

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LANDS TRIBUNAL
(MR A J TROTT)**

Royal Courts of Justice
Strand, London, WC2A 2LL

2nd December 2008

B e f o r e :

**LORD JUSTICE TUCKEY
LORD JUSTICE CARNWATH
and
LORD JUSTICE JACKSON**

Between:

GRAHAM

Appellant

- and -

EASINGTON DISTRICT COUNCIL

Respondent

**Mr H Smith (instructed by Crutes LLP) appeared on behalf of the Appellant.
Mr T Dumont (instructed by MSP Legal Services) appeared on behalf of the Respondent.**

Lord Justice Carnwath:

1. This is an appeal against a decision of the Lands Tribunal given by Mr Trott FRICS. It concerns an application for the discharge of a restrictive covenant. The Lands Tribunal's jurisdiction derives from section 84 of the Law of Property Act 1925 subsection (1)(aa), which allows a company discharge upon the grounds that:

“in a case formed within subsection (1A below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such a user.

Subsection (1A) authorises:

“a discharge...of a restriction by reference to its impeding some reasonable user of the land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user...

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them

...

and money will be an adequate compensation for the loss or disadvantage (if any) which any person will suffer from the discharge or the modification.”

2. There is also a ground (c), that the proposed discharge would not injure the person entitled to the benefit of the restriction, but it is common ground that that raises no separate issue in this case.
3. The appellant is entitled to the covenant as an adjoining landowner but is also the local planning authority. The site in respect of which the application for discharge was made is part of an industrial estate on the edge of a settlement called Horden in the county of Durham. There is residential development to the west, and further to the west the town of Peterlee. Much of the estate is owned by the council but it has sold off parts for various industrial or warehouse uses. The Member gave a full description of the estate and the position of the site within it in paragraphs 8 onwards of his decision, and I do not need to repeat that.
4. The covenant is in the following terms:

“The Transferee hereby covenants with the Transferor on his own and his successors in title:

(i) not to use the property for any purpose other than as a coach depot with an associated bungalow for residential use. Occupation of the bungalow must be linked with the use of the land as a coach depot and the bungalow cannot be sold or leased except from the depot.”
5. That covenant was imposed on the transfer of the freehold by the council to a Mr Pygall in July 2000. Mr Pygall then sold the land to a Mr Graham. The background of all that is not particularly material for the present purposes because the important point for our purposes is that in 2004 Mr Graham decided to apply for outline permission for residential development for some 30 houses on the site. That proposal came before the council as planning authority in April 2005 when it granted planning permission. Mr Graham then applied to the Lands Tribunal for release of the covenant to enable him to carry out that development, and that is the proposal which came before the Member.
6. Not surprisingly, at the heart of the decision of the issues before the Member, as before use, was whether the council could justify its apparent change of heart: from having granted permission, in its capacity as planning authority, to its later refusal of the discharge of the covenant under the Law of Property Act. Although that seems a relatively narrow issue, the case was hard fought before the tribunal and took some three days of evidence, the council calling no less than six witnesses.
7. The Member’s decision sets out very fully the arguments of the parties and the evidence. He also explained the relevant law. Although we have been referred to a number of authorities, it does not seem to me that there is any real dispute as to the applicable principles or that there is any serious criticisms of the Member’s summary of them. At paragraph 97 of his decision Mr Trott noted, correctly, that the expression “practical benefits” is to be construed widely and is not limited to a restriction to the benefit on protection of land. He refers to *Gilbert v Spoor* [1983] Ch 27. It was also common ground that the fact that planning permission had been granted by the very same body which was now objecting to the application was not determinative. The Member referred at paragraph 100 to the words of Fox LJ in *Re: Martins’ Application* [1988] 57 P&CR 119 at 124-125. That makes clear that the grant of planning permission is a circumstance which the tribunal can and should take into account but it is still able to make up its own mind. It is fair to note that in *Re: Martins’* the planning permission had been granted not by the same authority but by the Secretary of State on appeal against refusal of planning permission by the authority.
8. However, the same approach has been applied in circumstances where it is the same authority which has approved permission. An illustration of that is *Re: Jones & White & Co’s Application* [1989] 58 P&CR 512, a decision of the tribunal presided over by Mr Williams QC. There it was held that the authority was not bound by its own grant of planning permission but was able to

look at the matter again. So, as I say, I do not see there would be any real point of law in this case.

9. I should refer now to the way the case was put and Mr Trott's conclusions. The council's approach was really twofold: firstly that it was entitled as landowner to take a rather broader approach than it had to do as planning authority; and secondly that, in any event, circumstances had changed since the planning decision: specifically, in respect of the balance of the industrial land versus housing land.
10. To assess those submissions it is necessary first to look at the grounds on which the planning permission was granted. The best evidence of this is in the planning minutes of the council, which are in the bundle at 99 and 101. This was a meeting on 12 October 2004.
11. The planning officer had recommended refusal upon the grounds that, because of the adjacent existing industrial estate, the proposal residential use was considered to be inappropriate land usage, and also contrary to the provisions of the local plan. The minutes record the main issue was:

"the surrounding industrial land uses and proximity to industrial and commercial premises. Although the application proposed a landscaped buffer adjacent to the industrial estate, it was considered that there was a likelihood of noise and fumes affecting the residents of the proposed development."

So the planning officers were opposed to the proposal.

12. The committee then heard from the applicant's representatives. They suggested that any concerns about effect on adjoining development should be seen in the context of the industrial site as it already was, not what might happen in the future. They also suggested this site would provide local affordable housing which would enhance and regenerate the area and overcome the anti-social behaviour problems which were experienced on the site. There was also apparently no objections have been received from the parish council or the residents. The planning officer responded to that but the Members decided to support the application. The minutes say this:

"Members considered that on balance whilst taking into account the Planning Officers concerns about the adjacent industrial site, the land at present was derelict and unsightly and a development would served to enhance the area and provide much needed housing in Horden."
13. I note in passing that that difference of view between the officers and the committee turned almost entirely on local considerations (on the one hand impact of the industrial estate, on the other the need to clear up a derelict site) and the prospect of some local housing in Horden.
14. Against that background one comes to the evidence as presented to Mr Trott. He summarised the council's case on this and to a large extent accepted the factual basis of it. I should say, before referring to this, that one of the sort of background factors in the case is a proposal in Peterlee by a company called Persimmon, which had apparently produced proposals for redevelopment of some former industrial land, or land allocated for industry, with 600 houses.
15. Paragraph 73 notes that a company had constructed a new unit on the estate in Timber Road having moved from Peterlee North East "specifically because of the Persimmon proposals", and the council also were arguing that they had to look to the future provision of industrial land especially if the Persimmon proposal in the North East Peterlee industrial estate proceeded. He then went on to refer to the evidence of industrial land availability given, on the one hand, by Mr Wilson for the developers and, on the other hand, by Ms Hannon for the council. Ms Hannon's evidence was that there was very little industrial land available for general industrial purpose in the short term, and indeed of the 33 or so hectares of industrial land available in the district only 3.87 hectares were suitable for general industrial use.

16. There was also evidence about the housing position, again from Ms Hannon, recorded at paragraph 78. Ms Hannon said that, whereas in 2001 the council had had some difficulties in finding housing sites, the present position was that the district was exceeding its regional quota and the problems which there had been in 2001 were no longer applicable. There was also reference to the proposal of Persimmon which would represent “a strategic housing opportunity that would help regenerate the area.” Mr Trott’s conclusions on these issues come at paragraph 98 following. He first of all identified what he thought were the practical benefits. He said this:

“The practical benefits that the objector says are secured by the restriction are its ability to control the development and use of the application land and the prevention of complaints from future householders that would curtail the existing and future industrial use of the Seaview Industrial Estate, part of which is owned by the objector. As such they are benefits that are secure for planning purposes.”

17. In paragraph 99 he went on to note the concession that there was no basis for any suggestion that the value of the council’s interest would be reduced. Indeed it was conceded that the discharge of the covenant was, if anything, likely to increase the value of some of the land retained by the council.

18. Mr Smith, before us, on behalf of the council, criticised the Member’s characterisation of their interest as being purely for “planning purposes”. He suggests that leaves out the council’s legitimate interest as a landowner. However, I do not myself read it in that limited way. As I see it, the Member was contrasting the nature of the objection with the concession that there was no decrease in land value, so that I do not understand him to have been excluding the interest of the council, as both planning authority in the wider sense, and as owner in the sense of being concerned with the planning and management of the estate. Having referred to the cases which I have mentioned, Mr Trott summarised the main argument by the council in paragraph 102:

“The second argument raised by the objector in response to the applicant’s doubts about the genuineness of its objection is that the Tribunal must consider the facts and evidence as they existed at the date of the hearing. It says that circumstances have changed since planning permission was granted in April 2005. There is now less pressure to release land for housing given that the council has exceeded its regional targets, whilst the latest figures for industrial land availability show an increasing shortfall of such land in the District, pressure upon which has been exacerbated by the Persimmon proposals at the North East Peterlee Industrial Estate. Those proposals were unknown when residential planning permission was granted on the application land. The objector also notes that the planning committee only referred to existing rather than future industrial users when considering the planning application for that residential development.”

19. Mr Trott went on to refer to the evidence, and on that he preferred the evidence on behalf of the council as to industrial land availability. He commented:

“It was apparent from the current figures that there is some, albeit disputed, pressure upon employment land supplies, especially in the short term. Ms Hannon also gave evidence that the supply of housing was ahead of regional targets. At the date of the hearing, however, the Persimmon proposal was not the subject of a planning application and remained a tentative proposal.”

20. He then came to his conclusions, which I should quote in full:

“I have considered the objector’s arguments carefully regarding the change in the substantiality of the practical benefits that are secured to it by the restrictions since planning permission was granted in 2005. The circumstances of this case are unusual in that the objector is also the local planning authority and has imposed the proposed restriction for planning purposes. There is

therefore a close coincidence between its role as the landowner and that of local planning authority. Under these circumstances I cannot attribute to those roles the degree of independence suggested by the objector. The grant of that permission was, in my opinion, an event of singular importance in this case and is the best evidence that the practical benefits secured by the restriction are not of substantial advantage to it. Those benefits were considered by the objector in the context of the residential planning application and were overridden in favour of residential development. I do not think that the changes that have occurred subsequently are sufficient for me to conclude that the practical benefits should be regarded as substantial given the grant of residential planning permission in April 2005.”

21. He went on in paragraph 106 to refer to an argument which had been advanced in relation to land further to the east which was planned for recreational use but on which the council had been willing to consider housing. The applicant had suggested that showed that there was no serious problem about residential development but, as I read paragraph 106, Mr Trott was not reaching a final view on that and did not regard it as a relevant or determinative factor in his conclusion. So it is to 104 that one has to look for his reasoning.
22. The grounds upon which Mr Smith, for the council, seeks to challenge those conclusions are threefold. First he says it was the tribunal’s reliance on the decision to grant planning permission for residential use that determined whether the decision to discharge the covenant by EDC was wrong in law; secondly he was wrong in law in concluding that there had been no change of circumstances since the grant of permission; and that thirdly his conclusion was contrary to the evidence.
23. I say at once that Mr Smith in my view makes a legitimate criticism of the reasoning of the Member. He refers us to *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377, which gives an authoritative summary of the principles relating to the need to give reasons for decisions and the quality expected of them.
24. That is one in a long line of authorities on this subject. Many of the authorities were reviewed in *English Exporters v Emery* [2002] 1 WLR 2412. However, there is no doubt about the importance of the giving of reasons and it does seem to me unfortunate in this case that, having set out the arguments and the evidence at considerable length, the crucial conclusion of the Member has to be found in what is in effect the last sentence of paragraph 104. However, it is also clear from the authorities that decisions of this kind should be read benevolently and that the court should endeavour to give a fair reading to them where it can, particularly in relation to a decision of an expert tribunal: as to which, see most recently *AH (Sudan) v SSHD* [2007] UKHL 49 at paragraph 30. So with that in mind I look to see whether Mr Smith’s criticisms go beyond simply criticisms of the quality of the reasoning and amount to the identification of errors of law.
25. The first point about the relevance of the planning permission seems, with respect, to be overstated. As I have said, it is common ground that the grant of planning permission by the authority is a relevant factor but it is not a determinative factor. I do not read the Member, Mr Trott, as having suggested that it was determinative. What he said was that, on the facts of this case, as a very recent decision of this very authority it was very good evidence, or I think he said “best evidence”. That seems to me a judgment which he was perfectly entitled to make. It is said that the factors are not necessarily the same. I accept that in some cases there may be a significant difference between the interest of the authority as landowner and its interest as local planning authority, but again it seems to me that Mr Trott was entitled to take the view that this case, looking at the way the matter was dealt with by the authority in 2004, raised very much the same issues, which were the balance of advantage at a very local level. So it seems to me that the real point is in relation to the alleged change of circumstances. I do not see how it can be said that the Member was wrong in law in concluding there had been no change of circumstances. It seems to me that, whether there had been a change of circumstances and if so whether it was substantial, was a judgment of fact. As I understand this ground, it is taking a rather specific point, which is explained in Mr Smith’s skeleton at paragraph 33. He picks up the comment in paragraph 103

about the reference to the Persimmon proposal being only a tentative proposal, and Mr Smith says “Therefore the Member appears to have concluded that circumstances have not changed since the grant of planning permission because the Persimmon proposal has remained tentative and no planning application has yet been made”.

26. He goes on to make the point, correctly, that the prospect of future harm may be material as much as present harm, and he refers to *Re Abbey Homesteads Developments) Ltd's Application* [1986] 53 P&CR 1 at page 8. However, I do not read Mr Trott as making any such point, although I do not find paragraph 103 entirely easy to understand. As far as Persimmon is concerned, all he appears to be saying, as I read it, is that, as a tentative proposal, the weight to be given to it in the overall judgment is limited. That is a conclusion of fact not law. So one then comes to the question of the third ground: was the conclusion contrary to the evidence? This seems to me to raise a point of law only if it can be said that the conclusion was perverse. Mr Smith submits that Mr Trott had accepted the evidence that there was now a shortage of industrial land and a relative surplus of housing land and therefore it was unarguable that the balance of interest had not changed since the previous decision.
27. However, as I see it, that does not really meet the point because the judgment which has to be made under this section is not whether there has been any change of circumstances or indeed whether there is any possible harm to the council but whether it is substantial. As to that, the judgment of the Member has to be made in the light of all the material, but it seems to me of its nature it raises no issue of law.
28. Mr Smith referred us to a case called *Re: Wake*, which was an unreported decision of the Lands Tribunal (Mr Francis FRICS) given on 12 April 2002 relating to a covenant protecting residential land adjoining agricultural land. The issue there was whether allowing more housing would lead to the possibility of more complaints against farming operations. Mr Francis concluded that even a small risk of such increased complaints would be sufficient to justify refusing discharge, and he explains his reasons for that at paragraph 73. That decision was a decision of a Member on the facts of a particular case. It lays down no point of principle and relies on no precedent for this or any other case. The question of whether on the facts of the present case the changes in circumstances which had occurred in the general planning picture were sufficiently substantial to change the balance for the purposes of section 84 was, as I say, entirely a matter for the Member. As I say, it would have been better if he had spelt out his reasoning in more detail, but certainly I do not think that a case has been made out that his decision was perverse nor do I think this is one of those rare cases where it would be appropriate to remit the case to the tribunal to fill out its reasoning.
29. It seems to me that, when one reads his conclusions against the background of his very full explanation of the way the case had been put on either side, there is no difficulty in understanding why he reached his final conclusion, and for my part I would dismiss this appeal.

Lord Justice Tuckey:

30. I agree.

Lord Justice Jackson:

31. I also agree.