



LP/89/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – discharge or modification – dwellinghouse – covenant not to erect more than one dwellinghouse and garage – application to modify or discharge to permit retention of existing house and erection of four two-bedroom flats on rear garden – whether proposed use reasonable – whether practical benefits secured by restriction of substantial value or advantage – application refused – Law of Property Act 1925, s84(1)(aa).

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

BY

NIGEL JOHN HOPKINS

**Re: Land at 14 Mead Close
Andover
Hampshire
SP10 2JT**

Before: N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 18 and 19 June 2008**

Montague Palfrey, instructed by Parkes Browne, solicitors of Andover for the applicant
Geoffrey Zelin, instructed by Lester Aldridge LLP, solicitors of Bournemouth for Mr and Mrs
Fennell, objectors
Clifford Crompton, objector, in person.

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The following cases are referred to in this decision:

Duffield v Gandy [2008] EWCA Civ 379

Re Fairclough Homes Ltd's Application LP/30/2001, unreported

The following cases were also cited:

Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594

Turner v Pryce Lawtell LTL 17 January 2008 AC0116019

Gilbert v Spoor [1983] Ch 27

Celsteel v Alton House Holdings [1985] 1 WLR 204

Henderson's Conveyance [1940] Ch 835

Patel v WH Smith (Eziot) Ltd [1987] 1 WLR 853

Woollerton and Wilson Ltd v Richard Costain Ltd [1970] 1 WLR 411

Wakeham v Wood (1981) 43 P & CR 40

Ridley v Taylor [1965] 1 WLR 611

Re Cordwell's Application LP/40/2006, unreported

Re Hunt's Application (1997) 73 P & CR 126

DECISION

Introduction

1. This is an application by Mr Nigel John Hopkins under section 84(1) of the Law of Property Act 1925 for the discharge or modification of a restrictive covenant affecting freehold land containing a dwellinghouse and garden and known as 14 Mead Close, Andover, Hampshire, SP10 2 JT so as to permit the erection of four two-bedroom apartments in the rear garden (the application site).

2. The restriction was imposed by a conveyance dated 21 February 1955 between (1) Horace Charles Pitt (the Vendor), (2) Barclays Bank Limited (the Bank) and (3) Roy Howard Farrant (the Purchaser). The preamble to the conveyance included the following clauses:

(1) The Vendor is seised in fee simple in possession of certain property ... and has recently laid out the same in plots as a building estate and will thereon and thereunder construct the road drains and sewers for the convenience of the persons erecting houses on such estate ...

(4) The land described in Part I of the first schedule hereto [that is, 14 Mead Close] forms one plot on the said building estate.

(5) The Vendor has already sold and conveyed to purchasers certain of the said plots with the right to use the said road drains and sewers but subject to covenants on the part of each such purchaser to observe stipulations similar in all respects to the stipulations set out in the second schedule hereto.”

3. Paragraph (b) of the second schedule contained the following stipulation, which is the subject of the present application:

“Not to erect on the said plot more than one dwellinghouse and garage with tiled roof”.

4. On 6 July 2006 planning permission was granted by Test Valley Borough Council for the erection on the application site of four two-bedroom apartments, bin store and cycle area together with new access onto Salisbury Road. The applicant now seeks the discharge or modification of the covenant on ground (aa) of section 84(1) of the Act. Paragraph (c) was also relied upon, but that ground was withdrawn during the hearing.

5. There are outstanding objections from the following residents of Mead Close: Mr Colin and Mrs Margaret Tindall (No.2), Mr Philip and Mrs Eveline Attwood (No.3), Mr Brian and Mrs Sonia Coomer (No.4), Mr C B and Mrs J Newman (No.5), Mrs Joan Webb (No.6), Mr James and Mrs Evelyn Murray (No.8), Mr Edward and Mrs Heidi Fennell (No.9), Mr Clifford and Mrs Valerie Crompton (No.10), Mr Carlo Brettelle and Mrs Peggy Fisher (No.11) and Mrs Cynthia Forsey (No.12). It is agreed that the all the objectors are entitled to the benefit of the covenant.

6. Mr Montague Palfrey of counsel appeared for the applicant. He called one witness of fact, Mr R F Gilley of Farley Developments Limited, who have entered into an option agreement to purchase the application site. He also called one expert witness, Mr R E Meeson MRICS, a partner in Dreweatte Neate of Winchester.

7. Mr Geoffrey Zelin of counsel appeared for Mr and Mrs Fennell and called Mr Fennell to give evidence of fact. Mr Crompton appeared in person and gave evidence. On the afternoon of 19 June 2008, the second day of the hearing, I inspected the objectors' properties externally. I made a more detailed inspection of the gardens of Nos. 9, 10, 11 and 12 and a partial internal inspection of the house at No.12. I obtained a clear view of the application site from the garden of No.12 and I inspected the surrounding area generally. I was accompanied by representatives of the applicant and the objectors.

Facts

8. In the light of the evidence and my inspection I find the following facts. Mead Close is a short cul-de-sac which runs in a westerly direction from Mead Road. Mead Road serves a large residential area, including a council estate built in about the 1950s (Suffolk Road etc) to the east. To the south it serves a playing field and provides access to a modern housing development, built in the 1980s (Cress Gardens, Sainsbury Close etc).

9. No.1 Mead Close is on the corner of Mead Close and Mead Road. It actually fronts Mead Road, although vehicular access to its garage is from the southern side of Mead Close. The remainder of the close comprises 13 detached houses and bungalows, probably built in the late 1950s and early 1960s. Nos.1A, 2, 3, 4, 5, 6, 7 and 8 are rectangular shaped sites with medium sized gardens. Nos.9, 10, 11, 12 and 14, at the western end of the close, have larger, irregular shaped sites which widen towards the rear. Nos.1A, 2, 3, 4, 6 and 8 were originally built as bungalows, although No.8 has been enlarged by converting the roof space into living accommodation and adding a dormer window at the front. Nos.5, 7, 9, 10, 11, 12 and 14 are houses. No.9 has been significantly enlarged by a double storey side extension. No.5 has a single storey front extension and No.10 a rear extension. The land slopes up at a moderate angle from south to north.

10. Salisbury Road lies to the north. It is one of the arterial roads serving Andover town centre. There is a line of mature trees between Salisbury Road and the rear gardens of Nos.10, 12 and 14 Mead Close. To the west are semi-detached houses built in the 1930s fronting Walnut Tree Road. There has been some additional infill development, probably about 20 years ago when a two-storey block of four flats (Anton Court) was built immediately to the west of 14 Mead Close. Anton Court is accessed from Salisbury Road. Andover town centre, including a main line railway station, is about half a mile away.

11. The proposed development would consist of a two-storey block of four flats, each with a gross internal floor area of approximately 80m² (861 ft). It would occupy a large proportion of the rear garden of No.14 and be accessed via a new drive at the north connecting to Salisbury

Road. There would be no vehicular or pedestrian access from Mead Close. The existing double garage would be demolished.

12. The block would be built with traditional cavity brick walls, part timber clad, beneath a pitched roof covered with tiles. The roof would be of a complicated design, involving several different roof structures. It would therefore be much lower than if a single roof frame had been used. The height of the eaves and ridge would be slightly below that of Anton Court to the west and similar to those of the houses at 14 and 12 Mead Close.

13. The proposed development would be visible, when completed, from Mead Close in the gap between the existing houses at Nos.12 and 14. It would, however, be partly obscured by the existing house (No.14).

14. The Environment Agency Flood Map of the area shows that the houses in Mead Close are some 150 to 200 metres away from an area considered liable to be affected by flooding.

Evidence for the applicant

15. Mr Gilley said that the character of the area surrounding the application site had changed considerably since the covenant was imposed, in particular as a result of the construction of Anton Court. In view of this, and of the fact that the proposed development would not involve any vehicular access over Mead Close, the proposed discharge or modification would not have any real effect on any of the persons with the benefit of the restriction.

16. Mr Gilley pointed out that the Borough Council officer's report on the application for planning permission had concluded that the proposed development

“would not adversely affect the character and appearance of the area, highway safety or the amenities of neighbouring properties. The development could be accommodated without detriment to the existing trees and an access provided which would not lead to surface water from the Salisbury Road running through the site”

17. Mr Meeson said that, in his opinion, the original purpose of the restriction, when it was imposed in 1955, was to ensure that the saleability of the later plots was not prejudiced by any inappropriate development on the earlier plots. This purpose was therefore being fulfilled. He pointed out that there had been several breaches of the restrictive covenant, in that the garages at Nos.11, 12 and 14 Mead Close did not have tiled roofs. He considered that the general area around Mead Close had changed since the covenant was imposed in 1955. There had, for example, been additional residential development at Anton Court to the west and substantial private housing development to the south. Some of the houses and bungalows in Mead Close had been enlarged and created a more built up feel.

18. Mr Meeson accepted that the proposed development would be visible from Mead Close, but he felt that this was not significant and the view would largely be obscured if No.14 were enlarged by a double storey side extension similar to that already built at No.9. Moreover, the proposed development would not be readily visible from the majority of the properties in Mead Close. Although it would be visible from No.11, there would be no significant loss of privacy as none of the principal windows of No.11 faced the development, nor would any of the principal windows of the proposed flats overlook No.11. Furthermore, the rear garden at No.11 was well screened from the proposed development by its own range of outbuildings, including a garage, on the north side of its garden. The only window of No.12 which would have a view of the proposed development was that serving the stairs/landing. The development would therefore not cause any significant harm inside the house of No.12. There would be some reduction in privacy and evening sunlight in the rear garden of No.12 as a result of the proposed development. This would be relatively minor. Mr Meeson considered that it would result in the diminution in the value of No.12 from £310,000 to £300,000 and that Nos.11 and 12 would be affected by some nuisance from noise and dust during the duration of the proposed building works.

Evidence for the objectors

19. Mr Fennell considered that the proposed development did not constitute a reasonable use of the application site, even though it had been approved by the local planning authority. Whilst the planning officer's report, recommending that the application be granted, had considered the effect of overlooking on Nos.11 and 12, no consideration had been given to the effect on his own property, No.9. Moreover, the extent of overlooking of neighbouring gardens (as opposed to houses) had not been mentioned. Nor was the fact that the land rose towards Salisbury Road, which would have an impact on the privacy of neighbours.

20. Mr Fennell added that the planning officer had not given any consideration to the views from neighbouring properties. He had considered the effect on the street scene, but only in relation to the view from Salisbury Road. The effect on the street scene in, and the view from Mead Close was of far more relevance to the continued utility of the covenant. At present, if one looked up Mead Close a small part of Anton Court could be seen behind and to the left of No.14, but the view to the right was still open, with a clear view of the trees bordering Salisbury Road. If the proposed flats were built, the view to the right of No.14 would be drastically altered and the whole character of the close would change. The flats would be far closer to Mead Close than Anton Court. They would create an impression of overcrowding and would not be in keeping with other buildings in the close.

21. The original developer's decision not to overdevelop the western end of the close had been justified. It had maintained the overall character of the estate and ensured that it contained a number of larger and therefore more valuable plots. The covenant ensured that this situation would be preserved. It was unlikely that the plots along the main length of Mead Close would be large enough to accommodate any additional buildings, so the covenant was probably primarily aimed at preserving the character and amenity of the four larger plots at the western end.

22. Mr Fennell considered that the covenant secured substantial benefits to the objectors. If the application were granted it would create a precedent that would have a serious effect on the character of the neighbourhood. Apart from the loss of privacy and amenity he believed that the value of his property would be adversely affected. There would be an increase in noise from traffic generated by the development, as well as other nuisances such as smells from dustbins. Moreover, any additional building was likely to generate additional run-off water, particularly where there were driveways and hardstandings. This would increase the risk of flooding to the properties in Mead Close.

23. Mr Crompton said that the restriction had been in place for over 50 years. It had proved to be valuable in the 25 years since he bought No.10. He believed that its discharge or modification would have severe consequences for the residents of Mead Close. It would probably set a precedent and make further developments more likely. Should the application succeed he thought that the value of his property – his main asset – would be reduced. In the course of his oral evidence Mr Crompton said that the existence of the restriction had been drawn to his attention before he bought the property and was an important consideration in his decision to proceed with the purchase.

Conclusions

24. Before I state my conclusions as to the effect on the objectors of the proposed modification or discharge, I consider Mr Meeson's suggestion that the resultant loss of the view from Mead Close of the trees along Salisbury Road was not material, because 14 Mead Close could be extended at its northern side without infringing the restriction and with a broadly similar effect. Mr Zelin submitted that the Tribunal should not have regard to such a hypothetical situation. In my judgment that submission is inconsistent with the following observations of the President, George Bartlett QC, in *Re Fairclough Homes Limited's Application* (LP/30/2001, unreported) at paras 29 and 30:

“How the character of the area and the amenities would be affected by the modification of the restriction is not in my view to be judged by envisaging the worst that could be done without breaching the restriction and comparing it with what the proposed modification is intended to permit, and indeed, as I have said, this is not Mr Fancourt's case.

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

25. That formulation was approved by the Court of Appeal in *Shephard v Turner* [2006] 20 EG 294. Mr Zelin suggested that the legal position had changed following the subsequent

Court of Appeal judgment in *Duffield v Gandy* [2008] EWCA Civ 39. I am unable to understand how it can be said that *Duffield* has imposed a different test from that set out in *Fairclough*. In paragraph 60 of *Duffield* Mummery LJ, with whom Toulson LJ and Patten J said this:

“In brief, Mr Rose did not ignore or fail to take into account the garden use of the property that could be made regardless of the restriction on the covenant. He correctly construed the covenant as securing a practical benefit of substantial value to Mrs Gandy by enabling her to prevent the development of the property by the erection of a residence, which would also involve ancillary use of a garden adjoining her property. In paragraph 18 of the decision Mr Rose compared the difference between the use *or potential use* of the property by Riversview, which had no real impact on Mrs Gandy’s privacy, and the use of a rear garden on the part of the property very close to hers that would be made by the occupants of the proposed bungalow. On making the comparison of the two types of garden use Mr Rose was entitled in law to conclude that the practical benefits of the restriction were of substantial value or advantage to Mrs Gandy.” (Italics added).

26. The potential (or, as Mr Zelin put it, hypothetical) use which may be made of a property without breaching the restriction is therefore to be taken into account in any consideration of ground (aa). That said, I accept Mr Zelin’s further submission that, in this case, there was no evidence to suggest that the applicant had any intention of adding a northern extension to No.14, or that such development would be feasible.

27. The proposed development has been approved by the local planning authority. Whilst there may be some force in Mr Fennell’s suggestion that the planning officer did not give sufficient consideration to the effects of the proposal on Mead Close, I am unable to accept Mr Fennell’s opinion that the proposed development would not constitute a reasonable use of the application site. It is not suggested that the covenant, in impeding that use, is contrary to the public interest. The issues under ground (aa), therefore, are whether the restriction secures to the objectors any practical benefits of substantial value or advantage to them and, if it does not, whether money would be an adequate compensation for the loss or disadvantage which the objectors would suffer from the proposed discharge or modification.

28. In the light of the evidence and my site inspection, I find that the proposed block of flats would interfere with the privacy and views currently enjoyed in the garden of 12 Mead Close and lead to a reduction in the amount of sunlight available in that area. It would overlook and cause interference with the views from the gardens of Nos.9 and 11. It would increase the risk of flooding to neighbouring properties in Mead Close. There would be an adverse effect on the general character of the close, as a result of the intensification of development at its western end. The view currently enjoyed from the close in the direction of Salisbury Road would be impaired. The risk that attempts would be made in the future to carry out further residential development in the gardens of Nos.9, 10, 11 and 12 would be increased.

29. I bear in mind that there have been a few minor breaches of the restriction, so far as it relates to garage roofs, but none in relation to the one house per plot requirement. I am in no doubt that the power to prevent the effects I have mentioned is a practical benefit of substantial advantage to the objectors, who all own properties on the building estate. The evidence, such as it is, about the development plan and the pattern of planning decisions in the area does not suggest that a different conclusion should be reached. Ground (aa) has therefore not been made out and the application must be refused. The parties are now invited to make submissions on costs, and a letter on that accompanies this decision, which will become final when the question of costs has been determined.

Dated 7 July 2008

N J Rose FRICS