[2018] UKFTT 319 (PC)

REF/ 2016/0879

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

MICHAEL MOORE

APPLICANT

and

(1) ANTHONY LIGHTFOOT
(2) HELEN LIGHTFOOT

RESPONDENTS

Property Address: Land at Pipe Gate, Market Drayton

Title Number: SL147821

ORDER

The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicant, Michael Moore dated 21 December 2015 for alteration of the register to title number SL147821

Dated this 6th April 2018

Michael Michell

BY ORDER OF THE TRIBUNAL

REF 2016/0879

PROPERTY CHAMBER, LAND REGISTRATION DIVISION

FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

MICHAEL MOORE

APPLICANT

and

(1) ANTHONY LIGHTFOOT
(2) HELEN LIGHTFOOT

RESPONDENTS

Property Address: Land at Pipe Gate, Market Drayton
Title Number: SL147821

Before: Judge Michell

Sitting at: Chester Civil Justice Centre

Applicant Representation: Mr Marc Wilkinson, counsel,
instructed by Hatchers Solicitors LLP

Respondent Representation: Mr Anthony Tanney, counsel,
instructed by Knights Professional Services Ltd.

DECISION

APPLICATION TO ALTER REGISTER- RESTRICTIVE COVENANT NOT ENTERED ON REGISTER OF BURDENED LAND- LAND REGISTRATION RULE 72 – WHETHER A MISTAKE- WHETHER ENTRY OF A RESTRICTION APPROPRIATE FORM OF PROTECTION-IF MISTAKE, WHETHER REGISTER SHOULD BE RECTIFIED AS PROPRIETOR IN POSSESSION

Cases referred to

Horrill v. Cooper 78 P & CR 336
Sainsbury's Supermarkets Ltd. V. Olympia Homes Ltd. [2006] 1 P & CR 17
Rees v. Peters [2011] 2 P & CR 18

1. The Applicant, Mr Moore applies to HM Land Registry for alteration of title number SL147821 being the title to land at Pipe Gate, a village near Market Drayton. The Respondents, Mr and Mrs Lightfoot are the registered proprietors of title number SL147821. They object to the application. The matter was referred to the Tribunal for determination.

2. The alteration sought is as follows

(1) the replacement of entry number 4 of the Proprietorship register with the following entry

"A Transfer dated 8 October 2013 made between (1) Phoenix Rubber Limited and (2) Anthony Lightfoot and Helen Lightfoot contains a purchaser's covenant details of which are set out in the schedule of personal covenants.

Schedule

The following are details of personal covenants contained in the Transfer dated 8 October 2013 referred to in the Proprietorship Register:

The Transferee shall observe and perform the covenant contained at clause 13.5(i) of a Transfer dated 1 October 2007 and made between (1) Phoenix rubber Limited and (2) George Wimpey Midland Limited so far as such covenant is still subsisting and capable of being enforced or taking effect and will keep the Transferor indemnified against all losses costs claims expenses liabilities and demands arising from any future breach or non observance of it" and

(2) the addition of the following entry to the Charges Register:

"A Conveyance of other land dated 1 October 2007 made between Phoenix Rubber Limited and George Wimpey Midland Limited contains the following covenant by the Transferor:

"The Transferor covenants with the Transferee to the intent that the burden of this covenant may run with and bind the Retained Land in each and every part thereof and to the intent that the benefit of this covenant may be annexed to and run with the Property and each and every part thereof:

(i) not to use or permit the Retained Land to be used for any purpose other than the use permitted by the Planning Consent and the Section 106 Agreement"

Definitions

"Planning consent" means the Outline Consent numbered N/06/25/WO/39 dated 3 September 2007 and any subsequent reserved matters or ancillary approval.

"Section 106 Agreement" means the Agreement made pursuant to section 106 of the Town and Country Planning Act 1990 dated 3rd day of September 2007 and made between Phoenix Rubber Limited and North Shropshire District Council".

NOTE 1: The retained land referred to is the land in this title".

3. Mr Moore says that there is a mistake on the register. He says that the entries should have been made at the time of registration of the transfer dated 1 October 2007 and were omitted by Land Registry in error.

4. Mr and Mrs Lightfoot objected on the following grounds:

(i) they said that the restrictive covenant sought to be registered has come to an end because the s. 106 agreement referred to and the planning consent to which the s. 106 agreement related, has lapsed and been replaced by a new planning consent so that it would be impossible now to comply with the provisions of the original section 106 agreement or the earlier planning consent; and

(ii) they said that they are the registered proprietors in possession, that paragraph 6(2) of Schedule 6 to the Land Registration Act 2002 applies and that the conditions in paragraph 6(2) for alteration where the registered proprietor in possession does not consent are not met.

The first argument was not pursued at the hearing. Instead, the Lightfoots' sought to argue that the restrictive covenant was not intended to bind all successors in title and had been adequately protected by the entry of an agreed restriction.

5. I shall refer to the land in title number SL147821 as "the Open Land". The Open Land is an area of some 6 acres. It was formerly part of a site where industrial operations were carried on by Phoenix Rubber Ltd ("Phoenix"). The Phoenix factory was on adjacent land lying between the Open Land and a road, the A51. I shall refer to the adjacent land as "the Factory Site". There is a public footpath across the Open Land marking the approximate boundary between the Open Land and the Factory Site. The Open Land was used in part for the storage and disposal of chemicals and other materials used in the factory while the factory

was still operating. There were two rectangular ponds on the Open Land. They are visible in an aerial photograph taken in 2004. The Open Land and the Factory Site were formerly registered together under Title Number SL147821.

6. The factory closed down in about 2001. Between 2002 and 2007 Phoenix then made a number of planning applications for the development of the Factory Site. In December 2005 North Shropshire District Council ("the District Council") adopted a new Local Plan prepared in accordance with the Town and Country Planning Act 1990. By Policy H4 of the Local Plan, the Factory Site, described as "Former Phoenix Works" and as having an area of 1 hectare, was allocated as land for housing. The Local Plan stated "Development of the [Factory Site] will be subject to ... the provision of open space/recreation land on the non-brownfield site element of the land to the west of the footpath". Reference to the "non-brownfield site element" was to the Open Land.

7. On 11th January 2006 Phoenix applied to the District Council for outline planning permission for the residential development of the Factory Site to provide 25 new dwellings and ancillary estate roads. The District Council gave the application reference N/06/25/WO/39/OUTLINE.

8. The planning officer recommended granting permission. In his report he said

> "The land to the west of the footpath is to be allocated as open recreational land ... The provision of both open space and play provision and their future maintenance will need to be considered as part of a future legal agreement under s. 106".

The reference to the land to the west of the footpath was a reference to the Open Land. The reference to "s. 106" is a reference to s. 106 of the Town and Country Planning Act 1990 as amended by s. 12 of the Planning and Compensation Act 1991.

9. On 3rd September 2007 Phoenix was granted planning permission on application N/06/25/WO/39/OUTLINE ("the 2007 Planning Permission"). On the same day Phoenix and the District Council entered into a deed made in pursuance of s. 106 ("the s. 106 Agreement"). By that Deed Phoenix covenanted with the District Council in the terms set out in Parts I, II and III of the schedule. Part II of the Schedule included covenants

> "2.1 to provide a Local Amenity Area on [the Open Land] and

2.2 to provide on [the land then in title number SL147821] at least 15 square metres of play area per family Dwelling erected pursuant to [the 2007 Planning Permission] in a location designated by [Phoenix]

2.3 not to use or allow or permit to be used any part of [SL147821] designated as a Local Amenity Area or play area in any approval of any reserved matters application pursuant to [the 2007 Planning Permission] and laid out as such except as a Local Amenity Area or play area

2.4 to maintain the Local Amenity Area and play area provided pursuant to [the 2007 Planning Permission] together with all equipment and fencing thereof in a safe and tidy and clean state and to keep planted areas (within such Local Amenity Area and play area) properly cultivated and mown as appropriate to the satisfaction of the [District Council] until such time as such areas are adopted by the Woore Parish Council or some other local authority as maintainable at the public expense or transferred to a Management Company and to keep such areas available for their intended use

2.5 ....to lay out and construct the Local Amenity Area in accordance with the Recreation Scheme following the occupation of all of the Dwellings to be erected on the Land pursuant to [the 2007 Planning Permission]".

"Recreation scheme" was defined in paragraph I of the Schedule as meaning details of a scheme to provide a Local Amenity Area and play area to include details listed in paragraph 3. Those details included details as to the design of footpaths, boundary treatments, landscaping and seating; the provision of litter bins, lighting and security; and proposals for management and maintenance. The covenants were a planning obligation for the purpose of s.12 of the Planning and Compensation Act 1991. That section contains the amended version of s. 106. S. 106 (3) provides

"Subject to subsection (4) a planning obligation is enforceable by the authority....

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person".

S. 106(4) provides

"The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land".

10. The term "Local Amenity Area" is not defined in the deed. Counsel were unable to assist me as to whether it is a term of planning law or a term of art in the planning field.

11. Phoenix transferred title to the Factory Site to George Wimpey Midlands Limited ("Wimpey") by a transfer of part dated 1st October 2007. Phoenix retained title to the Open Land. By clause 13.4 of the Transfer, Phoenix covenanted with Wimpey as follows

> "to the intent that the burden of this covenant may run with and bind [the Open Land] and each and every part thereof and to the intent that the benefit of this covenant may be annexed to and run with [the Factory Site] and each and every part thereof:-
>
> (i) not to use nor permit [the Factory Site] to be used for any purpose other than the use permitted by the Planning Consent and the Section 106 Agreement
>
> (ii) at the request of the Transferee to join with the [Transfer**ee**] in entering into any adoption or wayleave agreements on the standard terms of the relevant Sewerage or Utility provider and upon the condition that the Transferee pays the Transferor's reasonable legal fees in connection with the entry into such agreements and indemnifies the Transferor against any liabilities thereunder provided that such request must be made by the Transferor to the Transferee prior to the End Date
>
> (iii) not to dispose of [the Open Land] (or any part thereof) prior to the End Date without first procuring a covenant from the disponee thereof to observe and perform the covenant contained in sub-clause 1 above and "dispose" shall mean a freehold transfer or long lease thereof."

"End date" was defined in paragraph 13.1 as meaning "the date of completion of the sale of the last dwelling to be erected on [the Factory Site] pursuant to [the 2007 Planning Permission] or three years from the date hereof whichever shall be the earlier".

12. Clause 13.6 and 13.7 contained provisions as to a restriction to be entered on the title to the Open Land. Clause 13.6 provides

> "The Transferor and the Transferee request the Chief Land Registrar to enter upon the Proprietorship Register of [the Open Land] a restriction referring to this Transfer and reading as follows:
>
> "No disposition of the Registered estate or any part thereof by the Proprietor of the Registered Estate or by the Proprietor of any registered charge is to be registered without a certificate signed by the Registered Proprietor of title number .... (or his

Solicitor) that the provisions of Clause 13.5(iii) of the Transfer dated … 2007 made between [Phoenix] and [Wimpey] has been complied with".

Clause 13.7 contains a covenant in then following terms

"The Transferor hereby covenants with the Transferee that the Transferor will remove the restriction registered against the [Open Land] in accordance with clause 13.6 above as soon as reasonable practicable on the End Date".

13. The transfer to Wimpey was registered on 22nd October 2007. The Factory Site was removed from title number SL147821 and given a new title number SL187973. An entry was then made in the property register of title number SL147821 recording that the land in the title had the benefit of the rights reserved by but was subject to the rights granted in the transfer of the Factory Site dated 1st October 2007.

14. On 3rd January 2008 a restriction was entered in the Proprietorship Register of SL147821 (the Open Land) in the following terms

"No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without a certificate signed by the registered proprietor for the time being of the estate registered under title number SL187973 or his conveyancer that the provisions of Clause 13.5(iii) of the Transfer dated 1st October 2007 referred to in the Property Register have been complied with".

15. On 20th September 2007 Wimpey applied for approval of reserved matters under the 2007 Planning Permission. Those reserved matters included landscaping. Wimpey submitted plans of the Open Land to the Council dated 5th November 2007. The plans showed a kidney-shaped path with another looped path branching off in the north-east corner and gave a planting specification. The plans were stamped as approved. The planning authority by this time was Shropshire Council, a unitary authority. Approval was given on 10th December 2007.

16. There is some dispute as to whether the Open Area was laid out as a Local Amenity Area in accordance with a recreation scheme. RPS Planning and Development Ltd prepared for Wimpey a "Landscape Management Plan and Maintenance Schedule" for land at Pipe Gate. The plan is dated October 2007. The description in the general summary section of the

report included "wildflower and meadow planting to recreational area". An aerial photograph taken on 24th June 2009 shows a path in roughly the position of the main path shown on the plan approved on 5th November 2007. The looped path shown on the plan in the north east part of the land is not visible in the photograph. It is apparent from the 2009 photograph that the rectangular ponds had been removed and that the land had been transformed from an area of rough scrubland to an area of grassland with trees at the edges and in the north-east corner. The Open Land appears to be in a similar condition in another aerial photograph. This photograph is undated but it was taken at a time when the estate roads for the current development of the Factory Site had been laid down but the houses had not all been constructed. This would indicate the photograph was taken in about 2011. A further aerial photograph in which Mr Moore's house can be seen also shows that main path on the Open Land.

17. There was some witness evidence going to the question of whether the Open Land was in fact laid out as a Local Amenity Area in accordance with an approved recreation scheme. Mr Amos bought 19 Phoenix Rise from Wimpey. He gave evidence of walking on a path laid over the Open Land and surfaced with bark. He said that the Open Land was maintained by tractor for two years after he bought. He spoke to the contractor doing groundworks. The contractor told him that he had to pick up litter, plant wild flowers, and mow the margins. Mr Vellings has lived a short distance from the Factory Site since 1975. His evidence was that Phoenix had tidied up the Open Land and created the "looped" oath but he said that any subsequent maintenance had been minimal. Paula Green has lived in Pipe Gate opposite the entrance to Priory Gardens since 1987. Her evidence was that Phoenix had asked Frank Woodcock, a parish councillor, to maintain the Open Land and that Mr Woodcock kept the grass and undergrowth under control. Mr Ellsmoor is a farmer in Woore, who farms land near the Open Land. His evidence in cross-examination was that after planning permission was given for the Factory Site, the Open Land was levelled and concrete on the land was crushed. The land was sowed with a mix of grass and wildflower seeds. The grass was mown. He himself took a hay crop from the Open Land. He could not tell a difference between what was sown outside the path and what was sown inside it.

18. In July 2010 Wimpey (which by this time had become Taylor Wimpey North Midlands Limited) applied to renew the 2007 planning permission and for full planning permission for a different scheme. The new application (No. 10/02935/FUL) was for a

scheme to build 35 dwellings on the Factory Site. The Planning Statement submitted in support of the application stated at paragraph 4.2 "A similar area of public open space and landscaping is proposed in the same location as previously approved and the existing public footpath is retained and enhanced". This is likely to be a reference to public open space on the Factory Site. The Planning Statement at paragraph 4.10 stated

> "The development proposes a large area of open space to the west of the site, adjacent to the existing footpath. The open space measures 5,300 square metres, in addition a further 2.4 hectares of dedicated amenity space to the opposite side of the footpath".

What was described as "dedicated amenity space" was the Open Land.

19. On 16th December 2010 Wimpey and the Council entered into a s. 106 Agreement (the (2010 Agreement). This did not relate to the Open Land. Planning permission for the 35 house scheme was given on 17th December 2010. Wimpey then withdrew its application to renew the 2007 planning permission.

20. On 22nd April 2011 Mr Moore and his partner, Gillian Ann Evans reserved plot 17 at the development on the Factory Site, a development that had been given the name "Priory Gardens". The address of the plot was 8 Phoenix Rise, Pipe Gate. Mr Moore agreed subject to contract to pay £243,995 for the property. The estimated time for completion of the build was November/December 2011. Mr Moore said that he chose this plot because of the aspect at the front onto the Open Land, which provided a place to exercise his dog and gave a peaceful character to the area. If the Open Land had not been public open space, he would not have bought the house. He accepted that he did not tell Whiteheads, who were his conveyancing solicitors that if the Open Land was not public open space, he would not buy.

21. 8 Phoenix Rise was transferred to Mr Moore and Ms Evans by a transfer dated 30th November 2011. Mr Moore and Ms Evans were registered as proprietors of 8 Phoenix Rise under title number SL214880 on 16th December 2011.

22. On 10th April 2012 Woore Parish Council applied for planning permission for change of use of the Open Land to sports and recreational use to include a bowling green, tennis courts, a basketball court, a cricket pitch, a football and rugby pitch, a trekking path, an informal area, a pavilion and car parking. Pipe Gate is within the civil parish of Woore. In May 2012 the Parish Council withdrew its application.

23. In May 2012 Mr Moore contacted Mr Hart of Phoenix to ask if he would sell the Open Land to a group of residents. Mr Moore had contacted neighbours at Phoenix Rise to see if they would be interest in participating in a purchase of the Open Land. Later in July, Mr Moore made an approach by circular to residents of Pipe Gate generally to see who would be interested in a purchase of the Open Land for the benefit of the community. As there was a concern amongst some interested in joining in a purchase as to whether they might become personally liable for contaminants on the Open Land, Mr Moore asked Mr Hart to agree to trial bore holes being dug to test for contamination. Mr Moore refused and as a result the purchase did not go ahead.

24. In 2013 Mr and Mrs Lightfoot agreed to buy the Open Land from Phoenix. Knights Solicitors LLP acted for the Lightfoots on the purchase. On 27th September 2013 they provided a report on title. The report included the following

(i) In the executive summary at paragraph 3.2 the statement that the use of the Property is restricted to use as local amenity and play area "further details of which are provided at paragraph 10", paragraph 10 being headed "Planning".

(ii) At paragraph 4.4 notice that the proposed transfer

> "provides that you will comply with the restriction on use as contained in the Transfer dated 10 October 2007 made between (1) Phoenix Rubber Limited and (2) George Wimpey Midland Limited. This provides that the Property must not be used for any purpose other than the use permitted by the planning consent and the s. 106 agreement. Please see paragraph 7.4 for further details".

(iii) At paragraph 7.4 a statement that on the sale to Wimpey the use of the Property

> "was restricted so that it is not to be used for any purpose other than the use permitted by the planning consent and s. 106 Agreement that was obtained in relation to the development of the estate. These provided that the whole of the Property is to be used as "local amenity area and play area".

(iv) At paragraph 10.1 advice that the use of the Open Land as local amenity area and play area was authorised by the planning permission and section 106 agreement dated 3rd September 2007

(v) At paragraph 10.2 advice that there was an obligation to maintain the local amenity area.

(vi) At paragraph 10.3 advice that there was an obligation to equip the play area and construct the local amenity area in accordance with the recreation scheme and a statement

"We understand that none of these requirements have been implemented at the Property. Therefore upon you purchasing the Property it will become your obligation to ensure that the requirements are carried out. You will also have to allow members of the public to utilise the Property and you will be liable for maintaining it".

25. Phoenix transferred the Open Land to Mr and Mrs Lightfoot for the consideration of £6,000 by a transfer dated 8th October 2013. Box 11 of the transfer includes the following covenant

"The Transferee shall observe and perform the covenant contained in clause 13.5(i) of a Transfer dated 1 October 2007 and made between (1) Phoenix Rubber Limited and (2) George Wimpey Midland Limited so far as such covenant is still subsisting and capable of being enforced and taking effect and will keep the Transferor indemnified against all losses costs claims expenses liabilities and demands arising from any future breach or non-observance of it".

26. Mrs Lightfoot was a member of Woore Parish Council at the time she and her husband purchased the Open Land. She had become a member of the Council in June 2013. Mrs Lightfoot attended a parish council meeting on 14th October 2013, 6 days after she had completed the purchase of the Open Land. Draft minutes of the meeting drafted by the parish clerk and circulated to members for their approval stated the following

"Cllr Lightfoot reported that she and her husband had bought the public open space in Pipe Gate from the ex owner of the Phoenix Rubber Company and planned to maintain it as public open space. It was resolved that the clerk would write to Cllr Lightfoot thanking her for her commitment for the area to be maintained as open space and expressing the view that it was very public spirited of her and her husband".

The approval of the minutes was an item of business at the next council meeting, being on 11 November 2013. At this meeting, the draft minutes were approved with the removal of the word "public" so that they read "planned to maintain it as open space". The minutes of the 11 November 2013 meeting record as follows:

"Following the rewording of this item in the approval of the Minutes to "open space", Cllr Moore questioned if Cllr Lightfoot and her husband were aware of their obligations upon purchased of the open space in Pipe Gate. Cllr Lightfoot said they were very aware of what they had purchased and their obligations with the land".

27. Mrs Lightfoot said that she did not say that she intended to maintain the Open Land as "public" open space. Mr Moore's evidence in cross-examination was that he could not be certain Mrs Lightfoot had used the words "public open space" but that he thought he and all the councillors believed that was what she meant. It was because they thought she had meant public open space that the clerk had been instructed to write to thank her and Mr Lightfoot.

28. Mr Lightfoot said that when he and his wife purchased the Open Land there was nothing on it to suggest that it was being used by anyone. He denied that Mr Hart of Phoenix had told him that the owner of the Open Land had to maintain it as amenity land. He said that Mr Hart had told him about the 2007 s. 106 Agreement but had said that the 2007 planning application had not come to fruition. Mr Lightfoot insisted that he understood from the report on title only that there was a restriction on the land imposed by the 2007 s. 106 agreement. He believed that to be a planning matter. He understood that the houses at Priory Gate had been built under a different planning permission than that to which the 2006 s.106 Agreement related and understood the s. 106 Agreement therefore to be not enforceable. He believed that he and his wife could negotiate with the Council for the release of the s. 106 Agreement restriction. He said that he was not aware of any other restriction.

29. Mrs Lightfoot adopted Mr Lightfoot's evidence as to their understanding of the source of the restriction, namely that it was the 2007 s. 106 Agreement, was not enforceable and it would be possible to negotiate with the Council. She said that she misunderstood the report on title. She and Mr Lightfoot formed the view that it was a planning matter only. It appeared from Mrs Lightfoot's evidence that she was confused by the difference between a restriction entered on the title and a restriction on user. Asked about whether she had been told the restriction on user was at an end, she said that she had been told there was an out of date restriction on the title that had to be lifted.

30. Mrs Lightfoot's evidence was that Mr Hart told her Phoenix was paying £1,000 a year to maintain the Open Land and that it did not have any value to him; it was just a liability. That was why he agreed to sell it for £6,000.

31. Mrs Brenda Amos lives at 19 Phoenix Rise, having moved in on 23rd March 2012. Her evidence was that some time before buying Phoenix Rise, she had a conversation with Mrs Lightfoot about the Open Land. This was by chance; her dog ran onto the road from an

adjoining field and was caught by Mrs Lightfoot. In the ensuing conversation between the ladies, Mrs Lightfoot had told her the Open Land was public open space, that it was owned by Mr Hart, that it was subject to a s. 106 agreement and a restrictive covenant and would have to remain as it was; and that Mr Lightfoot had worked for the rubber factory for years.

32. Mrs Lightfoot denied that she had ever had the conversation with Mrs Amos. She said she would not then have had any interest in the Open Land, would not have known about any s. 106 agreement or restrictive covenant; and that her husband had never worked in the rubber factory. He was a self-employed mechanic who worked from a garage close to the Factory Site.

33. Mr and Mrs Lightfoot approached the Council seeking the discharge of the obligation under the 2007 s. 106 Agreement affecting the Open Land. The Council and Mr and Mrs Lightfoot entered into a Deed of Discharge dated 26th January 2016. Paragraph 2.2 of the Deed stated

> "With effect from the date of this Deed the Planning Agreement shall cease to bind the Land and the Planning Agreement shall be deemed to be discharged".

34. Mr Moore learned of the deed of discharge and wrote to the Council on 28th January 2015 to complain.

35. The Council now accepts that the deed of discharge was not effective to discharge the restrictive covenant because prior notice was not given to all of the successors in title to the Factory Site, being those having the benefit of the covenant. However, in a letter by email to Mr Moore dated 3rd September 2015, Mr Tim Rogers of Shropshire Council stated

> "the council's current position is that it would not seek to enforce the 2007 planning obligation. This planning consent was not implemented and the amenity land would not need to be provided to meet any identifiable need as the development was never constructed. The s. 106 agreement relating to the 2010 permission made provision for public open space on that development and did not include the provision of amenity land. …"

36. Mr Moore made his application to HM Land Registry on 17th December 2015. After correspondence between Mr Moore and HM Land Registry concerning the basis of the

application, HM Land Registry served notice on Mr and Mrs Lightfoot on 26th May 2016. They objected and the matter was eventually referred to the Tribunal for determination.

Alteration of the register

37. The registrar has power under s. 65 of and Schedule 4 to the Land Registration Act 2002 to alter the register for the purpose of correcting a mistake. An alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor is defined in schedule 4 paragraph (1) as rectification. Paragraph 6 contains provisions as to the power of the registrar to rectify the register

> "(2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietors consent in relation to land in his possession unless-
>
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
>
> (b) it would for any other reason be unjust for the alteration not to be made".
>
> (3) If on an application for alteration under paragraph 5, the registrar has power to make the alteration ,the application must be approved, unless there are exceptional circumstances which justify not making the alteration.
>
> (8) The powers under this schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate"

38. The Issues

There are two issues for me to decide. The first is whether there is a mistake on the register. That involves consideration of two sub-issues, namely whether the state of the register reflects the intention of the parties to be ascertained from the construction of the 2007 transfer and whether the registrar complied with Land Registration Rule 72 entering as restriction and not registering the burden of the restrictive covenant on the title to the Open Land. The second issue arises if there is a mistake. That issue is whether the register should be rectified.

Mistake

39. The version of the Land Registration Rule 72 in force from 13th October 2003 to 9th November 2008 provided so far as material

"(1) Subject to paragraphs (3) and (4), on a transfer …of part of the registered estate in a registered title the following entries must be made in the individual register of that registered title –

(a) …

(b) entries relating to any rights, covenants, provisions and other matters created by the transfer … which the registrar considers affect the retained …registered estate".

The relevant provision of Rule 72 as amended and in force from 10th November 2008 is to be found in Rule 72(4)

"(4) Subject to paragraph (5), on registration of a transfer or charge of part of the registered estate in a registered title the registrar must (where appropriate) make entries in the relevant individual registers in respect of any rights, restrictive covenants, provisions and other matters created by the transfer or charge which are capable of being entered in an individual register".

40. It is not in issue that the omission of an entry on the register which should have been made in relation to a restrictive covenant is capable of being a mistake for the purposes of Schedule 4. A restrictive covenant looses its priority on the occasion of a registration of a registrable disposition for valuable consideration unless it is the subject of a notice in the register. S. 29 provides

"(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(3) For the purposes of subsection (1), the priority of an interest is protected –

(a) in any case, if the interest-

(i) is a registered charge of the subject of a notice in the register

Construction

41. Counsel for Mr Moore submitted that the covenant in clause 13.5(i) is a stand alone covenant and is not limited as to its duration by the other provisions of clause 13.

42. Counsel for the Respondents submitted that the parties intended that the covenant should be protected so as to be binding on successors in title to Phoenix only until the End

Date and that that was its effect as a matter of construction. Effect was to be given to the intention of the parties as appearing from the transfer of the Factory Site to Taylor Wimpey by means of the entry of a restriction in the agreed form. The entry of a notice of the restrictive covenant on the charges register would have defeated the intentions of the parties by making it binding on registered proprietors other than Phoenix after the End Date. He submitted that there is no mistake on the register since the covenant was only intended to be binding on successors in title to Phoenix.

43. I do not accept that submission. I have come to the conclusion that there is a mistake in clause 13.5(iii) that can be corrected as a matter of construction. A mistake in a written instrument can be corrected as a matter of construction where there is a clear mistake on the face of the instrument and it is clear what correction ought to be made to cure the mistake – see *East v. Pantiles (Plant Hire) Ltd.* [1982] 2 EGLR 111 at 112A-112C per Brightman L.J.. The reference in 13.5(iii) to sub-clause 1 is intended to be and is to be construed as a reference to 13.5(ii). The restrictive covenant in clause 13.5(i) would be binding on successors in title to Phoenix subject only to registration. There is no good reason why Taylor Wimpey should have wanted Phoenix to obtain a covenant with a purchaser from Taylor Wimpey to observe the restrictive covenant but have wanted Phoenix only to obtain such a covenant if it disposed of the Open Land before the End Date. Clause 13.5(ii) was of potentially great importance to Taylor Wimpey because it may have needed to have sewerage and utility infrastructure run over the Open Land in order to service the development on the Factory Site. For that infrastructure to be put on the Open Land, the owner of the Open Land for the time being may have to enter into adoption or wayleave agreements. They would be entered into before the development of the Factory Site was completed. Clause 13.5(ii) is a covenant by Phoenix to enter into adoption or wayleave agreements but it would not bind successors in title to Phoenix. To protect Taylor Wimpey's position in the event that Phoenix disposed of the whole or part of the Open Land before the development of the Factory Site was complete, Phoenix entered into the covenant in clause 13.5(iii) in the event that it disposed of the Open Land or part of it before the End Date to procure a covenant with any purchaser to comply with the covenant in clause 13.5 (ii).

44. I do not accept the submission for the Respondent that the register reflected the intentions of the parties because the parties intended only that the covenant in clause 13.5(i) should be binding only on Phoenix and successors in title who took before the End Date. The

covenant was expressed by the opening words of clause 13.5 to run with a bind the Open Land. I can see no reason why the covenant should have been intended to bind successors in title of Phoenix only if they took prior to the End Date.

Rule 72

45. As the restrictive covenant was intended to bind all successors in title of Phoenix andn not just those who took prior to the End Date, the registrar did not comply with Rule 72 by entering only the restriction. The restrictive covenant should have been entered on the title to the Open Land so as to bind all and any successors in title.

Would it be unjust not to make the alteration?

46. Land Registration Act 2002 Schedule 4 paragraph 6 provides as follows

> "No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless –
>
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake;
>
> (b) it would for any other reason be unjust for the alteration not to be made".

Mr and Mrs Lightfoot are the registered proprietors of the open land and are in possession. They do not consent to the alteration and they did not cause or contribute to the mistake on the register by fraud or lack of proper care. The issue is therefore whether it would for any other reason be unjust for the alteration not to be made.

47. Counsel for Mr Moore submitted that it would be unjust for the alteration not to be made for the following reasons:

(1) the Lightfoots were notified by their solicitors in the report on title that the Open Land was subject to the restrictive covenant;

(2) the Lightfoots were advised in the report on title that they would have to allow the Open Land to be used as local amenity land to which the public had access;

(3) the price paid by the Lightfoots was consistent with their being aware of the restrictive covenant and reflects a common understanding between them and Mr Hart that they would need to comply with the covenant;

(4) the covenant would confer a real advantage on Mr Moore by ensuring that the land was not built on and so preserving the open aspect from Mr Moore's home; and

(5) Mr Moore had been influenced in buying his house by the existence of the land as recreation land.

48. Counsel for the Lightfoots submitted that it would not be unjust for the alteration not to be made for the following reasons:
(1) the Lightfoots believed that the only restriction on the Open Land was the planning restriction in the s. 106 agreement and did not understand there to be a restrictive covenant;
(2) they could not be criticised for holding that belief because clause 7.4 of the report on title was capable of being read as referring only to a planning restriction;
(3) the price they paid reflected the value of the land to them as a garden and wildlife sanctuary; there was no evidence the value of the Open Land would have been higher had the restrictive covenant not existed;
(4) the alteration of the register to add the covenant would not force the Lightfoots to make the Open Land available to the public as open amenity land but would simply sterilise it by preventing use for any other purpose;
(5) Mr Moore's intention was to force the Lightfoots to sell the Open Land to Mr Moore.

49. I was referred to several cases in which an issue was whether it would be unjust not to rectify the register. In *Horrill v. Cooper* 78 P & CR 336, HH Judge Collyer Q.C., sitting as a deputy High Court judge, ordered rectification of the register to add the burden of a restrictive covenant. The covenant had not been registered because of a mistake. The purchaser of the burdened land had taken by a transfer which recited that the land was subject to restrictive covenants. The purchaser did not produce evidence that the price he paid was negotiated on the basis that the land was not bound by the restrictive covenant. The learned judge decided that it would be unjust not to rectify the register when not to do so would give the purchaser a windfall and leave the plaintiff to claim compensation from HM Land Registry to be assessed by reference to an historic date. On appeal the Court of Appeal held that HH Judge Collyer QC had no jurisdiction to rectify the register under Land Registration Act 1925 s. 82(3) but affirmed the order for rectification, though under s. 82(1)(h), stating that it was just to rectify the register for the reasons stated by the learned trial judge.

50. In *Sainsbury's Supermarkets Ltd. V. Olympia Homes Ltd.* [2006] 1 P & CR 17, there was a mistake on the register because Olympia had taken a transfer of the equitable interest in the registered estate but not a transfer of the legal title. Sainsbury's sought rectification to

delete Olympia's title because Sainsburys had an equitable interest under an option agreement, which equity was prior in time to that of Olympia and so binding on Olympia. Mann J. ordered rectification on the grounds that Olympia believed that it was purchasing subject to Sainsbury's rights, the vendor to Olympia had not sought to sell free of those rights and if the register were not rectified then Olympia would have acquired a potentially very significant windfall.

51. *Rees v. Peters* [2011] 2 P & CR 18, Mr Rees sought rectification of the charges register of Mr Peter's title to add the burden of a restrictive covenant given when a common vendor of both parties' land had on the sale off of Mr Rees's land given a restrictive covenant over the land retained, being land subsequently conveyed to Mr Peters. The Court of Appeal held that Mr Peter's title should be rectified to include reference to the restrictive covenants on the grounds that it would be unjust for the alteration not to be made. The transfer to Mr Peters stated that the land was sold subject to the restrictive covenant.

52. These are all cases turning on their own facts. Not surprisingly, they are each cases in which the knowledge of the registered proprietor of the rights sought to be made enforceable by rectification of his title was a highly relevant factor. It is a matter for me to determine whether on the facts of this case it would be unjust not to alter the register. In so determining it is relevant for me to consider whether Mr and Mrs Lightwood knew of the existence of the restrictive covenant prior to their registration as proprietors of the Open Land.

53. Having heard all the evidence, I am satisfied on balance that Mr and Mrs Lightfoot did not in fact appreciate at the time they purchased the Open Land that it was subject to a restrictive covenant as well as to the planning restriction. I accept that they believed that the land was subject to a planning restriction and that it was just a matter of negotiating with the council to have the restriction lifted. They did not appreciate that there was a restrictive covenant, independent of the planning restriction. I am satisfied that they read the report on title as indicating only that the Open Land was subject to the planning restriction. Such a reading would have been supported by the executive summary at paragraph 3.1 which says that the use of the Property is restricted to use as a local amenity and play area "further details of which are provided in paragraph 10". Paragraph 10 is the section headed "planning". A more careful reading of paragraph 4.4 and 7.4 of the report would have led them to consider that the planning restriction was not the only restriction. However, I note that the report

nowhere clearly stated that the land was subject to a restrictive covenant enforceable by the residents of Phoenix Rise.

54. As regards the evidence of the conversation between Mrs Amos and Mrs Lightfoot sometime before October 2012, I am afraid I am unable to accept the evidence of Mrs Amos. Having seen Mrs Amos and Mrs Lightfoot give evidence and considered the substance of their evidence, I prefer the evidence of Mrs Lightfoot. Though Mrs Amos may well have had some conversation with Mrs Lightfoot some time before Mr and Mrs Amos bought their home in Phoenix Rise, I do not accept that Mrs Lightfoot then said who owned the open land, or that it was subject to a restrictive covenant or that her husband worked for the rubber factory. Mrs Amos's recollection is mistaken. Mrs Lightfoot would not have said that her husband worked at the rubber factory when he had not done so. Mrs Lightfoot knew that Phoenix owned the Open Land and that Mr Hart owned and controlled Phoenix. However, there is no reason why she would have known the land was subject to a restrictive covenant or of a s. 106 agreement.

55. There is no evidence that Mr and Mrs Lightfoot paid a reduced price for the Open Land because it was subject to a restrictive covenant. There is no evidence that the Open Land free of the burden of the restrictive covenant but subject to the s. 106 planning restriction would have been any different than the price they paid. This case is different from *Horrill v. Cooper* in that the Open Land was subject to a factor which would have depreciated its value, quite apart from the restrictive covenant, namely the s. 106 planning restriction.

56. The burden is upon Mr Moore to satisfy me that it would be unjust not to alter the register. Having considered the matter carefully, I am not so satisfied. This is not a case in which the Lightfoots sought knowingly to take advantage of the absence of the entry of the restrictive covenants on the title to the Open Land and thereby secure an advantage. Furthermore, to order rectification of the register would not necessarily secure the benefit that Mr Moore wishes to achieve, namely the use of the Open Land as local amenity land.

Conclusions

57. There is a mistake on the register in that the burden of the restrictive covenant does not appear in the Charges Register of the title to the Open Land. However, Mr and Mrs

Lightfoot as registered proprietors in possession of the Open Land are entitled to the benefit of the protection given by paragraph 6 of Land Registration Act 2002 Schedule 4. It is not unjust not to alter the register. Accordingly, I shall direct the Chief Land Registrar to cancel Mr Moore's application.

Costs

58. My preliminary view is that there should be no order as to costs. The costs of the proceedings could be fairly evenly split between the issue of whether there was a mistake on the register and the issue of whether there should be alteration of the register. Mr Moore won the former but the Lightfoots won the latter. An order that there be no order as to costs would do justice between the parties. Any party who wishes to submit that I should make some different order as to costs should serve written submissions on the Tribunal and on the other party by 5pm on 27th April 2018.

BY ORDER OF THE TRIBUNAL

Michael Michell

DATED 6th April 2018