

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*RESTRICTIVE COVENANT – modification – building scheme – land originally designated a close to which all residents would have access – prohibition on building and uses other than garden or recreation ground for residents – land sold in 1952 and since used as private garden with no access for residents – history of objections to development – planning permission for erection of two detached houses – whether covenants to be modified – application granted – no compensation awarded – Law of Property Act 1925 s84(1)(a), (aa), (b) and (c)*

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

BY

SUNITA SURANA

Re: Land adjoining  
21 Icklingham Road,  
Cobham,  
Surrey

Before: Martin Rodger QC, Deputy President  
Andrew Trott FRICS

The Royal Courts of Justice, London WC2A 2LL  
17-18 May 2016

*Tom Weekes QC*, instructed by Wedlake Bell, Solicitors, on behalf of the applicant  
*Mr John Collyear* and *Mr Bernard Abrahamsen*, on behalf of themselves and other objectors

The following cases are referred to in this decision:

*Re Voss's Application* LP/11/1973 (Lands Tribunal) (unreported)  
*Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261  
*Re W Findlay & Co Ltd's Application* (1963) 15 P&CR 94  
*Attorney-General of Hong Kong v Fairfax Ltd* [1997] 1 WLR 149  
*Odey v Barber* [2008] Ch. 175  
*Shephard v Turner* [2006] EGLR 73  
*Winter v Traditional & Contemporary Contracts Limited* [2008] 1 EGLR 80

The following further cases were referred to in argument:

*Swan v Sinclair* [1924] 1 Ch 254  
*Betterment Properties (Weymouth) Ltd v Dorset County Council (No.2)* [2014] AC 1072

## Introduction

1. The applicant, Ms Sunita Surana, applies under grounds (a), (aa), (b) and (c) of s.84(1) of the Law of Property Act 1925 to modify restrictive covenants relating to a parcel of land adjoining her house at 21 Icklingham Road, Cobham, Surrey.

2. The application land is part of a substantial residential estate known as the Burhill Estate, which was laid out and made subject to schemes of mutual covenants by its original owner, the Burhill Estate Company Limited, between 1934 and 1952. Icklingham Road is one of a number of sub-estates within the larger Burhill Estate and is the subject of its own scheme of covenants. It is referred to in the relevant conveyances as Fairmile Section One, but is known locally simply as the Fairmile Estate (“the Estate”). The Estate now includes 34 residential plots on each of which has been built a single substantial detached house.

3. When the Estate was laid out and the building scheme inaugurated the application land was intended to be retained and maintained by the Estate Company as land over which residents of the Estate were to have access for recreation. Despite that original intention the application land has not been used for that purpose for more than 60 years. In 1952 the land was sold by the Estate Company to the owner of “Druids Lodge”, a house at 15 Icklingham Road, which adjoins the application land on the opposite side from No. 21. Although the application land then passed into private ownership the conveyance nevertheless repeated the same scheme of covenants as already bound the Estate, prohibiting its development and restricting its use to communal recreation.

4. Since its sale in 1952 the application land has been enclosed and used exclusively for the enjoyment of the owners of Druids Lodge and then, from approximately 1962, by the owners of No.21. The other residents of the Estate have therefore been unable in practice to exercise the rights of access to the application land for recreation given to them by the building scheme.

5. Planning permission has now been obtained by Ms Surana for the construction of two detached houses on the application land. To implement that permission would be contrary to the building scheme so Ms Surana has applied to the Tribunal to modify the covenants to enable the proposed development to proceed. She was represented at the hearing of the application by Mr Tom Weekes QC.

6. Ms Surana’s application is actively opposed by the owners of 13 of the houses on the Estate, whose names are listed in the schedule attached to this decision. Those objectors include Mr John Collyear, who lives at 27 Icklingham Road, and Mr Bernard Abrahamsen, who lives at 8 Icklingham Road, both of whom appeared before the Tribunal to give evidence and to explain their objections. Mr Collyear had the authority of the owners of numbers 12, 24, 26, 27, 28, 29 and 31 to represent their views.

7. In their formal notices of objection a number of the objectors said that if the covenants were modified they ought to be compensated; two objectors suggested that an award of £50,000 would be necessary to compensate them, while others proposed sums of £100,000, £300,000, £450,000 and £750,000; two objectors asked for appropriate compensation to be assessed without specifying any figure.

### **The Estate and the application land**

8. Icklingham Road runs in a south-easterly direction between the A307 Portsmouth Road and Leigh Hill Road in Cobham. It is a straight private road, about half a mile long and gated at both ends.

9. The road itself is separated from the individual properties on each side by wide grass verges, referred to as “greenways”. The greenways are maintained by the owners of the adjoining property. Trees have been planted at intervals along the greenways on both sides of the road, with usually two or three of a variety of species in front of each plot; many of these trees are now substantial mature specimens and are likely to have been planted when the Estate was first created.

10. The greenways adjoining the road are not of uniform width, one section towards the southern end of the road being about twice as wide on each side as the remaining stretches.

11. The houses on the Estate are set back from their road frontages (mostly) behind mature boundary hedges. They are of varying styles, materials and sizes, with those of more recent construction generally being much larger than the older properties. We were told that at least 14 of the houses currently on the Estate have been constructed in the last 10 years. Some of the more recent additions are not yet as well screened from the road as the older properties which typically stand behind beech or laurel hedges of three metres or more.

12. The individual plots themselves are large, with a minimum road frontage of 85 feet, but they are not of uniform size. Some are a little larger than others, and the distance between houses varies. With its mixture of building styles and variety of vegetation the overall impression given by the Estate is of spaciousness and absence of uniformity. These characteristics are infringed to an extent by some of the more recent properties, which maximise the use of available space and employ less conservative architectural styles. Paradoxically these modern additions, though not to any standard pattern, have a consistency of design and scale not apparent amongst their more traditional neighbours.

13. The Estate is adjoined on its eastern side by another of the Burhill Estate’s sub-estates, the Barton Burstead Estate, which is laid out according to the same principles but comprised in a separate building scheme. Two estate roads, with associated greenways, join Icklingham Road from the Barton Burstead Estate, creating wide “T” junctions. One

of these roads, The Barton, is perpendicular to Icklingham Road and intersects it towards its northern end; the other, Burstead Close, enters at an oblique angle about half way along Icklingham Road.

14. It is apparent from the estate plan attached to the first conveyances of properties on the Estate that when the Estate was originally laid out it was intended that The Barton and Burstead Close would each bisect Icklingham Road and continue in a south westerly direction into an area known as The Lea which was also then owned by the Burhill Estate Company. This intention was never carried into effect. Instead, the Lea was sold to a third party and was developed as a separate housing estate and school.

15. On either side of Icklingham Road, at what is now the T-junction with Burstead Close, are two largely undeveloped parcels of land, designated in the building scheme as “closes”. The greater part of the close on the west side of the road comprises the application land.

16. The application land has an area of about 0.42 hectares or 1 acre and is shaped approximately as a trapezium, with two parallel sides of unequal length. The shorter of the parallel sides forms the boundary of the application land with Icklingham Road itself, and on that side the land is separated from the greenway adjoining the road by a continuous mature beech hedge about 3 metres high. The longer of the parallel sides forms the boundary of the application land with The Lea, the housing estate to the south west. Along the southern boundary of the application land (separated from it by a fence and a mixed hedge) runs a public footpath connecting the Estate with The Lea. The northern boundary of the application land adjoins two long plots, each running parallel to Icklingham Road. The more westerly of these two plots is 21 Icklingham Road, Ms Surana’s property. The other plot, separating No. 21 from the road, is the site of “Breezes”, a very large house of recent construction.

17. 21 Icklingham Road has no frontage to Icklingham Road itself. Had the Estate been laid out as originally intended it would have fronted the continuation of Burstead Close connecting the Estate with The Lea, but that section of Burstead Close was included in the first conveyance of No. 21 in 1952, and the remainder appears only ever to have been made up as a cul-de-sac providing access to No. 21. Ms Surana’s house is therefore connected to Icklingham Road by a stretch of driveway which runs between Number 21 and Breezes on one side and the application land on the other. There is access between the application land and this driveway through garden gates at two points.

18. The application land is now overgrown by trees and shrubs. To the south west of the site is a large derelict greenhouse approximately 20 metres in length. The northern part of the application land is a slightly more open area of long rough grass.

19. In 2015 the road, the greenways and the closes (to the extent that they had not previously been sold off) were acquired for £1 from the Burhill Estates Company Limited

by Fairmile Estate Ltd, a newly established company owned by the residents of the Estate.

### **The scheme of rights and covenants**

20 Between 1934 and 1939, Burhill Estates Company Limited made up Icklingham Road and then sold off vacant building plots on either side of the road. The original conveyances of the building plots annexed an identical schedule containing detailed provisions identifying the use to which land on the Estate would be put, and conferring rights and imposing restrictions on different areas to facilitate and protect the intended uses. The restrictive covenants imposed by the schedule were expressly referred to in the conveyances as a building scheme.

21 The schedule to the conveyances defined three categories of land which (together with the roads) were represented on the coloured estate plan annexed to each.

22 The greater part of the Estate comprises “development areas”, coloured pink on the estate plan. These were sold off in individual plots to purchasers who were required to build a single house in accordance with plans approved by the Estate Company. Alterations require the Company’s consent and the houses may be occupied only for private residential or professional purposes. Each owner was under a positive obligation to plant and thereafter to maintain hedges along specified boundaries of their plot.

23 The greenways are shown coloured green and run along both sides of each of the three roads on the estate plan. They were to be retained by the Estate Company although in practice they appear to have been maintained by the residents of the adjoining property who have the right to create a driveway to Icklingham Road and a separate pedestrian right of way over the greenways. Building on the greenways is prohibited.

24 Areas coloured green and surrounded by red verge lines on the estate plan are referred to in the schedule of covenants as “closes”. The covenants in section II of Part III of the schedule restrict the use of the closes. These are the subject of the present application for modification. To the extent that they are relevant they provide as follows (“the Vendors” referred to being the Burhill Estates Company Limited):

“1. Except as hereinafter provided no building or erection of any description will be erected on any close but notwithstanding this stipulation or any other provision in this Section contained the Vendors shall be at liberty to place erect construct lay down and maintain in on or under any close:-

(a) [fences];

(b) [seats benches and shelters];

- (c) Such buildings (other than for residential purposes) as the Vendors shall think fit for the accommodation of any employee or employees of the Vendors concerned with the care or maintenance of the close and his or their tools and apparatus;
- (d) [utilities apparatus] and
- (e) [A carriageway along the southern boundary of each of the closes].

2. The Vendors may if they think fit so to do set apart and appropriate the whole or any part of any close for use (whether exclusively or otherwise) as and for a sports ground for the purposes of all or any one or more of such sports games and pastimes as the Vendors may prescribe and in such case the Vendors shall be at liberty to erect and maintain on the land so set apart and appropriated as aforesaid such pavilions changing rooms staff accommodation and other ancillary erections and apparatus as the Vendors shall consider necessary or desirable.

3. Subject to the provisions of the last preceding clause as to sports grounds the closes will be laid out as greens gardens open spaces or pleasure grounds in such manner as the Vendors shall think fit and (subject to such contributions or subscriptions if any as may from time to time be prescribed under Section IV of Part IV of this Schedule in the case of sports grounds) will be maintained by and at the expense of the Vendors.

4. Save as hereinbefore provided no close shall be used for any purpose other than as a green garden open space or pleasure ground for the benefit (subject to and in accordance with the provisions hereinafter contained) of the Purchasers and other residents on the Vendors' Burhill Estate and their families guests servants and invitees. Provided that this stipulation is to have effect subject to the existing right of way shown on the plan and provided further that nothing herein contained shall be construed as imposing any liability on the Vendors to see to the exclusion of unauthorised persons from any close."

25 The scheme of covenants, so far as they affect the closes, therefore comprise two restrictions, which are subject to a variety of permissive exceptions. The first restriction is that "no building or erection of any description will be erected on any close"; this is qualified in the remainder of paragraphs 1 and 2 by exceptions in favour of the Vendor. The second is that "no close shall be used for any purpose other than as a green garden open space or pleasure ground for the benefit ... of the Purchasers and other residents on the Vendors' Burhill Estate"; again this is qualified by the Vendor's right to appropriate any close for use as a sports ground.

26 The conveyance of each plot also granted the Purchaser certain rights of way and access, including rights over roads, closes and greenways. So far as they concern the

closes, those rights are at Section IV of Part IV of the schedule and comprise the following:

“1. Subject to the special provisions hereinafter contained with respect to sports grounds each Purchaser shall have for himself and his family guests servants and invitees full and free rights and liberty of access to and enjoyment of the closes in common with the Vendors and all persons authorised by them and any other persons having the like right.

2. [Rights to be exercisable in accordance with bye-laws and regulations made by the Vendors].

3. The Vendors may from time to time fix hours for the opening and closing of any close and in such case the rights aforesaid shall not be exercisable during the hours of closing; and may surround any close with fences having an entrance or entrances therein to give access to such close; and may fit any such entrance or entrances with gates to be opened or closed in accordance with such hours of opening and closing as may from time to time be fixed as aforesaid.

4. ...

5. In the event of any close or any part of any close being appropriated for use as a sports ground the Vendors may if they think fit –

(a) [Restrict access and use to the members of any club approved by the Vendors].

(b) [Require payment of periodical contributions to the maintenance of such sports ground]; and

(c) [Make rules and regulations].”

27 The Purchaser’s rights of access are therefore not indefeasible. If the close is appropriated for use as a sports ground the Purchaser may be prevented from having access to the close unless he or she becomes a member of an approved sports club and contributes to the maintenance of the close for that purpose.

### **Historic departures from the scheme of covenants**

28 In 1973 the Lands Tribunal was asked to modify the scheme of covenants to permit the construction of a house on a plot of land on the west side of Icklingham Road, opposite the T junction with The Barton, which was designated for use as a road. The intended road would have connected The Barton with The Lea, but it was never laid out. In 1957 the plot was sold off to the adjoining owner by the Burhill Estates Company, but it remained subject to the full schedule of estate covenants until the decision of the Lands Tribunal in *Re Voss’s Application* LP/11/1973 (unreported) granted the proposed modification.



29 In all, between December 1948 and October 1957, the Estate Company sold off five separate parcels of land to owners of houses on the Estate and thereafter permitted their use for purposes different from those for which the land was designated in the building scheme.

30 The greater part of the close on the other side of Icklingham Road from the application land was conveyed in 1948 to the owner of “Marlays”, which is assumed to be the building plot immediately adjoining the close.

31 In September 1952 part of what had originally been intended to form the continuation of Burstead Close (and its adjoining greenway) connecting the Estate with The Lea was conveyed to the owner of No. 21 and became part of the drive now leading to Ms Surana’s house.

32 Three months later the application land and a small adjoining parcel, all of which was designated as close, was sold to Vera Purefoy, who lived at Druid’s Lodge with John Purefoy.

33 In 1954 the remaining section of the surplus road and greenway connecting No. 21 and the application land to Icklingham Road was sold to Mr Purefoy’s company, The Purefoy Engineering Company Ltd.

34 Finally, in 1957 the surplus section of road and greenway which was later the subject of *Re Voss’s Application* was sold to the adjoining owner and incorporated in her garden until the Tribunal’s decision enabled a house to be built on the land.

35 Each of the conveyances by which these sales were completed included the same schedule of estate covenants which continued to bind the Estate Company and required that the parcels be preserved from development and used variously as road, greenway or close. As Mr Weekes pointed out, there was no obvious way for the Estate Company to free any part of the Estate from the original rights and restrictions included in prior conveyances.

36 The 1948 conveyance of the close opposite the application land included a recital that, for the purpose of the schedule of restrictions, the land would be deemed a development plot. That treatment of the covenants did not affect the rights of third parties who had the benefit of the covenants but it indicated that, as between the purchaser and the Estate Company, there was no intention that they were to be enforced. No such inconsistent designation was included in the remaining conveyances of surplus land and in the case of the application land it was sold expressly on the basis that it was deemed to be a close. The 1952 conveyance contains no indication that the application land was not intended thereafter to be used in a manner entirely consistent with its designation as a close to which the other residents of the Estate were entitled to access.

37 Evidence concerning the use of the application land was given by Jill Morrison, who had first visited Icklingham Road in the early 1960s. She had been married to the original owner of Druid's Lodge, John Purefoy, and had lived at No. 21 with her husband. John Purefoy had built the house which now stands at No. 21 in the 1960s, naming it "Jaybee". He and Mrs Morrison lived at Jaybee until they sold it to the Surana family in 1976, and he had built the large greenhouse on the application land.

38 There was no challenge to Mrs Morrison's evidence that since at least the early 1960s, the application land has been used as part of the garden of No. 21, whilst the smaller parcel of land conveyed with it in 1952 has been used as part of the garden of Druid's Lodge (subsequently renamed "Fair House"). The only way into the application land was by the private drive leading from Icklingham Road to Jaybee; the drive was gated at the road and bounded by a hedge through which further gates gave access to the application land. None of the owners of other properties on the Estate ever made use of the application land while Mrs Morrison had known it, and she had been unaware that others had been granted rights of access over it for recreation purposes by the original scheme of easements and covenants.

39 Evidence was also given by the applicant's mother, Mrs Bhawari Surana, which established that the application land had continued to be used as part of the family's private garden, without any access by other residents of Icklingham Road, since 1976 when she and her husband had acquired Jaybee and renamed it Surana House.

### **The applicant's case**

40 Ms Surana applies to modify the covenants under grounds (a), (aa), (b) and (c) of s.84(1) of the 1925 Act. Her application was originally for the discharge of the covenants in their entirety, but Mr Weekes QC indicated to the Tribunal that only modification was now sought.

41 Ms Surana has obtained two alternative planning permissions for the development of the application land. The first is for the construction of a pair of substantial two storey detached houses with rooms in the roof space having two dormer windows to the front and rear and one to the side. Each of the houses has its own separate drive, giving access directly on to Icklingham Road. As Fairmile Estate Ltd, the owner of the greenway whose consent would be required for the creation of the proposed drives, is controlled by objectors to the proposed development, it was obviously thought prudent to obtain a second planning permission. This permits the construction of the same two detached houses on the application land but with a single shared access to the highway over the existing driveway serving No. 21. The plans in support of the second planning permission show that the existing hedge screening the application land from the road (shown on the plans as being 2.5m tall) is intended to be retained.

42 The essence of the applicant's case was that the original object of the covenants had been to facilitate the use of the application land for a purpose for which it had not been

used for at least 60 years. It is unclear whether any of the closes were ever laid out as communal recreational areas, but in *Re Voss's Application* the Lands Tribunal found that they were never used by the owners of the houses on the Estate for that purpose. As a result, the covenants ought to be treated as obsolete or as having been released by agreement.

43 The application was supported by expert evidence on amenity issues given by Mr Michael Derbyshire MRTPI, Head of Planning at Bidwells LLP. He expressed the view that, as currently used, the application land makes no positive contribution to the amenity of the Estate, other than by providing some limited benefit in the form of the mature hedgerows which surround it and which it is proposed to retain. He described the application land as “uncharacteristic of the prevailing pattern of development” on the Estate and said that it was vulnerable to abuse by trespassers.

44 Valuation evidence was given by Mr Clive Beer MRICS, a Director of Savills (UK) Ltd, who considered that there would be no adverse impact on the value or amenity of other properties on the Estate as a result of the proposed development.

### **Grounds (a) and (b)**

45 Ground (a) permits the Tribunal to modify or discharge a restriction on the use of land if by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which it considers material, the restriction ought to be deemed obsolete. The meaning of “obsolete” in this context was considered by the Court of Appeal in *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261; at 272 Romer LJ said:

“It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word “obsolete” is used in section 84 (1) (a).”

46 Ground (b) is satisfied if those entitled to the benefit of the restriction have, either expressly or by implication, agreed to the same being discharged or modified.

47 Mr Weekes suggested that these two grounds could usefully be considered together. He argued that both grounds were satisfied because, with the acquiescence of those entitled to the benefit of the covenants, the Estate Company had sold the application land and other surplus land to owners of houses on the Estate for what plainly must have been intended to be private residential use. The Estate Company and the beneficiaries then

acquiesced, for over half a century, in the use of the application land and other surplus land for private residential purposes rather than for the communal purposes for which it was originally allocated by the scheme of covenants.

48 The same acquiescence, Mr Weekes submitted, barred reliance on the covenants by the owners of the houses on the Estate. As a result the covenants were entirely devoid of life for all purposes and, by reason of those circumstances, they could no longer achieve their original purpose and were obsolete.

49 In support of his submission that the covenants could no longer be enforced as a result of acquiescence Mr Weekes referred to a number of authorities in which land had been used in contravention of restrictive covenants. These included *Re W Findlay & Co Ltd's Application* (1963) 15 P&CR 94, which concerned land used for shops for more than 40 years “without complaint or objection of any kind” in defiance of a covenant restricting its use to a private residence; an application to modify the covenant succeeded under grounds (a) and (b). In *Attorney-General of Hong Kong v Fairfax Ltd* [1997] 1 WLR 149 the Crown let two and a half acres of land in 1862 for a term of 999 years by a lease restricting the use of the land to use for one or more dwelling houses. After 1945 the land was developed as a block of flats, which was inconsistent with the covenant. The Privy Council upheld the decision of the Court of Appeal of Hong Kong that, by acquiescing in a development which was “wholly inconsistent with the continuance of the covenant relied on”, the Crown must be presumed to have released or abandoned the covenant.

50 Reliance was also placed on *Re Voss's Application* and on the conclusion of the Tribunal that, by selling off The Lea for use as a school and its playing-fields, and by fencing off the application plot and transferring it to the neighbouring owner, the application plot could never now be used as a greenway and a roadway, that being the purpose which the restrictions had been intended to secure; as a result the restrictions were held to be obsolete.

51 For the same reasons, Mr Weekes submitted, the rights of way granted to the owners of houses on the Estate to use the application land for recreation must be taken to have been abandoned or released and to have ceased to exist. The easements over the application land had not been used for over half a century, and there had been acquiescence in the use of the land exclusively for private residential purposes so that the easements must be taken to have been abandoned.

52 We do not accept these submissions.

53 The purpose of the covenants must be ascertained from their language, read in the context of the building scheme as a whole. Shorn of permissive exceptions the purpose of the covenants was to secure that “no building or erection of any description will be erected on any close” and that “no close shall be used for any purpose other than as a

green garden open space or pleasure ground for the benefit ... of the Purchasers and other residents on the Vendors' Burhill Estate”.

54 It is true that the Vendor was entitled to derogate from the restrictions and to erect fences, seats, shelters and even buildings for the accommodation of employees and their tools and equipment (provided they were not residential buildings). But the Vendor was under no obligation to provide any of these additional facilities or to make the closes suitable for public access. It would have been entirely consistent with the scheme of covenants for the closes to have remained undeveloped and free of the presence of any building or erection of any description.

55 The closes have remained either entirely or substantially undeveloped. The only development on any of the closes has been the construction of the greenhouse or “garden house” on the application land by Mr Purefoy, sometime in the 1950s or 1960s. That structure is now derelict, but even when newly built its presence would have been an insubstantial basis on which to conclude that the covenants had been wholly abandoned. Although large enough for a greenhouse, it covers only a very modest proportion of the site. It is not visible from Icklingham Road because of the continuous hedge along the frontage (which Mrs Morrison’s evidence confirms was present for as long as she has known the land); for there to be acquiescence in a breach of covenant there must first be knowledge of the breach. The Tribunal’s decision in *Re Voss’s Application* records that when the Estate Company became aware of it they granted a licence for the retention of the building on the grounds that it was well hidden and used for the storage of garden plants; to regularise what was originally a breach is not consistent with acquiescence in the breach. Moreover, as the grant of the licence suggests, the building was of the sort contemplated by the exceptions in favour of the Vendors and is consistent with the use of the application land for its permitted use as a garden, for which purpose it has been used continuously for the whole of the period relied on by the applicant.

56 The close opposite the application land was sub-divided in 1948 when the greater part of the land was sold off to the adjoining owner. Despite that sale and its incorporation into the neighbouring garden no buildings have been constructed on the plot. A new house has recently been built on the adjoining plot, but no part of that building encroaches onto the area designated as a close in the scheme of covenants which remains in use as a garden; nor has the portion of the close retained by the Estate Company in 1948 been developed. The covenants have therefore been observed in relation to the whole of that close.

57 It is true that with the exception of the unsold portion of the close on the eastern side of Icklingham Road, the Estate closes have not been used for public, as opposed to private, recreation. This is in contrast to the closes on the adjoining estate to the north-east, which remain as wooded open space with easy access. But we do not consider that this departure from the original object of the covenants justifies the conclusion that they have been abandoned or become obsolete. They continue to perform their intended purpose of preventing the development of blocks of land on opposite sides of Icklingham Road at its mid-point and main junction. We consider that to have been a significant

purpose of the covenants, which remains capable of achievement despite the public no longer exercising their rights of access. We note also that while the Tribunal in *Re Voss's Application* was prepared to treat the covenants against building on the greenway as obsolete following its incorporation into a private garden it made it clear that “in respect of a close it may be more difficult to conclude that the prohibition on building thereon is obsolete”. We agree.

58 Nor do we consider that it follows simply from a prolonged period of non-use, that the rights of access for the use of the application land for public recreation have necessarily been abandoned. The sole authority on which Mr Weekes relied concerning the abandonment of rights of way was *Swan v Sinclair* [1924] 1 Ch 254 but the facts of that case involved significantly more than non-use; the ground over which a road was to be constructed to provide access to the rear of the row of houses and shops had always been obstructed by a series of walls, which were never removed, and the topography of the ground was subsequently altered to create a further major obstacle to the use of the intended route.

59 The principles relevant to the abandonment of rights of way are considered in detail in *Gale on Easements* (19<sup>th</sup> ed., 2012) at 12-71 onwards and summarised at 12-104 in terms adopted with approval by Silber J in *Odey v Barber* [2008] Ch. 175. Abandonment is not lightly to be inferred and the conduct of the dominant owner must have been such as to make it clear that they had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement. It is unnecessary for us to consider these well established principles in any detail because they are peripheral to the issue we have to determine.

60 A further aspect of the evidence to which we have not previously referred also weighs against a finding that the covenants binding the application land have become obsolete or that the rights of access were abandoned. That is evidence which goes to show that the covenants have been asserted and relied on by the Estate Company whenever it has come to its knowledge that a breach was threatened or had taken place.

61 We have already mentioned the grant of a licence permitting the retention of the garden house or greenhouse put up by Mr Purefoy on the application land. Mrs Morrison also recalled “a stock broker living in one of the nearby properties getting into hot water about having breached a covenant”. The Tribunal’s decision in *Re Voss's Application* records that counsel was instructed on behalf of both the Estate Company and a number of local residents entitled to the benefit of the covenants to resist the application to modify in that case. Ms Surana said in her evidence that in 1997 her father had obtained planning permission for the development of the application land which he had been unable to implement because the Estate Company refused to release the covenants. A further effort had been made to persuade the beneficiaries of the covenant to release it before the current application but they had refused.

62 Against this background of regular reliance on the covenants against building on closes and greenways (and on the scheme of covenants generally) we do not think a finding of such acquiescence in the disregard of the covenants as would render them unenforceable would be remotely justified. It follows that the applicant's case based on grounds (a) and (b) must fail.

### **Grounds (aa) and (c)**

63 Mr Weekes submitted that grounds (aa) and (c) were also satisfied in this case.

64 Ground (c) is applicable where the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. Ground (aa) is more complex and requires that, unless it is modified, the continued existence of the restriction will impede some reasonable use of the land for public or private purposes and, in impeding that use either (a) will not secure to those entitled to the benefit of the covenant any practical benefits of substantial value or advantage to them; or (b) is contrary to the public interest; and that in either case a payment of money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

65 The applicant's expert witnesses both said that the restrictions secured no practical benefits to the objectors by preventing the residential development of the application land.

66 Mr Michael Derbyshire BA (Hons), MRTPI is Head of Planning at Bidwells LLP and gave expert town planning evidence. He said that the application land did not make a positive contribution to the amenity of the Estate and was unusual in the street scene by being open and undeveloped. Mr Derbyshire could not identify any amenity reason why it should remain undeveloped. It did not facilitate views outside the Estate and did not form part of a structured provision of visual gaps. The prevailing characteristic of the Estate was its development by large houses in good sized plots. The front boundary hedge (which would be retained under the proposals) and adjoining greenway were well maintained and provided some limited benefit to the amenity of the Estate, but otherwise the application land was untended, overgrown, poorly maintained and lacked any meaningful use. The site was not readily defensible against trespass and littering and could not sensibly form part of any nearby house's garden. Residential development, for which planning permission had been obtained, would conform to the prevailing character of the Estate and would blend in with the building pattern along this side of Icklingham Road.

67 Mr Clive Beer MRICS, MCI Arb is a Director of Savills (UK) Limited and gave expert valuation evidence. Mr Beer agreed with Mr Derbyshire's opinion that the proposed development would not harm the amenity of the Estate or its residents. He considered a number of relevant factors such as outlook, loss of privacy, overlooking, increased noise etc but concluded that not even the amenity of the immediate neighbours would be adversely affected. Mr Beer said that there would be no impact upon any of the

objectors' properties, that the proposed development was consistent with the Estate and that the "natural shielding" present on the subject land, i.e. the front hedge, would prevent any loss of amenity. It followed, said Mr Beer, that the proposals would not diminish the value of any property.

68 Mr Weekes submitted that the application land could not be used for communal recreation purposes and therefore this was not a practical benefit secured by the restrictions. For ground (aa) to succeed the restrictions, by impeding the proposed development, must secure substantial practical benefits. A substantial practical benefit meant one that was "considerable, solid, big", *per* Carnwath LJ in *Shephard v Turner* [2006] EGLR 73 at [19] to [23]. The experts believed that no practical benefits were secured by the restrictions and the Tribunal would have to conclude that they were seriously wrong in their opinions if the objectors' claim of substantial harm was to be upheld. Mr Weekes acknowledged that the objectors were plainly sincere but suggested that they were likely to be over anxious about the effects of the proposals; they were not experts and expressed only lay views and the experts' views should be preferred. It was, he submitted, eccentric to think that the amenity of the Estate was enhanced by leaving a gap in the built frontage. Nobody would think of designing a new street in such a way and nobody would suggest that the amenity of a street could be improved by demolishing a house and leaving a vacant space. Most section 84 applications sought to depart from the planned design of a building scheme; in this case the opposite was true – the application sought to give effect to an improved and consistent built form given that the original intention for the application land to be located at a crossroads had long since effectively been abandoned. This part of Icklingham Road was not designed to have a vacant plot.

69 Mr Weekes submitted that the application land was presently an unconventional feature with little or no practical use. It was not a natural garden to the applicant's house at No. 21 and there was a good chance that it would remain overgrown and unkempt for the foreseeable future. There was no practical benefit in overlooking a wasteland. The objectors did not rely on the view from any particular house. Instead they spoke of the views when driving or walking past the application land; views which were dominated by a 3m high hedge that was to be retained in any event. There would be a significant disadvantage in not redeveloping the application land which was prone to acts of trespass, vandalism and littering, and which would likely be a source of nuisance to residents.

70 For the objectors Mr Collyear said that the proposed development of the application land should be distinguished from the development of the land in *Re: Voss's Application* which was originally identified as a new estate road and not a close. As a close situated half way along Icklingham Road the application land helped provide a distinctive character to the Estate and deliberately differentiated it from the built area represented by the identified plots in the building scheme. When the close opposite the application land was sold in 1948 it remained undeveloped and was deliberately kept as an open area. Mr Collyear said that whereas the residents may have acquiesced in the private use of the application land they had not acquiesced to its development. He suggested to us that the applicant was relying on her own default by not maintaining and securing the application land so that it had become the overgrown wasteland whose condition Mr Weekes now



relied on. It was totally unacceptable in those circumstances for the claimant to obtain a huge windfall at the expense of the residents. Mr Collyear also submitted that to allow the application would create a dangerous precedent for development elsewhere on the Estate and would lead to a diminution in the value of property as purchasers would no longer regard the system of covenants as secure.

71 Mr Abrahamsen provided his own appreciation of the amenities of the Estate, from the perspective of a long term resident. He considered that it was not necessary to have uniformity and symmetry in the layout of the Estate for that layout to contribute to a pleasant environment. To the residents the gap in development represented by the application land was part of the Estate's natural beauty and attraction. The restrictions were much cherished and had been consistently defended against a series of four planning applications made on the application land since 1997. In Mr Abrahamsen's view they secured a substantial practical benefit in terms of visual amenity.

72 We found at paragraph 57 above that a significant purpose of the covenants, and one which they continue to perform, is the prevention of the development of blocks of land on opposite sides of Icklingham Road. The question under ground (aa) is whether by impeding the proposed development of the application land those covenants secure to persons entitled to the benefit of them any practical benefits of substantial value or advantage to them. The context in which this question must be considered is that of a well-established building scheme.

73 We identify two aspects for consideration in this case:

- (i) Whether by preventing the proposed development of the application land the covenants secure, as a substantial practical benefit, the integrity of the building scheme and the protection of the closes as undeveloped land; and
- (ii) Whether by preventing development the covenants secure, as a substantial practical benefit, the visual and other amenity of the persons entitled to the benefit of them.

74 The first aspect relates to what is often referred to as the thin end of the wedge argument, which was relied on in the witness statements of several objectors. They consider that it is essential to prohibit the proposed development of the application land in order to maintain the utility of the scheme of covenants as a whole. If the defences of the Estate are allowed to be breached, they are liable to be overwhelmed. This argument was considered by the Tribunal in *Re: Voss's Application* where the Member, Mr V G Wellings QC, gave it little weight, saying at page 12:

“It appears to me that the thin edge of the wedge was the act of the Company when, recognising the effect of its own act in selling off the land to the west to the County Council [the Lea] it transferred the application plot to the applicant's predecessor.”

75 The Tribunal went on to consider this argument in the context of the possible redevelopment of closes and of the “Jaybee driveway”, i.e. the land originally designated as road and greenway but which was subsequently incorporated into what is now 21 Icklingham Road when The Lea was sold off. The Tribunal said at page 12:

“If my decision in the present case should encourage the making of an application to the Tribunal under section 84 in respect of the Jaybee driveway or any of the closes any such application will have to be considered on its own merits. It is very doubtful whether the owner of Jaybee could seek to develop the Jaybee driveway because that driveway is in fact the only means of access from Icklingham Road to Jaybee. Moreover in respect of a close it may be more difficult to conclude that the prohibition of building thereon is obsolete and will cause no detriment or injury than in the case of the application plot.”

76 We do not consider that the proposed development would create any precedent for the development of the greenways, which are integral to the appearance of the Estate and incapable of separate development. These are likely to remain undeveloped and the application does not seek to incorporate any of the adjoining greenway into the proposed development. That greenway is now owned by Fairmile Estate Limited.

77 The only other close on the Estate is located directly opposite the application land on the eastern side of Icklingham Road. Part of this close is now owned by Fairmile Estate Limited with the remainder (the greater part) having been sold in 1948 to the owner of what is now 14 Icklingham Road. This land has been kept undeveloped and the current owners, Mr and Mrs Hennessy, objected to the present application on the grounds that it would set an adverse precedent. There is also a small sliver of the close on the western side of Icklingham Road, to the south of the public footpath, which is now part of the garden of Druid’s Lodge (No.15). The current owner, Mrs Hussain, is also an objector to the application. This sliver of land is too small to be capable of independent development.

78 Whilst recognising that to some residents a decision favourable to the applicant in this case may appear to weaken the covenants as they apply to other land, and giving that factor weight in the context of a long established building scheme, in our judgment the overall integrity of the scheme will not be further jeopardised by allowing the current application. We agree with the Tribunal in *Re Voss’s Application* that it was the sale of land designated for road, greenway or close to private owners by the Estate Company which destabilised the scheme of covenants. That break from the original conception of community use inevitably created greater scope for the consideration on their individual merits of proposals by the new owners of the burdened land and their successors. At a practical level the covenanted land would remain protected. Fairmile Estate Limited owns, and therefore controls, a substantial part of the other close on the Estate as well as the closes on the adjoining Estates (and to which the public appear to have access). Any possible development of that part of the close which has now been incorporated into the garden of 14 Icklingham Road would have to be considered on its own merits, and we do not think those merits would be significantly altered by the development of the

application land. Despite this part of the close being deemed to be a development area since 1948 the owners of 14 Icklingham Close have not developed (or apparently attempted to develop) it, and its prominent position on the corner of Icklingham Road and Burstead Close would require specific consideration.

79 The second aspect of the consideration of ground (aa) requires us to determine whether the covenants secure to the persons entitled to the benefit of them substantial practical benefits in terms of amenity. It is suggested by the objectors that the absence of residential development on the application land creates an attractive visual break in the street scene. The applicant says that the existence of a large plot of undeveloped land within a row of houses on the west side of Icklingham Road is anomalous and that Icklingham Road would benefit from the application land being developed for a purpose that better reflects how the Estate has actually been laid out and occupied.

80 In approaching this question we begin by rejecting Mr Weekes' invitation to set to one side the views of the lay residents and to place weight only on the expert views of Mr Derbyshire and Mr Beer. The assessment of visual amenity is a subjective matter on which the Tribunal is well able to reach a conclusion of its own without the assistance of experts, and on which views expressed by residents with long experience of the neighbourhood, and a mature appreciation of its attractions, are at least as worthy of consideration as those of professional observers whose assessment is likely to be based on a fleeting acquaintance and inevitably risks being influenced by the interests of their client.

81 We also give no significant weight to the current overgrown condition of the application land, either as a factor in favour of, or against, the application. The land is concealed from view behind its high hedge. The applicant is free to make such use as she chooses of her own land, within the constraints of the covenant, but cannot improve her prospects of success by leaving it in an unkempt condition (although we do not suggest that she has done so deliberately in this case).

82 In our judgment the key determinant of the character and amenity of the Estate is the system of greenways on either side of the road, rather than the presence of the undeveloped closes which in the main have long since been appropriated to private use and which are now enclosed and shielded from view by tall hedges. The proposed development of the application land would be in keeping with the type, size, style and density of the existing houses in Icklingham Road and would not, in our opinion, have a substantial effect on the amenity of the Estate in general or on neighbouring properties in particular. The dominant feature of the frontage of the application land is the greenway and the tall hedge behind it. We consider that, provided the hedge is retained and kept to a minimum height of 2.5m, the visual amenity of the Estate would be preserved and the development would not adversely affect the character of the Estate. The view of the application land from the neighbouring properties and that of residents of the Estate when passing the site will change; but that does not inevitably mean that a substantial practical benefit will be lost. We give weight to the views voiced by Mr Abrahamsen, but we do not consider that the benefit of retaining the application land as an undeveloped plot,

rather than as the site of two further dwellings largely concealed from view by the sort of high hedge common in the area, is substantial.

83 We do not consider that the proposed development would lead to a material increase in traffic using Icklingham Road nor that there would be any substantial adverse effect arising from the normal residential activities likely to take place.

84 None of the objectors said in terms that the covenants secured practical benefits of substantial value. But six of the objectors stated the amount of compensation they would claim if the application were successful. Those amounts range from £50,000 to £750,000. In our opinion, and given the high value of the properties on the Estate, a claim for a six figure sum for loss or disadvantage suffered, if sustained, would necessarily mean that the covenants did secure practical benefits of substantial value to the objectors.

85 The objectors did not adduce any expert valuation evidence to support their claim figures. For the applicant Mr Beer concluded that even the immediate neighbours would not be “affected adversely in any way” and that there would be “no diminution in value” of any of the objectors’ properties. He considered that the proposed development would give a certainty about the future use of the application land which the market would welcome. We accept that there would be no diminution in the value of the objectors’ properties caused by the proposed development (although we doubt the benefit suggested by Mr Beer). In our opinion the covenants do not secure to the objectors practical benefits of substantial value.

86 We have considered whether the prevention of any temporary disturbance which might arise from the construction of two new houses in this location is capable of being a practical benefit of substantial value or advantage. We note that under Section II of Part II of the schedule (restrictions as to user) restriction 6 states:

“Nothing shall be done or permitted on any plot which may be or grow to be a nuisance damage grievance or annoyance to the Vendors or to the owners or tenants of any of the other plots or to any adjoining or neighbouring property.”

87 In *Shephard Carnwath* LJ said at [60] that:

“I do not think such a covenant is to be equated with a covenant providing a specific protection from construction disturbance.”

He also said at [58]:

“The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular

covenant, or in the facts of the particular case, which justifies giving special weight to this factor.”

88 The objectors have not identified any facts in this case which justifies giving special weight to the possible effects of temporary disturbance. The proposed development is unexceptional in its size, type and likely duration and appears to us to be no different in kind to other developments, both recent and ongoing, on the Estate. We do not think that the prevention of such temporary disturbance constitutes a practical benefit of substantial value or advantage.

89 Section 84(1A) requires that money will be an adequate compensation for the loss or disadvantage (if any) which any person entitled to the benefit of the covenants will suffer from the modification of the covenants. Mrs Hussain at 15 Icklingham Road said that money would not be “an adequate or suitable remedy” but gave no reasons why this should be the case. In our judgment money would in principle be capable of providing adequate compensation for loss of amenity or other disadvantage in this case, but we have found on the evidence that the objectors will suffer no loss or disadvantage that would give rise to such compensation.

90 A number of objectors expressed concern that were the application to be allowed the applicant would receive a substantial windfall gain. It appears that at least some of these objectors based their claim for compensation on the basis that the modification of the covenants and the consequent release of development value would properly entitle them to a negotiated share of such value. This argument was considered in *Winter v Traditional & Contemporary Contracts Limited* [2008] 1 EGLR 80 where Carnwath LJ, having considered the relevant case law, said at 84[33]:

“Certain points can, in our view, be extracted from those cases taken together. First, the basis of compensation under section 84 is the loss caused by a diminution in the value or enjoyment of the objector’s property, not the loss of its financial bargaining position. There is no “hard and fast rule” as to how that loss is to be assessed, but the negotiated share approach is a permissible tool for the Tribunal...”

He then considered a series of other cases where other approaches had been taken, including the negotiated share approach, and continued at 84[35]:

“These cases are of value, not as precedents as such but as indications of the flexible approach adopted.... when assessing compensation for neighbours in a residential area. They do not support the suggestion that there is any established practice of awarding a share of development value. However, they show that it is a possible approach in circumstances where a simple estimate of the diminution in value of the objectors’ properties is unlikely to be a fair reflection of their subjective loss.”

91 In our judgment this is not a case in which a share of development value would be an appropriate measure of the loss caused by a diminution in the value of the objectors’ properties. We are satisfied that there will be no diminution in the value of any of the

objectors' properties were the application to be allowed, nor any other loss of amenity requiring compensation.

92 In our opinion and taking into account those matters identified in section 84(1B) of the 1925 Act, by impeding the proposed development the covenants do not secure to the objectors any practical benefits of substantial value or advantage.

### **Determination**

93 We are satisfied that the applicant has established ground (aa) and that there are no reasons why we should not exercise our discretion to grant the application to modify the covenants. It is therefore unnecessary for us to consider the application made under ground (c).

94 Section 84(1C) of the 1925 Act confers upon the Tribunal the power to add such further provisions restricting the user of, or the building on, the land affected as appear to us to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicant. We may refuse to modify the covenants without some such addition.

95 We consider it is appropriate in this case to distinguish between the two schemes of development for which planning permission has been obtained. The first planning permission, reference 2014/2373, dated 2 September 2014 shows each of the two proposed detached houses having its own driveway and crossover onto Icklingham Road. This would involve the creation of two new gaps in the existing beech hedge. The second planning permission, reference 2014/4564, dated 12 January 2015 shows both the proposed houses sharing a driveway running parallel to, but inside, the existing beech hedge and joining the existing driveway connecting Icklingham Road to the applicant's house at No. 21. The second permission would therefore maintain the integrity of the existing hedge. Our assessment of the impact of the development on the visual amenity of the Estate has assumed that the application land will continue to be fully screened as it presently is. The retention of the existing hedge at a height of no less than 2.5m is therefore an important factor in ensuring that the amenity of those with the benefit of the covenants is not adversely affected by the proposals.

96 The following order will accordingly be made:

“The restrictions of the Estate building scheme relating to closes shall be modified insofar as they affect the application land so as to permit the development for which detailed planning permission was granted by Elmbridge Borough Council on 12 January 2015 under reference 2014/4564 and in accordance with the terms, details and approved plans referred to therein, provided always that the existing beech hedge on the application land fronting the greenway to Icklingham Road shall not be reduced below a minimum height of 2.5m. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of

that planning permission and any other matters approved in satisfaction of the conditions attached to such permission.”

97 An order modifying the restrictions to this extent will be made by the Tribunal providing the applicant shall have notified the Tribunal in writing within three months of the date hereof of her acceptance of the terms of the proposed modifications.

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

Martin Rodger QC  
Deputy President

A J Trott FRICS  
Member, Upper Tribunal, Lands Chamber

30 August 2016

## **SCHEDULE OF OBJECTORS**

- |     |                                      |                    |
|-----|--------------------------------------|--------------------|
| 1.  | Mr Andrew and Mrs Melissa Reay:      | 2 Icklingham Road  |
| 2.  | Mr Julian and Ms Helen Benkert:      | 3 Icklingham Road  |
| 3.  | Mr Bernard and Mrs Debra Abrahamsen: | 8 Icklingham Road  |
| 4.  | Mr Jakob and Mrs E Groot:            | 10 Icklingham Road |
| 5.  | Ms Natalie Calafiore-Mully:          | 12 Icklingham Road |
| 6.  | Mr Mark and Mrs Philippa Hennessy:   | 14 Icklingham Road |
| 7.  | Mrs Balkis Hussain:                  | 15 Icklingham Road |
| 8.  | Mr Alastair MacDonald                | 24 Icklingham Road |
| 9.  | Mr John and Mrs Laura Collyear:      | 27 Icklingham Road |
| 10. | Mr Simon and Mrs Linda Coombs        | 28 Icklingham Road |
| 11. | Mr Gavin and Mrs Rini Williams:      | 29 Icklingham Road |
| 12. | Mr Keith and Mrs Linzi Anderson:     | 31 Icklingham Road |
| 13. | Mr Colm and Mrs Denise Doran         | 26 The Barton      |