

UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – proposed erection of detached house in place of former lodge – whether practical benefits of substantial value or advantage – application granted on ground (aa) – compensation awarded of £75,000 – Law of Property Act 1925 s84(1)(aa) and (c)

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

by

(1) MR RAMESH BECHAR KERAİ

(2) MRS NIRMALA KERAİ

**Re: 3 Aylmer Drive
Stanmore
HA7 3EJ**

Before: P D McCrea FRICS

Sitting at: 43-45 Bedford Square, London, WC1B 3AS

on 25-26 February 2014

The following cases are referred to in this decision:

Re Bass Ltd's Application (1973) 26 P&CR 156
Stannard v Issa [1987] 1 AC 175
Re Marcello Developments Ltd's Application [2001] LP 18 1999, [2001] EWLands LP_18_1999
Re Chandler's Application (1958) 9 P&CR 512
Re Walker's Application [2010] UKUT 16 (LC)
Re Wild's Application [2010] UKUT 306 (LC)
Shephard v Turner [2006] 2 P&CR 28, [2006] EWCA Civ 8
Re North's Application (1998) 75 P&CR 117
Re Fairclough Homes Ltd's Application (2004) LP 30 2001, [2004] EWLands LP_30_2001

Wakeham v Wood (1982) 43 P&CR 40
Re Gaffney's Application (1978) 35 P&CR 440
Re Coles' Application [2004] LP 2 2003, [2004] EWLands LP_2_2003

The following cases were referred to in argument:

Re Collins' Application (1975) 30 P&CR 527
Ridley v Taylor [1965] 1 WLR 611
Stockport Metropolitan Borough Council v Alwiyah Developments
(1986) 52 P&CR 278
Winter v Traditional & Contemporary Contracts Ltd LP/10/2000
Re Teagle & Sparkes' Application (1962) 14 P&CR 68

DECISION

Introduction

1. This is an application by Ramesh Bechar Kerai and Nirmala Kerai, the freehold owners of 3 Aylmer Drive, Stanmore HA7 3EJ (the application land) for the modification of a restrictive covenant in order to construct a new house on the application land in accordance with a planning consent granted on appeal on 27 October 2011. The objector is Mr Rohit Jaswantra Popatlal Radia, the owner and occupier of 'Linden', 5 Aylmer Drive (Linden). Linden is to the west of the application land, and adjoins it.
2. The restriction is contained within a conveyance dated 22 June 1942 made between Jan Stephan Jacobi as vendor and Helen Annie Isabella Glover as purchaser. In so far as relevant to this application, the covenant provides;

"That no house or other building shall be erected on the land hereby transferred unless the plans and specifications thereof shall be previously submitted to and approved in writing by the Vendor or his assigns as aforesaid and no alteration in the structure of [sic] elevation of any house (whether now or hereafter erected upon the said land) shall be made without the consent in writing of the Vendor or his assigns as aforesaid whose consent shall not be unreasonably withheld..."
3. There is a dispute between the parties as to whether the qualification that consent cannot be unreasonably withheld applies to both the approval of plans and specifications of a new house or building **and** the alteration of the structure or elevations of any house, or solely to the approval of plans and specification of a new house or building. However the parties have agreed that I am not required to consider this point, and that it is sufficient for the purposes of this appeal that the objector maintains that the proposed construction is prohibited by the covenant. I will therefore proceed on the assumption (without deciding) that the contention is well founded.
4. Mr Radia did not consent to plans and specifications proposed by Mr and Mrs Kerai in respect of the proposed development of the application land, and an application was made to the Tribunal to modify the covenant to allow the development to proceed.

Background

5. The parties were unable to agree a statement of facts and issues, but from the evidence and my inspection of the application land and Linden on 27 February 2014 in the presence of the parties and the valuers, I find the following facts.
6. Aylmer Drive is the main road within a private cul-de-sac development off Stanmore Hill approximately three quarters of a mile north-west of Stanmore. It comprises relatively large houses, some from the 1930s and some of more modern design. There is night-time security. In general the plots are reasonably large and benefit from mature trees and foliage. Aylmer Drive is considered to be an attractive residential location. The application land and Linden are to the eastern end of the development, close to the entrance from Stanmore Hill.
7. The applicants are the joint registered proprietors of the application land having purchased it on 16 March 2007. At the time of purchase, a two-bedroom cottage known as Aylwards Lodge (the Lodge) stood on the application land. The Lodge was described by the selling agent as being “a delightful character cottage dating back to 1750 in parts...”. There is no evidence that the Lodge was quite that old but it is common ground that it dated back to the late 18th or early 19th Century, and predated the surrounding properties including Linden. The gross internal area of the Lodge was approximately 150 sqm. There was a proposal to statutorily list the Lodge, but the assessors did not consider that it had sufficient architectural merit to warrant this. The Lodge was demolished by the applicants in October 2008 and all that now stands on the plot is a detached garage. The application land was fairly overgrown at the time of my inspection.
8. The houses along the relevant section of Aylmer Drive are generally in a building line, approximately one third into each site and are mainly on regularly shaped plots. The application site narrows at the point of the building line of the other properties. The Lodge was set further back within its plot, behind the subsequent general building line, and therefore further into the site than the rear of Linden.
9. The objector purchased Linden in October 1981 and has since lived there with his family. Linden was built in 1935 and is locally listed. It comprises six bedrooms, two bathrooms, a reception room, dining room, kitchen, larder and utility area and has two balconies on flat roofs. It has not been extended and retains original steel framed windows. To the rear of the house is a paved patio area with a lawn area behind. There is a second lawn to the rear, and the final third of the garden comprises a mini golf area. To the front of the plot there is a garage and car port. The plot is longer than the application land by approximately one third, with the final third or so adjoining numbers 12 and 14 Old Forge Close. The parties are agreed that at the date of the hearing Linden had a value in the order of £1.5 million.
10. Following a series of planning applications for a new house on the application land, the majority of which were either withdrawn or refused by the London Borough of Harrow, planning consent was granted on appeal by the planning inspectorate on 27 October 2011. I comment on the Inspector’s findings in more detail later.
11. The planning consent was for a detached dwelling house and the retention of the existing garage. The new house would be situated, approximately, in the same place on the plot as the former Lodge (although it would be larger), and therefore would be visible from the rear windows of Linden. It would be over two storeys plus a basement. The basement would be extensive and run under the front of the plot linking the detached garage via a spiral staircase. It would comprise a living area with kitchen, guest bedroom, bathroom, utility room, gym suite with changing room, WC, and sauna, and a large family room. At ground floor level there would be a breakfast area, kitchen, study, cloakroom, and a large living/dining area with access to a rear terrace. At first floor level there would be a master bedroom suite including dressing room, two further bedrooms, each having ensuite facilities and a small temple area.

Statute

12. The application to modify the covenant is made under grounds (aa) and (c) of section 84(1) of the Law of property Act 1925. These provide as follows;

84(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—

(a) ...

(aa) that (in a case falling 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 user; or

(b) ...

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—

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

(b) is contrary to the public interest;

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

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

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the

relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition.”

13. Ms Catherine Taskis of counsel appeared for the applicants and called Mr Kerai and Mr Richard Henley as witnesses of fact, and Mr Ronald Preston FRICS who gave expert valuation evidence. Mr Andrew Bruce of counsel appeared for the objector and called Mr Radia, Mrs Radia, and their son Kishen Radia as witnesses of fact, and Mr Barrington Sworn FRICS who gave expert valuation evidence.

The Planning Inspector’s decision

14. It is convenient at this point to outline the Planning Inspector’s findings. The application to the London Borough of Harrow under reference P/3429/10 was refused by the planning authority (despite officers’ recommendation to grant) on 23 March 2011. The Planning Inspector granted consent, subject to conditions, in a Decision dated 27 October 2011 under appeal reference APP/M5450/A/11/2151373.
15. The Planning Inspector noted that the proposed dwelling would be larger than the previous dwelling but would be situated towards the rear of the appeal site, “in the same position as the former dwelling” and that “in common with the previous dwelling the proposed dwelling would be subservient in height to the adjacent dwellings”. She also noted that since the previous appeal, “the appellants have sought to replicate as closely as possible the height and form of the upper floors of the previous dwelling...” and concluded that “the siting, height and massing of the proposed dwelling would not harm the character or appearance of the area”.
16. The Planning Inspector considered that:

“the proposed design is simple and contemporary, which would not look out of place in the area, where a wide variety of both traditional and contemporary house designs can be seen. The quality of the materials will be an important factor and this can be secured by the use of a condition.”
17. She subsequently dealt with the effect of the proposed development on the neighbouring properties:

“I saw on the site visit that the proposed siting is unusual for the area in that it is set back behind the building line in Aylmer Drive and is close to the adjacent rear boundaries in Heriots Close. Modern development was built up around the older dwelling and as a consequence there was a degree of mutual overlooking between the former dwelling and the adjacent dwellings”.

“The front of the proposed dwelling would be set behind the line of the rear wall of [Linden], which is immediately to the west of the proposed dwelling. The windows of the first floor of the proposed dwelling would face, as did the windows of the previous dwelling, across the rear of [Linden] at an angle and there would be no significant change to the living conditions of the occupiers of [Linden] attributable to these windows. The patio at the front of the proposed dwelling would be screened by a high boundary fence but I accept that any doors connecting the patio to the breakfast room would be likely to cause an increase in noise and disturbance to the occupiers of [Linden]. The appellant has accepted that a condition could be applied to restrict the openings of this room to windows only and I consider that this would reduce the likelihood of noise and disturbance on the patio to an acceptable level.”

“Other windows in the proposed ground floor west elevation would face not only a proposed boundary fence at 2m, but I saw that there is also a substantial boundary hedge, so these

windows would not have a significant effect on the privacy or residential amenity of the occupiers of [Linden]”.

18. Having also considered the effect on other occupiers, the planning inspector concluded that “the residential living conditions of the adjacent occupiers, subject to conditions, would not be unacceptably harmed when considered in the light of the previous dwelling”. Consent was therefore granted on appeal, subject to conditions, including the requirement for obscure glazing; that some windows will be fixed shut; that the full details of the breakfast room windows in the north elevation be approved so that the amenity of Linden is protected; that the existing trees and hedges be retained; that the flat roof areas shall not be used as balconies; and that the use of the basement annexe and garage to purposes ancillary to the residential use of the approved dwelling. In order to ensure that the ridge height, use lines and finished floor levels did not exceed those on the approved plans, no site works or development could commence unless these levels in relation to an agreed datum level was approved.

Evidence for the applicants

Mr Kerai

19. Mr Kerai said that he bought the application land in 2007 to use as a home for himself and his family. He was intending to extend the Lodge and substantially refurbish it. However having had the property surveyed it became evident that this would not be economically viable and he decided to demolish the Lodge and build a new house. He said that he instructed Mr Henley to deal with the planning process on his behalf. An application for a large house was refused by the local planning authority and the application that was subsequently successful upon appeal more closely followed the roof line and height of the former Lodge. Mr Kerai referred to the planning inspector’s decision and that she had considered the amenity effect on residents including Linden.
20. Mr Kerai said that the footprint of the proposed new dwelling was similar to that of the Lodge apart from single-storey extensions at the front and the rear which would not overlook Linden. He considered that the new house would compare favourably to the Lodge in respect of overlooking because there was a window in the side wall of the Lodge which overlooked the garden of Linden whereas there is no such window in the new house. He commissioned a report from John A Clark FBEng that indicated that there would be no material loss of daylight or sunlight to the neighbouring properties, nor would it cause any areas of the neighbouring properties to be in permanent shade.

Mr Richard Henley

21. Mr Henley is a director of Preston Bennett and a Member of the Royal Town Planning Institute. He was instructed by the applicant in 2007 following the purchase of the application land, and was responsible for the planning aspects of the proposed new development.
22. Mr Henley produced a planning chronology, which briefly consisted of the details of building regulations (D/01266/2007) and planning (P/3599/07/DDO) approval for the demolition of the Lodge; a subsequent variation of the condition to demolish within 6 months of that approval (P/1849/08/DVA); a refusal (P/1338/08/DFU) of an application for a new dwelling on the grounds of design, siting, cramped, height, loss of privacy, lack of private space at the rear, and tree issues; a refusal of a subsequent application for a replacement dwelling (P/3932/08) and subsequent dismissal of appeal to the planning inspectorate (APP/M5450/A/09/2109297); the submission and subsequent withdrawal of a “barrel roof” scheme (P/1678/10), and the ultimately successful application (P/3429/10) which was refused by the members of the planning committee, although recommended for approval by officers, and granted on appeal (APP/M5450/A/11/215373).

23. Mr Henley exhibited a letter that he had written to Mr Kerai in June 2012 in which he agreed with the planning inspector's assessment that the proposed development would not lead to a significant loss of privacy nor any additional harmful overlooking. He considered it would be appropriate for Mr Radia to give consent for the development which in his opinion would be a reasonable development of the site.
24. Mr Henley instructed Square Edge Ltd to produce photomontages of the proposed development, and also of the former Lodge. These were submitted in his second witness statement, together with Square Edge's method statement. Mr Henley had seen and taken photographs of the Lodge prior to its demolition and considered the Square Edge photomontages to be as accurate a representation of the Lodge as could be reasonably achieved by digital formulation. The Square Edge photos showed the proposed building and the former Lodge from both the patio and the music room of Linden, both with and without boundary vegetation.

Mr Ronald Preston

25. Mr Preston is a chartered surveyor and a founder of Preston Bennett. His firm has specialised in residential estate agency and land assembly for new homes in Stanmore and the surrounding area for over 50 years. His office is based less than a mile from the application land.
26. Mr Preston said that he was very familiar with Aylmer Drive and the immediate vicinity and in the three years up to the date of his report his firm had sold 15 properties in the area. He considered Aylmer Drive to be one of the better residential locations, being a private road with controlled access. However he considered that Linden had a disadvantage of having traffic of the remainder of the cul-de-sac driving past its frontage. In comparison with some other locations such as Priory Drive and Priory Close, where properties occupied noticeably wider plots with greater seclusion, Aylmer Drive had more of an appearance of an estate-type layout, albeit a high-quality one, where the majority of houses were built on an identifiable building line with the footprint of each house being barely less than the width of each plot. Accordingly, he considered that Aylmer Drive was a residential area where any would-be purchaser of Linden would expect to have other residential development alongside it.
27. Mr Preston noted that planning consent had been granted for the proposed building and that the land had not been previously undeveloped – the Lodge having stood on it for a very long period. In addition this part of Aylmer Drive and the immediate surrounding area was already well developed in terms of density. He therefore considered that the construction of the house for which the applicants had planning consent was a perfectly reasonable use of the application land. In considering whether the covenant impeded some reasonable use of the application land, and whether it secured a practical benefit of substantial value or advantage to Mr Radia, Mr Preston noted that until October 2008 the application land was occupied by a dwelling house. He also noted Mr Henley's comments about the proposed new property and under all the circumstances considered that the modification to restrict the occupation of the application land to a single-family dwelling house to be constructed in accordance with the planning permission would not cause the objector any injury and that the covenant should be modified under section 84(1)(c) of the Act.
28. He did not consider that by impeding the proposed use, the covenant secured practical benefits of substantial value or advantage. He said that Mr Radia would be no worse off in terms of overlooking and noise than he was with the original building in existence. Indeed, he considered it apparent from the plans statements and other documents before the Tribunal that Mr Radia would be likely to be better off than he was with the original building in existence.
29. Mr Preston considered that should the application site remain undeveloped it would be likely to become neglected which would not be of any practical benefit to the objector. He said that if

the application land is left as it was it would become overgrown, infested with weeds and attract wildlife. He pointed out that even if the grounds were maintained, they would be likely be used for play purposes, a use compatible in the context of land ancillary to a former dwelling house, and that unsupervised play by trespassers can have a significantly detrimental effect on the amenity of an area (although he made some concessions from this position under cross examination given the security arrangements). He considered that the fact that the plot was vacant may be of concern owing to the uncertainty as to what would be developed there. But in essence, he did not consider that impeding the proposed user secured any practical benefits of substantial value or advantage to the objector.

30. In the event that the Tribunal found that impeding the user secured practical benefits that were not of substantial value or advantage, Mr Preston did not consider that any compensation should be payable, in that the objector's position would be no different after the construction of the new building than it was with the original building in existence. In fact, he considered that the value of the objector's property is likely to increase with a new building beside it rather than an older property or, worse still, a neglected and overgrown plot of land. Accordingly he considered that no compensation would be warranted for the modification of the covenant.
31. In oral evidence, Mr Preston said that he considered a suitable figure to compensate Mr Radia for disturbance by the building work would be £5,000. This was based, loosely, on a rate of £100 per week for approximately 12 months.

Evidence for the objectors

Mr Radia

32. Mr Radia said that he purchased Linden in October 1981 and has lived there with his family ever since. He bought the property because he wanted a large attractive house with a secluded garden in a safe neighbourhood with access to central London. The main reception room and dining room of Linden both enjoy excellent views over the back garden and lead to a rear patio area which is private. On the first floor, the three south facing rooms are used by Mr Radia's son Kishen and by his elderly mother. There is a balcony from Kishen's room which he uses in connection with his telescope hobby. The south-facing master bedroom on the second floor also has excellent views and from the second floor there is a balcony which the family use for recreation.
33. When the Radies moved into Linden, the lodge was occupied by Mr and Mrs Leton and by 2006 after Mr and Mrs Leton had passed away the property was put on the market. Mr Radia exhibited the particulars from the estate agent in which the lodge was described as "a truly delightful character two-bedroom cottage....dating back to 1750 in parts". Mr Radia said that Aylwards Lodge was demolished despite being locally listed by Harrow Council.
34. In addition to the planning applications referred to by Mr Henley, Mr Radia indicated that a further planning application (ref P/2480/10) was refused by the local authority under delegated powers on 8 November 2010.
35. Mr Radia outlined the benefits that Linden currently enjoys. The property is south-facing with each rear room benefiting from open views. The family spends a significant proportion of their time in these rooms and are not affected by any noises from the road or being overlooked. He said they used the balconies extensively including entertaining guests. Linden has a long garden which the family uses at every opportunity and they frequently dine on the rear patio during the summer month. He said the family entertain guests in their extensive garden including the mini-golf area.

36. Mr Radia said that the Lodge did not seriously diminish these features of Linden. The cottage did not spoil the rural feeling that they enjoyed despite its awkward position. He considered that the properties were a fair distance apart which prevented any noises carrying or any perceived or actual overlooking. The small footprint of the Lodge was such that it was not a distraction to his view and because the building did not have a front patio or large French windows at the front or raised terraces at the rear there was no feeling of encroachment on Linden. Use of the Linden garden was not substantially diminished as the cottage was unimposing and blended in with the surroundings. The parts of the lodge that were visible were not “in your face”. There were no flank doors or openable windows facing Linden on the ground floor and the only window on the flank wall of the Lodge was a small dormer that gave the impression that it was used only as a source of light rather than a practical viewpoint.
37. Mr Radia then considered the extent to which the amenity of Linden would suffer should development of the application land take place. He considered there would be increased overlooking; loss of privacy and outlook; increased bulk; increased noise; inhibiting the use of balconies on two rooms; potential loss of the yew tree; and diminution in property value.
38. In terms of overlooking, privacy and outlook Mr Radia was concerned about the four full size patio doors on the front elevation of the development. In addition he noted that the ground floor wall was closer to Linden by approximately three metres than the site of the former lodge. He felt that moving the bulk of the ground floor forward by three metres and the front patio accessed by patio doors would be a detriment to him that could not be remedied by compensation.
39. One of his major concerns was overlooking by the development directly into the living room of Linden. He said that the first floor windows of the development are larger and closer to Linden than those of the lodge and would have a direct line of sight to his living room, patio area and first floor bedroom. This would be a significant detriment. He was concerned that the additional patio doors on the side wall faced the middle garden at Linden which was a privacy issue. He considered that the rural, parkland atmosphere that Linden currently enjoys would be irreparably damaged due to the imposing nature of the building in the proposed location. Mr Radia was concerned about the retained garage and noted the applicant proposed to link this via an underground stairwell to the basement. He was concerned that the garage may quickly be modified or used as a utility room as proposed in a former scheme.
40. In terms of increased bulk, Mr Radia noted that the plans were for an oversized building in a narrow strip of land and not on the building line. The building would give the impression of overflowing from the boundaries of the land and would give a feeling of encroachment which would be an annoyance to his family. The property being three metres further forward exacerbated the overbearing effect. In terms of noise, the use of the patio area just outside the living room of Linden would be a nuisance factor for reasons of noise, music, food smells, barbeque smoke etc. He doubted the planning inspector’s proposed condition that any windows cannot be opened and thought that this would not be enforced by the local planning authority. He was concerned about raised voices and banging of doors and throughout the summer months, the use of his patio and upper section of the lawn would be inhibited. The full sized doors and kitchen windows on the side wall, facing his garden, were less than two metres from his boundary and this would contribute to noises and smells carrying to the middle section of his garden.
41. Mr Radia said the proposed patio is almost underneath and in full view of his first and second floor balconies, the use of which would then be severely inhibited and the peace and tranquillity of the two balconies that his family had enjoyed for 30 years would be ruined. Mr Radia said that there was a substantial yew tree on the boundary between the appeal land and Linden and this helped screen buildings from Heriots Close and Old Forge Close. Mr Radia was concerned

that the substantial basement excavation would mean that the yew tree had a very low chance of survival further compounding the potential negative effects on the parkland setting.

42. In terms of diminution in value, Mr Radia referred to Mr Sworn's evidence but said that some benefits (that Linden currently enjoys) are non-pecuniary. He provided a table comparing the accommodation of the lodge with that of the proposed building. He also submitted a series of photographs showing the garden and Linden from a variety of aspects.

Mrs Radia

43. Mrs Radia's evidence was brief and was in essence a supporting statement of her husband's objection. She was concerned that the use that her family made of Linden and its garden would be severely curtailed from a privacy point of view owing to the large first floor windows that would overlook her living room and immediate garden area. She considered that the use of the patio area for dining would be affected and that her use of the second floor balcony would be rudely interrupted by a bulky building so close by.

Mr Kishen Radia

44. Kishen Radia is Mr and Mrs Radia's eldest son. He said that he works at home occasionally and is sometimes required to work over the weekend. He therefore spends a large amount of time in his bedroom and enjoys using the balcony for recreation. He was concerned that the windows of the proposed development would give a full view of his bedroom. Kishen Radia is an enthusiastic astronomer and was concerned that the use of the second floor balcony, which he said was ideal for this, would be inhibited due to the potential for overlooking and overhearing conversations.

Mr Sworn

45. Mr Sworn is a chartered surveyor and a partner in Sworn and Co. He qualified on 7 March 1969 and for his entire career has been involved with the survey and valuation of residential and commercial properties within the London area. His firm also deals with residential sales in the West London area. He has given expert evidence in a number of restrictive covenant cases at the Tribunal.
46. Mr Sworn said that the proposed basement of the development on the application land was approximately 25 metres long and 7 to 9 metres wide. It would necessitate the excavation and removal of 600 tonnes of soil. He said that the ground floor was set back from the piano room of Linden by approximately 7.7 metres – some 3 metres further forward than the original house. He considered this to be significantly closer. He calculated that the first floor was set back approximately 9.7 m.
47. Mr Sworn submitted a series of photographs that he had taken showing the view from the rear piano room and patio area of Linden, together with computerised representations of how the proposed development would look from the same locations. These had been produced by Visual Eyes Media Ltd based upon architect's drawings. He estimated the gross internal area of the Lodge to be approximately 150 m², and that of the proposed building to be 390 m² which he considered a huge increase over and above the size of the original building. He thought that the impact on the Radia family would be considerable, involving loss of privacy from the private patio, and direct views from the bedrooms of the new property into the piano room of Linden.
48. Mr Sworn said that from the current private patio area of Linden there would be direct views into the windows of the proposed new building and if the established yew died back as a result of construction of the underground element (which he considered to be likely) then the impact would be even greater.

49. He therefore considered that the retention of the covenant was of substantial value and advantage to Linden.
50. Mr Sworn estimated that the value of Linden was in the region of £1,500,000 (in oral evidence Mr Preston agreed with this figure). He considered that the impact of the proposed development (in comparison with an empty site) would result in a diminution in value of Linden of between 5% and 10%. He took an average figure of 7.5% and accordingly considered that the diminution would be in the region of £112,500. He added that a smaller house may have a lesser impact and that a house built on the modern building line would have very little impact.
51. In respect of compensation for the building works, Mr Sworn assessed an adequate sum to be £8,000. This was based upon a rate of £150 per week, and an estimated build period of 6-8 months. He accepted in cross examination Mr Preston's £5,000 and his £8,000 formed a reasonable range of opinion.

Submissions

52. In respect of ground (aa) both counsel referred to the questions set down in *Re Bass Ltd's Application* (1973) 26 P&CR 156 With the exception of the public interest question, which by common ground did not apply, these are as follows:

Is the proposed user reasonable?

53. Ms Taskis relied upon *Re Bass* within which it was held that the grant of planning permissions could be very persuasive in this context and submitted that there could be no real doubt that the proposed user of the land was reasonable. Mr Bruce said that this statement was subject to a qualification that it could not always be concluded in the affirmative by the production of a planning permission. Here, he said, planning permission was granted on appeal – with the inspector noting that “the proposed siting is unusual” – and after four refusals and one withdrawal. He said that a “close run” planning decision (for example with the evidence of rejection of other applications) might tip the balance the other way. This was a “close run” decision and, he submitted, this particular development was not a reasonable user of the land.

Do the covenants impede that user?

54. Putting aside the question of whether consent can be unreasonably withheld, it was common ground that I am to assume that the covenant does impede the proposed user.

Does impeding the proposed user secure practical benefits to the objector?

55. Ms Taskis submitted that a restriction can only be said to secure a benefit if that benefit results directly from the observance of its terms. An assessment must be made of what can be done within the terms of the restriction, without infringement, in order to compare this with what is proposed, and from this comparison the existence and extent of any practical benefits will appear.
56. She submitted that the proper comparison in this case is between the proposed construction and the former Lodge. The Lodge stood on the site when the covenant was entered into, and was manifestly not in breach. In the event that the Lodge burnt down, there was nothing in the covenant to suggest that it could not be rebuilt. It was implicit in the imposition of the covenant that the Lodge was approved for the purposes of the covenant. She said that a comparison of the cleared site with the proposed development would put the objector in a better position than they were at the date that the covenant was imposed – this was neither the object nor the effect of the covenant. The objector asserts that the benefits enjoyed by Linden were not seriously

diminished by the Lodge, and therefore a comparison between the proposed development and the Lodge was not irrelevant for the purposes of ground (aa).

57. Mr Bruce said that given the Lodge had been demolished, and that nothing presently stood on the site other than the original garage, no building can be erected on the land, including any rebuilding of the Lodge, without Mr Radia's consent. He submitted that ground (aa) requires the Tribunal to look at the benefits existing at the time of the hearing, referring to *Stannard v Issa* [1987] 1 AC 175.
58. Mr Bruce said that it is immaterial whether the proposed development is better or worse than the situation that existed when either the covenant was imposed or the Lodge stood on the application land. He referred to the Tribunal's decision in *Marcello Developments Ltd's Application* [2001] LP/18/1999 in support of his contention that the practical benefits on which reliance can be placed are any that in fact exist whether or not it was a purpose of the restriction to confer them.
59. Mr Bruce noted the wider "any practical benefits" in ground (aa) that replaced the more restricted "practical benefits" in the former second limb of ground (a), and said that the Tribunal ought to have regard to any benefits now enjoyed by Linden, regardless of whether such benefits were intended when the covenant was taken. Thus benefits which have accrued as a result of the Lodge being demolished can be taken account of.
60. In respect of the right to scrutinise plans, Mr Bruce considered this to be a practical benefit, referring to *Chandler's Application* (1958) 9 P&CR 512. Ms Taskis said that in *Chandler* the covenant was absolute, rather than the objectors having right of veto as such and the practical benefit secured was not the right of veto, but the prevention of any proposals that would alter the character of the neighbourhood.
61. Mr Bruce submitted that a restriction that prevented a property being overlooked was a practical benefit, citing *Walker's Application* [2010] UKUT 16 (LC) and Mr Sworn's evidence; as was the protection of views, referred to in *Wild's Application* [2010] UKUT 306 (LC). Mr Radia's concern about the bulk of the new building was justified. Finally, the restriction serves to protect Linden from increased noise.
62. Ms Taskis submitted that the new development sits in the same position on the application land as the Lodge, and whilst the ground floor would be three metres further forward, it would be screened by boundary features. At first floor level the new building would be no further forward than the Lodge by the thickness of a wall, and had fewer windows than the Lodge. She said that Mr Radia's concerns about noise from the patio, patio doors and window openings were misplaced given the planning conditions. In terms of bulk, Ms Taskis said that the development was no higher than the Lodge, and would not intrude on views from Linden. Given that much of the proposed development was in the basement, this would not impact on Linden, and the proposed building was slightly more streamlined than the Lodge.
63. She said that the perceived benefit of lack of noise and smells was not a benefit secured by the covenant. These, together with the use of the balconies of Linden, were as a result of historic lack of use or limited occupation of the property, rather than as a result of the covenant. Additionally, there was no evidence that the yew tree was at risk, and a planning condition was imposed to deal with this.

If so, are those benefits of substantial benefit or advantage?

64. Ms Taskis, relying upon *Shephard v Turner* [2006] 2 P&CR 28, submitted that for this purpose substantial bore its ordinary meaning: considerable, solid, or big. It was a test of comparison

and a matter of degree (*North's Application* (1998) 75 P&CR 117). She said that the test had not been met.

65. Mr Bruce referred to Mr Sworn's evidence that the diminution of the value of Linden by reason of the proposed development would be 5-10%. He said that in *Re Fairclough Homes Ltd's Application* (2004) LP 30 2001 a 10% reduction in value was held substantial. Alternatively the benefits were of substantial advantage in that they protected the amenity of Linden because the restriction prevents all development on the application land without written approval and as such no house whatsoever can be erected without infringing the restriction.

Would money be an adequate compensation?

66. Mr Bruce said that this question does not arise because the benefit of the covenant was substantial. Alternatively and in any case, money would not be an adequate compensation because the benefits secured by the restriction are not easily quantifiable in monetary terms. (*Wakeham v Wood* (1982) 43 P&CR 40).
67. However, if the Tribunal were satisfied that the covenants should be modified to so as to permit the development, Mr Bruce relied upon Mr Sworn's evidence of £112,500 as diminution in value, plus £8,000 for a building works *solatium*.
68. Ms Taskis said that Mr Preston and Mr Sworn both adopted the same approach to assessing compensation by considering the diminution in value of Linden, which they had agreed had a market value of £1,500,000. Mr Preston did not consider that there was any such diminution. Mr Sworn did not differentiate between the proposed development and the Lodge. She submitted that unless the objector is entitled to prevent any building at all being erected in the position of the Lodge, which she said was not the case, any diminution would not result from the proposed modification and would not fall to be compensated under s84(1)(c)(i). She said that Mr Sworn did not substantiate his range of 5% – 10%, nor give any reasons for his adoption of the midway point of 7.5%. For the purpose of ground (aa), 5% is not substantial (*Re: Gaffney's Application* (1978) 35 P&CR 440 and *Re: Coles' Application* [2004] LP 2 2003). She submitted that Mr Sworn had failed to provide any support for the objector's claim that the practical benefits are of substantial value to the occupier.
69. In respect of ground (c) of s.84(1), Ms Taskis submitted that the applicable criterion was not whether the proposed development would be uninjurious, but whether the proposed discharge or modification would be. She said that the modification as proposed would not injure the objector for the reasons referred to under ground (aa). Mr Bruce submitted that ground (c) was a protection against a frivolous objection, and that Mr Radia's objections were plainly not frivolous, in that he had a legitimate interest to protect the privacy and amenity of Linden. He said that the alternative case under ground (c) should be dismissed.

Conclusions

70. I deal with the application under ground (aa) by considering the questions posed in *Re Bass*.
71. First, is the proposed use of the proposed user reasonable? I am mindful that Aylmer Drive is an established residential location, and that the application land is, in general terms, a residential plot upon which there formerly stood the Lodge. Mr Bruce accepted that the application land was a development site.
72. Whilst the ultimately successful planning application followed a series of refusals or withdrawn applications, the evidence suggests that at least some of these were in respect of developments of a different scale. The successful application followed, largely, the roof line of the former lodge and was no higher than it. The planning inspector's report carefully considered the

impact of the proposed development upon the amenity of Linden among other properties, and concluded that the siting, height and massing of the proposed dwelling would not harm the character or appearance of the area

73. I accept Ms Taskis's submission that the proposed modification sought from the Tribunal is not based upon the planning application, but is based upon the planning consent decision – with all the conditions that were attached to it. On this basis, there is no doubt in my mind that the proposed user of the application land is reasonable.
74. As indicated above, that the restriction impedes the proposed user is common ground.
75. Before considering whether impeding the proposed user secures practical benefits, I consider Ms Taskis's submission that Mr Radia could not withhold his consent to the Lodge being rebuilt as, by definition, it did not offend the covenant as originally drafted. Whilst this has some logic, I am not persuaded that it is a sound proposition. The restriction and benefit of the covenant run with the application land and Linden in perpetuity unless modified or relaxed. The ultimate effect of Ms Taskis's submission would be that an owner of Linden, at some point in the future and perhaps several owners on from Mr Radia, would be bound to accept a rebuilding of the Lodge without any possible ground of objection, and without knowledge of the Lodge's appearance or how it stood on the application land. In my judgement that cannot have been intended. There is no reason to think that a possible reconstruction of the Lodge was in anyone's mind, but if it had been destroyed I see no reason in principle why the parties would not have intended the covenant to have effect. I prefer Mr Bruce's case that once the Lodge was demolished the right to approve plans etc afforded to Mr Radia bites in respect of any new building, irrespective of whether it is a facsimile reconstruction of the former Lodge.
76. In answering the third question in *Re Bass*, whether impeding the proposed user secures practical benefits to the objector, it is necessary to consider the benefits that are actually secured and what could be carried out by the applicant without requiring Mr Radia's consent. At this point I remind myself that the covenant is in respect of the approval of plans and specifications of any new house or building, or the alteration in the structure [or] elevation of any house. The focus of the covenant is on the appearance of the building. There is no reference to nuisance, for example, and nothing to suggest that the covenant was intended to give protection against every adverse consequence of building work.
77. Mr Radia outlined a number of ways in which Linden would be affected by the proposed development. Some of these are not, in my view, benefits secured by the covenant. Mr and Mrs Kerai would be quite entitled to use the application land in a number of ways that would not require Mr Radia's consent but which he considered would affect his family's enjoyment of Linden. For instance the use of the garage (although this was the subject to a planning condition); noise and smells are not caught by the covenant, although they may be peripheral effects to be considered.
78. It is necessary to consider whether any building could be carried out within the framework of the restriction. To my mind there is very little that could be done given its general nature. In evidence and in submissions, the objector said that a new house constructed on the building line would, in principle, be permitted, although nothing much turns on that as plans and specifications of a proposed building on the building line are not in evidence. I am also not persuaded that the applicant would be highly likely to build there, given the tight nature of the site. It is possible that he might, if only to find an exit solution to the covenant issue, but there is no evidence to suggest with a high degree of probability that he would, and that is the test under *Re Fairclough Homes Ltd*. There is also no evidence to a high degree of likelihood that Mr Kerai would rebuild the Lodge itself, even if that were acceptable to Mr Radia.

79. It is the physical presence of the proposed house and the potential for overlooking and lack of privacy that lie at the heart of the objection. There is no doubt that the rear rooms of Linden, and to an extent the patio, would be visible from the front first floor windows of the proposed house. At the moment these are private. These are practical benefits that Mr Radia enjoys by impeding the proposed user.
80. In addressing the next stage of *Re Bass*, whether those practical benefits are of substantial value or advantage is a matter of fact and degree. In my judgement it is here that a comparison between the proposed development and the Lodge is legitimate as it provides a benchmark as to what Mr Radia found acceptable.
81. The planning inspector's findings were influenced by the former Lodge, which is referred to at various points in her report as a comparison with the proposed dwelling. She felt that the residential living conditions of the adjacent occupiers, subject to conditions, would not be unreasonably harmed when considered in the light of the previous dwelling. I agree with that.
82. Mr Radia's evidence was that the Lodge did not diminish his enjoyment of Linden. Mr Bruce said that Mr Radia's lack of objection to the Lodge lay simply with its historic nature but Mr Radia's witness statement went further than that by quite a degree. He said that the Lodge did not spoil the rural feeling that Linden enjoyed, despite its awkward position on the plot. He went on to say that the Lodge and Linden were a fair distance apart, which prevented any noises carrying or any overlooking (perceived or otherwise).
83. Mr Radia did not consider the windows of the Lodge to be intrusive. The new first floor windows would be further forward by half a metre to one metre, and at an angle to the rear elevation of Linden. There is no doubt that the proposed development would be deeper at ground floor level than the Lodge, and that it would be somewhere in the order of two and a half to three metres closer to Linden at ground floor. But the ground floor is largely screened by boundary treatments. The majority of the increased space would be at the rear of the property.
84. Some of the concerns expressed in Mr Radia's witness statement were dealt with by the conditions attached to the planning consent. The front patio area would not be an extension of the ground floor living space, but as a result of the patio doors being replaced by windows is more likely to simply be an area between the house and the garage. In my judgement the rear terrace of the new property is more likely to be used, and this is some distance from and faces away from Linden, shielded by the new house. Other side windows have been made obscure, whereas those of the Lodge were not, and the Lodge had a dormer window directly overlooking the garden of Linden.
85. Both parties submitted visualisations of the proposed development. To my mind there was not sufficient difference between the two versions to cause me to prefer one to the other, despite differences between the parties as to the exact siting position of the Lodge and some discrepancies in the architect's plans. However in comparison with the extent of overlooking of Linden from the Lodge, I do not consider that from the proposed property to be significantly more intrusive.
86. I have considered the issue of substantiality in conjunction with the last question – whether money would be an adequate compensation – as there is a degree of circularity between the two. In assessing whether the practical benefits of the restriction are of substantial value or advantage, I have had regard to the valuers' evidence. Mr Preston has operated in Stanmore for most of his professional life, and his office is five minutes' drive from Aylmer Drive. His firm regularly deals with houses in the area and he gave a reliable account. I found his evidence to be persuasive to a large extent. However, in my judgement his view that there would be no diminution in value, and that Linden would be as valuable without the proposed development

as with it, is understating the effect of the development proposed. He did not take issue with Mr Sworn's valuation of Linden at £1.5 million

87. Mr Sworn's practice is less local to the subject location, but in my judgement he had more experience of the valuation of the modification of covenants than Mr Preston. His assessment of the diminution in value was 5-10%, from which he adopted a midpoint. There was no evidence in support of the range, other than his professional opinion, and no evidence as to the choice of 7.5% other than it fell squarely in the middle of his range. This was as a comparison between the proposed development and an empty site.
88. Mr Sworn's range does not seem to me to be unrealistic. He has experience of covenant cases and has appeared at the Tribunal on a number of occasions. However in assessing whether his preference of steering a middle course is correct, I have also placed weight on Mr Preston's evidence, in that he operates in the local area and is entirely familiar with house values in Stanmore. I have also had regard to the fact that Mr Preston said that there would be little difference between the value of Linden with the Lodge adjacent and with the proposed house adjacent.
89. Having considered both valuers' views, I consider the appropriate percentage reduction in value of Linden having regard to the development of the application land is 5% – the lowest point in Mr Sworn's range. Whether the percentage diminution represents a substantial amount is, in all cases, a matter of fact and degree. 5% would represent a reduction of £75,000. This is a significant amount, but in this context, and as a reduction from a house worth £1,500,000, I do not consider it to be substantial for the purposes of s.84.
90. I therefore find that by impeding the proposed user the objector does not secure practical benefits that are of substantial value or advantage. I also find that money would, in the circumstances, be an adequate compensation.
91. Mr Bruce said that should the Tribunal be satisfied that the covenant should be modified to permit the development, the objector relied upon Mr Sworn's £112,500 as a compensation sum. It follows from my comments above that I consider this to be too high, and that £75,000 is an appropriate amount.
92. Having found that the appellant has satisfied the requirements under ground (aa) it is not necessary for me to consider ground (c). I have jurisdiction to modify the restrictions, and I am satisfied that I should exercise my discretion to modify them, subject to a compensatory payment of £75,000 to the objector.
93. It is inherent in assessing the diminution in value that the proposed house must actually be built, and this would involve some disruption to the objector. I consider the effect of this disruption to be reflected in the diminution amount and in any event it is not the purpose of the covenant to provide protection against disturbance. I therefore make no further award as a *solatium*.

The Order

94. The following Order shall be made subject to the prior payment of the compensation referred to in para 97 below:

In the transfer dated 22 June 1942 –

A new clause (2(a)) shall be inserted to read as follows;

“Notwithstanding anything in paragraph (2) above, a new detached dwelling may be constructed in accordance with the planning permission granted by the Planning Inspectorate on 27 October 2011 under appeal reference APP/M5450/A/11/2151373 in respect of planning application reference P/3429/10 dated 12 December 2010 and in accordance with the accompanying plans and subject to the conditions imposed. Reference to the said planning permission shall include any subsequent planning permission that is a renewal of that permission and any other matters approved in satisfaction of the conditions attached to that permission.”

95. An order inserting this clause as above shall be made by the Tribunal provided, within three months of the date when this decision becomes final, the applicants shall have paid compensation in the sum of £75,000 to the objector.
96. A letter on costs accompanies this decision which will take effect when, but not until, the question of costs has been determined.

Dated 29th April 2014

P D McCrea FRICS