to the benefited land, a point that was accepted by the court of appeal in *Gilbert v Spoor* [1983] Ch27 where Eveleigh LJ said at 32F:

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

53. The objectors in *Stanborough* considered Eveleigh LJ's judgment on this point had nothing to do with the fact that the case involved a building scheme but rather was a statement of principle of general application which bound the Tribunal. The Tribunal

rejected the objectors' submissions and distinguished *Gilbert v Spoor* on the grounds that it involved a building scheme. The Tribunal said at [83] that:

> "*Gilbert* is not an authority which supports a parasitic claim for benefits based upon the coincidence of common ownership of the benefited land and other land, where such other land is not part of a building scheme… In my opinion that argument, unless there is a building scheme is wrong and it is only the benefits secured to the objectors by the restriction through their ownership of the benefited land …., and no other land, that falls to be considered."

54. The Tribunal observed that in a building scheme the restrictions are enforceable by and against all owners of plots within the boundary of the scheme regardless of when they or their predecessors acquired their plots from a common vendor. It is a system of reciprocal rights and obligations amounting to a local law. The Tribunal then considered the views of Waller LJ in *Gilbert* at 35B:

> "As between each of these owners, including the applicant, there were mutual rights and mutual obligations. These rights and obligations were for the benefit of the whole estate. Each owner would be aware of the restrictions imposed on the other owners including the restriction imposed on the applicant. These restrictions would influence and control the development of the whole estate. Accordingly if the restriction remains in force, the objectors or other owners of land within the building scheme could enforce the restriction."

And later at 36A:

> "If a building estate contains a pleasant approach with restrictions upon it and some building is done contrary to those restrictions which spoils the approach, if then the owner of a plot complains about that breach, the fact that he does not see it until he drives along the road, in my opinion, does not affect the matter. He is entitled to the estate being administered in accordance with the mutual covenants, or local law; so in this case."

55. In *Dobbin v Redpath* [2007] EWCA Civ 570 Lawrence Collins LJ said at [16] that *Gilbert* was:

> "A decision of the application of section 84(1) in the context of a building scheme. In that decision, Eveleigh LJ said at page 32 that because the Lands Tribunal was authorised by section 84 to take away from a person a vested right, the Tribunal is required to consider adverse effects upon a broad basis. He also emphasised the importance of the fact that the restriction in that case was intended to preserve the amenity and standard of the neighbourhood in general and was aimed specifically at density of housing."

And at [32] he said:

> "Where there is no building scheme there may be a diminishing relationship as between the weight to be attributed to the source of the complaint and the physical distance of the objectors' land interest. By contrast, where there is a building scheme

> so long as the objector has an interest inside the physical compass of the building scheme, the location of the objector outside his or her land interest but inside the building scheme does not affect the matter, as Waller LJ pointed out."

56. The Tribunal in *Stanborough* concluded at [85] that, unlike *Gilbert*, there was no building scheme and the context in which the restriction was created could be distinguished:

> "There is a specific covenant restricting the use of defined (burdened) land for the benefit of defined (benefited) land. It is not possible to pray in aid the system of local law that would apply were both parcels of land to be within a building scheme. The benefits which are secured by the restriction in the present case are those which enure to the benefited land only."

57. This issue was considered by the Tribunal in two more recent cases, neither of which involved a building scheme. In *Re: Lamble's Application* [2018] UKUT 175 (LC) the applicant proposed to construct a summerhouse on land burdened by a restriction, the benefit of which was enjoyed by an area of amenity land to the rear of the objectors' house but not by the house and garden itself. The objectors relied on *Gilbert* as authority for the proposition that it was not a requirement of ground (aa) that the benefit in question must be enjoyed by a particular piece of land; the only qualification in the statute being that the objectors must be "persons entitled to the benefit of" the restriction.

58. Counsel for the applicant, Mr Andrew Francis, accepted in closing that a practical benefit was capable of being secured to a person having the benefit of a covenant by reference to a wider area than that to which the benefit was strictly annexed; the existence and extent of the benefit would be a question of fact in each case.

59. The Tribunal, Martin Rodger QC, Deputy Chamber President and Mr P McCrea FRICS, held that the objectors could rely on the impact which the proposed summerhouse would have on their house and garden as well as on their amenity land.

60. In *Re: Cole's Application* [2018] UKUT 368 (LC) the Tribunal, Martin Rodger QC, Deputy Chamber President, considered whether it was permissible for the objector to take into account benefits he might enjoy (ground (aa)) or injury he may sustain (ground (c)) in his capacity as owner of his house and garden, to which the benefit of the restriction was not annexed, or whether the only benefit or injury which were relevant were those enjoyed or sustained in his capacity as owner of a strip of land at the rear of his garden which did have the benefit of the restrictions. The Tribunal referred to its decision in *Lamble* and noted the concession that had been made by the applicant's "highly experienced counsel" that a practical benefit was capable of being secured to a person having the benefit of a covenant by reference to a wider area than that to which the benefit was strictly annexed. Accordingly, the Tribunal found that the objector was entitled to rely on any benefit which the restrictions secured to him in his capacity as owner of his house and garden.

61. The Tribunal's decision in *Stanborough* was not referred to in either *Lamble* or *Cole* and neither party was represented in *Cole*, which was an application determined under the Tribunal's written presentations procedure. In the present application Mr Denehan

submitted that the concession in *Lamble* was wrongly made and that the Tribunal's decision in *Stanborough* was correct.

62. The Tribunal's decisions in *Lamble* and *Cole* relied upon *Gilbert* (a case concerned with a building scheme) and a concession made by counsel for the applicants in *Lamble*, Mr Andrew Francis. Mr Francis is the author of a leading text book on restrictive covenants, Restrictive Covenants and Freehold Land (5th Edition) where he considers the issue of how far the practical benefit extends in terms of land ownership at paragraph 16.175:

> "The suggestion has been made in reliance upon the words of Eveleigh LJ in *Gilbert v Spoor* … that the requirement to consider the adverse effects of the application means that the effect of the application on land which is not within the benefit of the covenant within the application can be considered relevant. That view is sometimes asserted in reliance upon a very 'wide' notion of practical benefit."

63. Mr Francis expresses "three concerns about this wide approach". The first concern is that the decision in *Gilbert* must be seen against its own facts, particularly the fact that the covenants were set within a building scheme where the wider "benefit" (to preserve views and amenity) was a strong factor. Mr Francis adds:

> "(But note that even when a building scheme is not present it may be possible to argue that the practical benefit is secured to the 'non-benefited' land)."

This parenthesis echoes the concession made by Mr Francis in *Lamble* at [74].

64. Mr Francis' second concern is that in *Gilbert* Eveleigh LJ "conflated the strict concept of annexation of the benefit of a covenant, with the wider benefit derived from a covenant where it 'touches and concerns' land."

65. Finally, Mr Francis considers "it would be odd if the applicant (sic) A could acquire (or had acquired) additional land from B, not within the benefit of any covenant which relates to A's original land and against which the application is made, so that he could argue that the additional land would be adversely affected by the application." [It is considered that the reference should be to A as objector, not applicant.]

66. Notwithstanding these reservations Mr Francis noted that the Tribunal had recently applied the principle in *Gilbert* in *Lamble* and *Cole* and concluded that it would be:

> "prudent to approach this issue from that angle. It will be a question of fact in each case whether the practical benefit identified does as a matter of evidence benefit the 'non-benefited' land."

67. The authors of another leading text book, Preston and Newsom: Restrictive Covenants Affecting Freehold Land (11th Edition), discuss this issue at paragraph 13-026 and state:

> "No reference was made to [*Stanborough*] by the Tribunal in either of its subsequent decisions in [*Lamble* or *Cole*], in both of which the wider *Gilbert* principle was accepted and applied. It is submitted this remains the correct view."

68. In the present application the benefited land excludes the majority of the house at The Old Bothy. The house has been extended to the east and south but only the replacement garage and garden house and the new garden room were (or were to be) constructed on the benefited land.

69. It is the house at The Old Bothy which is closest to the application land and its northern elevation is close to and directly opposite the proposed development which lies on higher ground. In my judgment there is a significant difference between the effect of the proposed development on the amenity of the whole curtilage of The Old Bothy, including the house, and that on just the benefited land which mainly comprises garden land situated well back from the road and behind two large brick walls. If I take account of the whole ownership of The Old Bothy I think the restrictions, by impeding the proposed use, would secure to Mr and Mrs Harris practical benefits of substantial advantage, namely the protection of their current outlook, the prevention of overlooking and the preservation of the peace and quiet associated with an elevated and sylvan site which would be lost were the application land to be developed as proposed. I also think there would be noticeable disruption and inconvenience during the construction works given the constraints imposed by the topography of the application land, the narrowness of Chilston Lane and the lack of any right of the applicant to turn vehicles on the area in front of Little Chilston.

70. In considering whether the restrictions secure practical benefits of substantial advantage to Mr and Mrs Harris I have taken account of the proximity and elevation of the proposed house to The Old Bothy. The proposals involve the removal of some of the existing vegetation screen including a large Lawson Cypress (T2) and hedging at the front of the property to allow the construction of a wider radius for the parking area. I think it probable that the Spruce tree (T5) will need to be removed due to root loss arising from construction. I note the proposals to enhance the soft landscaping to replace many of the trees and shrubs which will be lost. But it was striking on my site inspection how close the front elevation of the proposed house will be to large trees and shrubs. This elevation faces south east and is the main elevation for the access of sunlight and daylight to the property. I share Mr Harris' view that a developer of the application land would be concerned to reduce the density of the screen at the front of the house to avoid overshadowing. Whilst I acknowledge the planning constraints which might prevent, or at least delay, such action I am satisfied that the effectiveness of the landscaping screen, which will be degraded in any event by the proposals, will be under an immediate and sustained threat. In this connection I note that the applicants emphasise the loss of similar landscaping elsewhere in Chilston Lane in their evidence. For instance, at paragraph 3.3.2 of her witness statement Ms Copleston says "[the dominant view of Marnock Place] has been exacerbated by the decision of the current owners of Greenhaven to remove both of the two mature hedges [along their boundaries]."

71. The rooms in The Old Bothy which would be directly affected by the proposed development are a drawing room and bedroom 2 which are closest to the application land on the ground and first floors respectively, and a living room and a guest bedroom on the ground floor and bedroom 3 above, although these are set back further from Chilston Lane.

72. The identified practical benefits are also secured to the benefited land, but to a lesser degree given the greater distance from the proposed development, its location to the rear of

the property and its primary use as a well screened garden. I do not consider that these practical benefits as they apply only to the benefited land would be substantial.

73. The question is therefore whether I should consider the effect of the reasonable use of the application land on the whole of The Old Bothy (in which case ground (aa) would fail) or just the benefited land to the rear (in which case it would succeed). I conclude that I should consider its effect on the whole property, including the house, for the following reasons:

    (1) The Old Bothy was purchased by Mr and Mrs Harris as a single property in 2008 including the benefited land which appears to account for more than half of the site area. They subsequently purchased another small area of benefited land in 2011 to incorporate into their redevelopment proposals.

    (2) The practical benefits secured by the restrictions to Mr and Mrs Harris are enjoyed on both the benefited and non-benefited land. On the facts of this case I consider it appropriate to consider the overall effect of the reasonable use on the occupation of The Old Bothy as a whole since it has always been occupied by the objectors as a single, integrated entity, the enjoyment of which is not meaningfully divisible into "benefited" and "non-benefited" parts. This is not an example of the type where an objector acquires benefited land as a means of leveraging his position as against the applicant (see paragraph 65). Nor is it an example of a case where only a minimal amount of benefited land is owned, described by Mr Denehan as "souvenir land".

    (3) Although *Gilbert* was a case concerning a building scheme it is not disputed that, in general, the practical benefits that can be secured by a restriction should be construed widely.

    (4) The wording of section 84(1A) is not limited in terms to the benefited land. It extends to any substantial practical benefit to the persons entitled to that benefit.

74. No expert evidence was adduced about the possible effect of the reasonable use on the value of the objectors' properties. In the light of my decision that the restrictions secure practical benefits of substantial advantage to Mr and Mrs Harris it is not necessary for me to consider this issue further.

75. The entirety of Ms Batchelor's lower ground floor flat lies within the benefited land. But, in my judgment, it is unlikely she would be able to see the proposed development from inside her property or from the patio outside. Nor is it likely she would be overlooked by it. She would be able to see the new house as she ascended the steps to ground floor level but I do not think, given the location of her flat, that impeding the reasonable use would secure to her any substantial practical benefits.

Determination

76. I am not satisfied that the applicants have established either ground (a) or ground (aa) and I therefore refuse the application. If I had been persuaded that, as a matter of law, it was not

permissible for me to have regard to the practical benefits enjoyed by Mr and Mrs Harris as owners of land to which the benefit of the restrictions is not attached, I would have found the applicants' case to have been made out on ground (aa) for the reasons given in paragraph 72 above and I would have been prepared to modify the restrictions.

77. This decision is final on all matters other than the costs of the application and the parties may now make submissions on such costs. A letter giving directions for the exchange and service of submissions accompanies this decision. The parties' attention is drawn to paragraphs 15.7 to15.11 of the Tribunal's Practice Directions dated 19 October 2020.

Dated: 16 February 2021

A J Trott FRICS