LP/30/2001

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification –estate of single houses on large plots – development of 20 flats – ground (aa) – effect on immediate neighbour – effect on character of area – precedent – application refused.

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

BY

FAIRCLOUGH HOMES LIMITED **Applicant**

Re: No 60 Wigton Lane and other land on the south side of Wigton Lane, Alwoodley, Leeds

Before: The President

Sitting at Leeds Combined Court, The Court House, 1 Oxford Row, Leeds LS1 3BG on 30, 31 March and 1 April 2004

Timothy Fancourt QC instructed by Herbert Smith for the Applicant
Bruce Walker instructed by Walker Morris for the Objectors

The following cases are referred to in this decision:

Re O'Reilly's Application (1993) 66 P & CR 485.
Re Forgacs' Application (1976) P & CR 464

The following further cases were referred to in argument:

Cryer v Scott Brothers (Sunbury) (1986) 55 P & CR 183
Re Banks' Application (1976) 33 P & CR 138
Re Farmiloe's Application (1983) 48 P & CR 317
Bell v Norman C Ashton Limited (1956) 7 P & CR 359
Driscoll v Church Commissioners for England [1957] 1 QB 330
Ghey & Galton [1957] 2 QB 650
Re Chandler (1958) 9 P & CR 512
Re Hornsby (1969) 20 P & CR 495
Re Henman (1972) 23 P & CR 102
Re Gossip (1972) 25 P & CR 215
Re Bass (1973) 26 P & CR 156
Re Saviker (No.2) (1973) 26 P & CR 441
Re Collins (1974) 30 P & CR 527
Re Gaffney (1974) 35 P & CR 440
Gilbert v Spoor [1983] 1 Ch 27
Re Martin (1988) 57 P & CR 119
Re Jones and White (1989) 58 P & CR 512
Re Beech (1990) 59 P & CR 502
McMorris v Brown [1999] 1 AC 142
Re Solarfilms (Sales) Ltd (1993) 67 P & CR 110
Re Bromor Properties Ltd (1995) 70 P & CR 569
Re Snaith & Dolding (1995) 71 P & CR 104
Re Page (1995) 71 P & CR 440
Re Lee (1996) 72 P & CR 439
Re Hunt (1996) 73 P & CR 126
Re North (1998) 75 P & CR 117
Re Zaineeb Al-Saeed LP/41/1999
Re Marcello Developments Ltd LP/18/1999 and LP/31/2000
Re Diggens LP/27/1999 and LP/25/2000
Re Wake LP/2/2001
Re Marshall LP/32/2001

DECISION

Introduction

1. The applicant in this case seeks modification of restrictive covenants to enable the construction of two blocks each containing 10 flats on land at 60 Wigton Lane in North Leeds. The application land at present consists of a large single house, now derelict, standing in grounds of 1.28 acre, and a strip of undeveloped land about 50 feet wide immediately to the west. The area of the two parcels together is 1.63 acre. The application land is part of the Wigton Moor Estate, which was laid out in plots that were sold subject to mutual covenants from 1936 onwards. Apart from the 50 foot strip of land, which appears to have been reserved from development so that it could if necessary become a road, the estate is fully developed at a low density with large single houses. It consists of frontage development to part of Wigton Lane, a through route running from Shadwell Lane on the east to the A61 Harrogate Road on the west; houses off Manor Lane, which runs north from Wigton Lane; and houses in Wigton Chase, a close also on the north side of Wigton Lane. Beyond the curtilages of the northernmost houses in Manor House Lane and Wigton Chase is Alwoodley golf course, which lies in the Green Belt. To the east, south and west of the Wigton Moor Estate is residential development, consisting of houses developed at higher densities.

2. Along the south side of Wigton Lane the Wigton Moor Estate stretches for about 750 yards and contains 27 houses. The plot depths are, with certain variations, 300 feet. Along the north side of Wigton Lane the estate stretches for about 500 yards and contains 13 houses. In addition to the house on the corner of Wigton Lane and Manor House Lane, there are six houses served by Manor House Lane, four of them on a small cul-de-sac, and these seven houses have particularly large curtilages. They and the Wigton Lane houses were built over a long period after 1936, and they are of a wide variety of styles. The houses are all well set back from the frontages. The houses in Wigton Chase were developed later, from 1989 onwards, and they have substantially smaller plots than those on the rest of the estate so that the density is higher, 7 houses per ha (2.8 to the acre), in contrast to 4 houses per ha (1.6 to the acre) on the previously developed part of the estate. The area that is now Wigton Chase had not been laid out in plots in 1936, and its subsequent inclusion in the Green Belt had prevented its development. Its exclusion from the Green Belt in 1987 opened the way to its development.

3. Wigton Lane itself has wide grass verges on either side and a footpath on the south side. The gardens of the houses are generally well treed, and in the region of the application land, where there is a slight bend in the road, trees along the frontages form an important element in the view.

4. Restrictions were imposed on 60 Wigton Lane in a conveyance dated 11 June 1956. These restrictions were in substance the mutual estate covenants and, as material, they provided:

> "(a) That no erection or building of any kind other than one detached private dwelling house containing not less than 1,800 super feet of floor space on the ground and first floors combined with appropriate offices and outbuildings to be appertaining thereto occupied for the purposes thereof (together with a detached

lodge or cottage) in such a position as may be approved in writing by the Vendor shall be erected or built on the land hereby conveyed or any part thereof.

(b) The plans of such dwellinghouse and outbuildings shall be designed by Messrs Jones & Stocks or other the architects to the Estate for the time being (hereinafter referred to as 'the Architects') and shall be approved of and signed by the Vendors or their Agent before building operations are commenced and all buildings shall be erected under the supervision of the Architects at the cost of the Purchaser. If any alteration or additions shall be made to the exterior of such dwellinghouse or outbuildings either on the occasion of any repair or total or partial re-building thereof or otherwise without first receiving the approval of the Vendors or their agent at any such alteration or addition made within a period of ten years from the date of the erection shall be designed by the Architects and carried out under their supervision at the expense of the Purchaser. No building or erection shall be erected or put up except on some part of the area coloured brown on the said plan.

(f) That neither the said piece of land nor any existing or future buildings thereon shall at any time be used otherwise than for the purpose of a single private residence.

(g) That the said piece of land shall not be used so as in the opinion of the Vendors in any way to cause an unreasonable nuisance or annoyance to the Vendors or their tenants or to the neighbourhood and that in particular no poultry shall be kept on the said premises."

5. The area coloured brown referred to in restriction (b) as the area in which any building must be erected was an area between two lines, one 40 feet back from the frontage, the other 100 feet further back. The frontage was shown as being carried round along the frontage of the 50 foot strip to the west, which was identified as the site of a proposed road.

6. The outstanding objectors to this application (other objectors having withdrawn) are Bryan Neville Irving Bloom and Phillipa Bloom, the owners of Willow Dene, 62 Wigton Lane, and Andrew and Carole Williamson of 6 Wigton Chase. Mr and Mrs Bloom's house stands on a plot of about two-thirds of an acre and has a boundary of 300 feet to the application land on the west. Mr and Mrs Williamson's house is about 250 yards from the application land and there is no inter-visibility. The applicant accepts that both Mr and Mrs Bloom and Mr and Mrs Williamson are entitled to the benefit of the restrictions.

7. The 50 foot strip of land to the west of 60 Wigton Lane was sold in 1965 subject to covenants restricting its development that differ substantially from the estate covenants. The objectors do not have the benefit of these.

8. The applicant seeks modification of the restrictions on ground (aa) of section 84(1) of the Law of Property Act 1925 to enable the construction of two blocks each of 10 flats in accordance with the planning permission granted by Leeds City Council on 13 April 2000. The density would be about 12 dwellings to the acre. The applicant claims that the restrictions do not secure to the objectors practical benefits that are of substantial value or advantage, and

that money would be adequate compensation for the loss or disadvantage that would be suffered if the restrictions were modified.

9. The parties produced an agreed statement of facts and issues in which very few facts were recorded as being agreed. There was, however, substantial documentation, and I viewed the land and the surrounding area on the day before the hearing. Evidence was given by witnesses to whom I shall refer later, and joint statements were produced by the expert witnesses. I derive the facts set out in this decision from these sources.

Planning

10. Planning permission for the development of 20 flats in two 3-storey blocks was first granted on appeal in 1987. No copy of the appeal decision, which was given nearly 17 years ago, was produced by the parties. The permission was renewed, most recently in 1996. In 1999 the applicant applied for full planning permission that differed from the approved scheme in certain respects. The principal difference was that the approved scheme included basement car parking, but the new proposal had all parking at surface level. The external design had also been altered. Local residents objected to the application, principally on the ground that the flat development would be out of keeping with the character of the area, and that the cars associated with it would cause problems with traffic and inconvenience and disturbance to neighbouring properties. The officer's report to the planning sub-committee, having identified as the first of the key issues and conclusions compliance with the North Leeds Local Plan and Leeds Revised Draft Unitary Development Plan Policies, said this:

> "(1) It is considered that the principle of a flats development on this site is contrary to policy RD1 of the North Leeds Local Plan and Policy H8 of the Leeds Revised Draft Unitary Development Plan, and Annex A of PPG1 which require new residential development on unallocated sites to being keeping with the character and scale of existing development in the locality. However, the current planning permission for 20 flats, based on an inferior design to the subject application, severely constrains the Council's ability to sustain a refusal."

The report went to say that, whilst not being able to hide the scale and massing of the proposed block of flats, the applicants had sought to improve their external appearance. It concluded that the proposed development was likely to result in a more acceptable scheme than that granted on appeal and on that basis should be supported.

11. The sub-committee deferred consideration for a members' site visit to take place, and, following a further meeting, the determination of the application was again deferred, so that officers could assess the implications of the extant permission in relation to a possible refusal of planning permission. A further report considered the matter under the heading "The 1987 appeal decision and relevant Government guidance", and it expressed these conclusions:

> "In the light of the above considerations, officers are of the opinion that there is no satisfactory basis for refusing planning permission given the earlier appeal decision, the subsequent renewals of the permission by the local planning authority, and the similar nature of the approved outline and proposed schemes. The previous findings

of the inspector and the fact that planning permission for flats development currently exists are significant material considerations. There is a strong possibility that appellant would be awarded costs against the Council, in the event of a refusal of planning permission and subsequent appeal."

12. The recommendation was that the members should grant permission, and they did so. The permission was subject to 24 conditions. Condition 3 required that all side elevation windows must be fitted with obscure glazing and that this must subsequently be maintained. Condition 5 required the provision of car parking spaces in accordance with the approved plans. The layout plan showed a car park with 32 spaces to the rear of the apartment blocks, in what is at present the rear garden of no 60 and the strip to the west. Four visitor spaces were shown at the front of the blocks. There were seven conditions dealing with landscaping, including the preservation of trees. Condition 14 required approval of the details of all external lighting, and condition 15 provided that no lighting fitment must be installed in such a way that the source of light was directly visible from nearby residential properties. There was to be a single vehicular access to the highway with 7.6m radius.

13. There have been numerous planning applications and permission for the extension or alteration of existing houses on the Wigton Moor Estate, but there have been no applications for the redevelopment with more than one house of single plots. The current statutory development plan is the Leeds Unitary Development Plan, adopted in 2001. Policy SP3 provides that new development will be concentrated largely within or adjoining the main urban areas and settlements, the intention being to make the most of opportunities to reuse for housing sites that have previously been developed. Housing is to take place on sites identified in policies H3, H4 and H6 and within the city centre and town centres under policy H7. Policy H8 provides:

"Residential development on sites not identified for this purpose in the UDP will only be accepted if the proposal:

(i) forms a natural infill of or extension to an existing built-up area, compatible with the size, character, location and setting of that area;

(ii) is within the capacity of existing infrastructure and facilities, or otherwise these are provided by the development;

(iii) does not conflict with UDP policies concerning protection and enhancement of greenspace and provision of additional greenspace, playing fields, urban green corridors and other open land (policies N1 to N11 inclusive).

14. The first deposit draft review of the UDP, put on deposit June-September 2003, includes a policy, H4, make similar provision to that made by policy H8. However, it omits the substance of policy H8(i), which requires compatibility with the size, character, location and setting of the area. It appears that specific provision in relation to density is not made in either the adopted or the draft review UDP. Planning Policy Guidance Note 3: Housing (2000) states at para 58 that local planning authorities should avoid developments that make inefficient use

of land (those of less than 30 dwellings per ha net) and encourage development with densities between 30 and 50 dwellings per ha.

Case for the applicant

15. For the applicant Mr Timothy Fancourt QC submitted that ain determining whether the restriction secures any practical benefit of substantial value or advantage the relevant comparison was between what the applicant proposed to develop and what another owner could lawfully develop on the land. That, he said, was because the focus was on the practical benefits that were secured by the covenant. He relied on *Re O'Reilly's Application* (1993) 66 P & CR 485. The terms of the covenants, he said, would permit one huge family house, a separate cottage for elderly relatives or for servants and a car parking area. On the adjoining strip of land a further family house could be built or a combined house and dental or medical surgery. This was the comparison that it was appropriate to make in determining whether, by preventing the approved development, the restriction secures to those entitled to enforce it any practical benefit of substantial value or advantage. Mr Fancourt accepted that it was not appropriate to make comparison with development that would be extremely unlikely to be carried out, but he submitted that his suggested comparator was a rational and possible development.

16. Mr Fancourt contended that by preventing the approved development the restriction secured to the objectors no practical benefit of substantial value or advantage in terms either of the preservation of the character of the area or of the amenities of Mr and Mrs Bloom. The blocks of flats were not themselves out of character with the existing large houses on the estate or what could be constructed on the application land. As far as density was concerned, the estate currently comprised 48 houses (subsequently the number was agreed at 46), excluding Wigton Chase, which, he said, had been built in breach of the scheme of covenants. After the development the number would increase to 67, but, assuming an occupancy rate of 5 in the existing houses and 1.6 in the proposed flats, the number of residents would only increase from 240 to 267. The area would remain one of exceptionally low density of occupation.

17. Mr Fancourt submitted that the thin end of the wedge argument, relied on by the objectors had no application in the present case. Both Mr Bloom and Mr Williamson had stated in evidence that they would accept development of houses on sub-divided plots. That would be in breach of the covenants, and thus rendered reliance on the thin end of the wedge argument impossible since the integrity of the scheme of development would be lost if such development were permitted. In any event, modification would not open the way to further modification in future. The local planning authority would not be more prepared to grant planning permission just because the Lands Tribunal had modified these covenants, which for its part the Lands Tribunal would consider each case on its merits. In terms of policy H8, the erection of 20 flats in blocks disguised as dwelling houses would not have altered the character of the area. The present application would only succeed if it was unobjectionable in terms of the practical benefits secured by the covenants. If it had no significant impact on the estate, it would not make it more likely that another development would succeed. Mr Fancourt relied on *Re Forgacs' Application* (1976) P & CR 464 as showing that this was the appropriate test to apply. In one respect, he said, the proposed development would make it less likely that other applications would succeed. That was in relation to road traffic, where there would come a point at which further development would be unacceptable.

18. Mr Fancourt called two witnesses, Jonathan Stoddard, a landscape architect, a chartered Member of the Landscape Institute, who gave evidence on landscape and amenity issues, and Philip Roebuck FRICS of DTZ Debenham Tie Leung, who gave evidence on the value of the objectors' properties and the likely diminution in those values in the event of modification of the restrictions. Mr Stoddard said that the proposed development would represent a minor change to some sensitive receptors and therefore have a slight visual impact on the neighbourhood and properties immediately surrounding and adjacent to no 60 Wigton Lane. That would be largely restricted to the late autumn, winter and months in the early spring when there would be less foliage on the deciduous trees and shrubs surrounding the development site. During the summer months, when the vegetation was in leaf, he considered that in general there would be no discernible difference. The main reason why the proposed development would have such a slight visual impact on the neighbourhood and Wigton Lane was due primarily to the retention of the existing vegetation surrounding the proposed development site. The scale and siting of the proposed apartments, set well back from the frontage of Wigton Lane, were also important considerations. Users of the Wigton Lane would find no discernible difference. The well established vegetation that defined the northern boundary of the site would be retained as would the western entrance to the site. The eastern access to the site will be planted with privet which would ultimately form a continuous hedgerow. Although the footprint of the proposed development will be approximately 18 metres closer to Wigton Lane and the apex of the roof will be approximately 3.0 metres higher than the existing property, Mr Stoddard considered that in visual terms the proposed development will not give rise to discernible difference to the road and cycle route users on Wigton Lane.

19. Mr Stoddard produced a traffic impact assessment which, he said, had been prepared in consultation with a highways expert. Wigton Lane was subject to a 40 mph restriction and had a 12-hour flow, estimated on the basis of a traffic count, of about 6250 vehicles. About 140 trips per day would be generated by the proposed development, an increase of just over 2%, which was well within the normal fluctuations of existing flow and below the 5% threshold for the requirement of a traffic impact assessment. The level of on-site car parking was sufficient to cover normal usage. Mr Stoddard thought that there would be no significant change to the noise environment.

20. Mr Roebuck expressed the view in the light of Mr Stoddard's conclusions that there would be no diminution in the values of properties in the neighbourhood as a whole if the covenants were to be modified. He assessed the value of 62 Wigton Lane, assuming there were no proposals to redevelop no 60, at £950,000, on the basis of sales and asking prices in the area. His joint report with Mr Cooke stated that both valuers regarded the recent sale of a house called South Lawns on Wigton Lane, a short distance west of no 62, to be a good comparable. It had been on the market for over a year and had sold for £1,125,000. It was substantially smaller than no 62, but had a larger curtilage (1 acre) and was architecturally more attractive. He considered that the market value of no 62 would be reduced by about 5%, or, say, £50,000, if the covenants were modified. Mr Roebuck said that purchasers at this level of the market were very discerning and could easily be deterred from purchasing a property by factors that purchasers in a lower market sector would not perceive to be important. Thus although evidence might show that the actual impact of a factor is not significant, purchasers of houses at this level of the market might perceive the problem to be greater and hence discount their bids accordingly or even decide not to purchase the property at all. Alwoodley, and particularly Wigton Lane, was a prestigious address. He considered that the construction of a development of flats next door to 62 Wigton Lane would diminish the prestige attached to the

property because rather than living next to a single occupier of a substantial house and large gardens, 62 Wigton Lane would be next to a development of flats containing many occupants. Although Mr Stoddard's report established that the actual noise from the car park at the rear of the block of flats would not be significant, purchasers could perceive it to be significant. Similarly they might perceive the visual impact of the development to be greater. Mr Roebuck also considered that purchasers might perceive that there would be additional noise disturbance to the occupants of 62 Wigton Lane as a result of there being more occupants next door on 60 Wigton Lane. That disturbance could come in the form of loud music, parties, additional delivery vans etc. Even though the actual disturbance might be insignificant, purchasers at this level of the market could be very discerning and perceive the problem to be greater than it actually was.

Case for the Objectors

21. For the objectors Mr Bruce Walker submitted that, while it was accepted that the proposed flats development was a reasonable user of the application land, in impeding it the restriction secured to the objectors practical benefits of substantial value or advantage. Those benefits were the preservation of the character of the Wigton Moor Estate as one of the most exclusive areas of Leeds, with large houses on individual plots; the protection of 62 Wigton Lane from the adverse effects of loss of privacy, overlooking, the effects of traffic and car parking, noise and pollution, and visual intrusion; and the prevention of other developments on the estate for which modification of the restrictions could constitute a precedent and which would have adverse effects.

22. Mr Walker called as witnesses Simon Wallace Chadwick BSc, MRICS, a Divisional Managing Director of RPS Planning, Transport and the Environment, Alan Cooke FNAEA partner of Alan Cooke Estate Agents, Simon G Nabarro BSc, FRICS, IRRV, Director of Nabarro McAllister & Co Ltd, and two of the objectors, Mr Bloom and Mr Williamson. Mr Chadwick gave evidence on environmental and planning matters, Mr Cooke and Mr Nabarro on the value, and the likely diminution in value, of the objectors' houses, and Mr Bloom and Mr Williamson on factual matters.

23. Mr Chadwick said that he had considered the impact on the objectors on two bases – scenario 1, consisting of the modification of the covenants and the construction of the 20 flats, and scenario 2, the wider medium terms impact of the modification of the covenant on the character of the Wigton Lane area. In scenario 1 there would be adverse impacts on Mr and Mrs Bloom consisting of disturbance caused by vehicle movements in the garden area; the overall increase in activity from the increased numbers of people and motor vehicles; increased activity from cars entering and leaving the land; inconvenience from refuse vehicles; and the general erosion of the character of the immediate area. Mr Chadwick accepted that the impact on Mr and Mrs Williamson would be minimal. In scenario 2, the Wigton Moor Estate would become a prime candidate for development of a higher density to take place as a consequence of the modification of the covenants on the application land. Government strategic and development plan policy encouraged the maximum use of urban land for residential purposes at higher densities. The result would be an erosion of the character of the area. The likelihood would be that high density development on the land immediately beyond the curtilage of Mr and Mrs Williamson's house, and they would therefore suffer from overlooking, disturbance and increased traffic movements. Mr and Mrs Broom would also suffer from the increased

traffic and activity in the area and a general erosion in its character. With these effects in prospect the modification of the covenants would represent the thin end of the wedge, signalling the acceptability of higher density developments. A change of character could be expected like the one that had occurred on Harrogate Road a short distance to the west, where the large plots of single houses had been redeveloped for flats. Mr Chadwick said that, from his knowledge of the development industry, he was sure that the only reason no further applications for flats developments on the Wigton Moor Estate had been made following the appeal decision in 1987 was the realisation on the part of developments that the system of covenants prevented development.

24. In his report Mr Cooke valued Mr and Mrs Bloom's house at "around the £1,200,000 mark" on the basis that a price of £220 per sq ft would be readily achievable in the light of sales of comparable properties devalued in this way. His joint report with Mr Roebuck said that he agreed with Mr Roebuck's measurement of 4,500 sq ft rather than the 4,500 sq ft he had used in his report. In cross-examination he said that he did not value houses on a sq ft basis, but used the basis as a guide. He considered that his valuation of no 62 was borne out by the price achieved for South Lawns, although he thought that that South Lawns was over-priced. Mr Cooke said that a development on the scale of that proposed for 60 Wigton Lane would have a major effect on the value of no 62. Many purchasers would be put off from showing interest and that would reduce the value of the property by at least 10% or £120,000 in the present state of the market which, for larger houses, was not very strong.

25. Mr Nabarro valued 6 Wigton Chase at £850,000 to £950,000. Mr Roebuck agreed with this valuation. In their joint statement they said that the proposed development at 60 Wigton Lane would have no material impact on the value of 6 Wigton Chase. Mr Nabarro said that an access driveway existed from Wigton Chase along the north side of no 6 and this would provide access to the site, which he referred to as Plot 3, for future development. The development of that vacant land with good sized detached houses would be unlikely to affect the value of no 6, but an intensive flat development, like that proposed for the application land, particularly in view of the elevation of plot 3, would have a very substantial impact on the marketability saleability and value of no 6.

26. Mr Bloom in his evidence said that he and his wife bought 62 Wigton Lane in 1991 because it was one of the few places in Leeds with substantial houses on large plots grouped together. He expressed his concerns about the effects on the proposed development – the significant increase in population density, the number of cars and the disturbance their movement would cause, traffic hazards, disturbance from the car park area at the rear and from people playing loud music and children playing, the noise of refuse collection, and the loss of privacy as the result of overlooking. Mr Bloom also expressed his concern that the application would open the floodgates to further such development over the next few years, increasing these adverse effects and altering entirely the character of the area. He said that he would find acceptable a development of 3 or 4 houses on the application land, and he would not have a problem with similar development on other plots.

27. Mr Williamson said that he and his wife had moved into 6 Wigton Chase in 1992. The Wigton Moor Estate, although architecturally unspectacular, was characterised by low-density development on large or relatively large plots with a substantial landscape element, which was dominant over much of the area. It was this character which he and his family currently

enjoyed and which would be significantly changed if future developments of a similar nature were carried out. In particular he was concerned that such a development on plot 3 immediately to the west of his house would, owing to level differences, have a much more significant effect than the application development would have on its own immediate neighbours. He would, however, be happy with a development of plot 3 consisting of 3 houses.

Conclusions

28. The application in this case is made on ground (aa) alone. Modification of the restrictions is sought to enable the carrying out of the development for which planning permission has been granted. There is agreement that such development would be a reasonable user of the land for the purposes of this provision and that the restrictions I have set out above affecting 60 Wigton Lane would, unless modified, impede that user. The question, therefore, is whether the restrictions in impeding that user do not secure to those entitled to the benefit of it any practical benefits of substantial value or advantage to them. (If they do not, it would be necessary also to consider whether money would be an adequate compensation for any loss or disadvantage suffered, and whether, as a matter of the Tribunal's discretion, the restrictions should be modified.) It is accepted that Mr and Mrs Bloom and Mr and Mrs Williamson have the benefit of the covenants.

29. The practical benefits of substantial value or advantage that the objectors say are secured by the restrictions and would be lost if they were modified are of two sorts. The first is said to arise from the adverse effects that it is suggested Mr and Mrs Bloom would suffer in the enjoyment of their house. The second is the effect that the development would have on the character of the area and as a precedent for further relaxations of the estate covenants and the adverse effects of the additional development that this would permit. In assessing whether in preventing these adverse effects from arising the restriction secure practical benefits of substantial value or advantage it is clearly necessary to carry out some sort of comparison with the situation as it would exist in the absence of the modifications that are sought. Initially Mr Fancourt appeared to suggest that what was required was a comparison with, effectively, the worst that could be done without breaching the covenant, but he made clear his acceptance that any comparison must be with what was at least a realistic possibility. *Re O'Reilly's Application*, to which he referred, was a case in which the practical benefit relied on by the objectors was the positive use of the application land for car parking, the only purpose permitted by the negative covenant. Different considerations in my judgment are likely to apply in the more typical case like the present where the restriction in issue is one limiting development to a single dwellinghouse on the land and the benefits relied on are the character of the area and the amenities of its residents. How the character of the area and the amenities would be affected by the modification of the restriction is not in my view to be judged by envisaging the worst that could be done without breaching the restriction and comparing it with what the proposed modification is intended to permit, and indeed, as I have said, this is not Mr Fancourt's case.

30. In such a case as this, the provision, it seems to me, operates in this way. By preventing development that would have an adverse effect on the persons entitled to its benefit the restriction may be said to secure practical benefits to them. But if other development having adverse effects could be carried out without breaching the covenant, these practical benefits

may not be of substantial value or advantage. Whether they are of substantial value or advantage is likely to depend on the degree of probability of such other development being carried out and how bad, in comparison to the applicant's scheme, the effects of that development would be.

31. In the present case the alternative development to which the applicant says I should have regard would consist of one huge family house, a separate cottage for elderly relatives or for servants and a car parking area; and, on the adjoining strip, a further family house or a combined house and dental or medical surgery. There was no evidence as to the probability of such development being carried out, so that it is hard to see how the applicant can rely on it for the purpose of establishing its case. However, even if I were to assume that such development would be likely to be carried out, I would have no hesitation in concluding that in terms of both its effect on Mr and Mrs Bloom and its effect on the character of the area the applicant's proposed development would be likely to be much worse, so that the practical benefits in preventing it are of substantial value or advantage to the objectors.

32. Although there was discussion of the details of the proposed scheme and much speculation about particular aspects of the use, such as the number of occupants, the collection of refuse, lighting and traffic movements, the conclusion I have come to is one that relies on a more generalised judgment. The replacement of a single dwellinghouse (or a principal dwelling with an ancillary one, and a further house, with a surgery, next door) with 20 flats would inevitably, in my view, give rise to greater numbers of occupants, more traffic movements and greater disturbance, and I accept the overall conclusions of Mr Chadwick on this. The replacement of the rear garden of the plot of a single house with a car park for 32 cars would in particular be a profound and disturbing change in terms both of noise and, at night, lighting. There would be a greater potential for overlooking given the number of windows in the south façade of the blocks. I have no doubt that in preventing this development the restrictions do secure to Mr and Mrs Bloom practical benefits that are of substantial advantage. Moreover, I think that the benefits are of substantial value. Number 62 Wigton Lane, on the basis of the evidence, I find to have a current market value of £1m. Purchasers of such a property would, as Mr Roebuck said, perceive the potential for disturbance from the 20 flats, and would reflect this in their bids. The fact that South Lawns took a year to sell bears out Mr Cooke's view that the market for houses such as this is not strong, and I accept his assessment that the diminution in value would be 10%.

33. The second adverse effect on which the objectors rely is the effect on the character of the area. The Wigton Moor Estate is an extensive area characterised by large, and evidently expensive, houses on individual plots. The density is extremely low. While it is no doubt possible to design a block of flats so that in appearance it is not greatly dissimilar to a large house, the very nature of a development consisting of flats would be out of accord with the character of the area, the establishment and preservation of which it was the purpose of the restrictions to secure. The applicant says that, because this would be the only flat development on the extensive estate, its effect, considered across the estate as a whole, would be small. It would give rise to only small proportionate increases in population and traffic density. The difficulty with this contention is that the same arguments could be advanced with similar force to any other site in the area, and there is no doubt in my judgment that many sites suitable for flat development could be identified. Each new development might have only a marginal effect on the character of the area, but cumulatively they could produce a fundamental change

as has occurred on Harrogate Road to the west. It may well be that, as the objectors say, planning policy will increasingly look for the achievement of higher density redevelopment of existing residential land. That the Wigton Moor Estate has not so far been the subject of applications for such development apart from the present scheme is, due to the fact, as Mr Chadwick said, and I accept his evidence on this, that the failure to progress the present scheme, which has been the subject of planning permission for approaching 17 years, is a deterrent to any developer for the time being. If the scheme were to go ahead there would in all probability be pressure for the development of further such schemes on the estate.

34. In addition I am satisfied that the modification of the restrictions would be seen to constitute a precedent. The system of covenants, at present intact in terms of their preservation of low density, single plot development, would have been breached. I accept that modification of the present restrictions would make it more likely that similar restriction burdening other land would be modified to permit similar developments. In particular I accept that there would be a significant prospect that such a development would be proposed on the open land to the west of Mr and Mrs Williamson's house. The maintenance of the system of covenants, and the preservation intact of the low density, single plot character of the estate, is in my judgment a practical benefit of substantial advantage that the restriction secures to them.

35. I do not accept Mr Fancourt's contention that the objections are undermined by Mr and Mrs Bloom and Mr and Mrs Williamson's preparedness to accept developments of 3 or 4 and 3 houses respectively on the plots adjacent to theirs since such development would be in breach of the estate covenants. Their acceptance of such developments would be relevant to the comparative exercise carried out in assessing whether, in enabling them to prevent the proposed development on the application land, the restrictions secured to them practical benefits of substantial value or advantage. There is nothing, however, to suggest that a low density, single plot development of the sort that they were prepared to accept would have the sort of adverse effects in terms of amenity and on the character of the area that the proposed development would have. On the other hand the acceptance of development in breach of the restrictions would imply acceptance of the loss of the integrity of the scheme of covenants, and I do not think that the objectors can rely on the preservation of this integrity as a practical benefit. But the objectors are not disabled from contending that in preventing a development of flats, which would have an adverse effect on the amenities and could constitute a precedent for further flat development on the estate, the restriction secures to them practical benefits of substantial value or advantage.

36. I conclude accordingly that the applicant has not made out its case, and the application is therefore refused.

Dated 23 April 2004

George Bartlett QC, President

Addendum on costs

37. I have now received submissions on costs. The objectors ask for their costs. They say that they should be awarded on an indemnity basis. The applicant accepts that the general rule that costs follow the event should apply, so that the objectors should have their costs, but it contends that it should have to pay only one set of costs.

38. It is always right to bear in mind when dealing with questions of costs in proceedings in the Lands Tribunal on applications under section 84 that such proceedings are different from ordinary civil litigation on rights of property in which the parties each assert their existing rights. The nature of the proceedings under section 84 is that the applicant is seeking to have removed from the objectors particular property rights that they have. In view of this, an unsuccessful objector will normally not have to pay the applicant's costs unless he has acted unreasonably, and a successful objector will ordinarily get all his costs unless he has in some respect been unreasonable.

39. The Blooms and the Williamsons were throughout represented by different firms of solicitors, but both firms instructed the same counsel at the hearing. I do not think it was unreasonable that the objectors should each have retained their own solicitors, and the applicant made no suggestion that it was unreasonable before its submissions on costs. The objections related to different properties and raised different issues in addition to the ones that were in common. Any offers of settlement by the applicant could have raised a conflict of interest between the two pairs of objectors. It seems to me entirely proper that the objectors should have sought to minimise the costs of their representation through the instruction of the same counsel which ensuring that their own particular interests were looked after by separate firms of solicitors. Whether there was any unnecessary duplication in work done by the two firms of solicitors is a matter that is appropriately to be left to the detailed assessment of the Registar.

40. The applicant contends also that it should not have to bear the costs of two valuers; or, alternatively, if it was reasonable for the Blooms to instruct a separate valuer, that there should be no order as to the costs of the valuation evidence because of the two valuation issues, value and percentage diminution, the applicant succeeded on the first and the Blooms on the second. I do not think it was unreasonable for the objectors to have instructed different valuers. The properties each required separate valuation and the question of diminution was different in each case. Nor can I see any reason, given the nature of the proceedings that I have referred to above, for depriving the objectors of any part of their costs on an issue basis. I do not think that they unreasonably pursued any of the issues.

41. In contending that the applicant should be ordered to pay their costs on an indemnity basis the objectors advance a number of arguments relating to the applicant's conduct of the case. The applicant has responded to these in details. Apart from the applicant's assertion that this was litigation "no different in principle from any other sort of contested property litigation", which is erroneous for the reasons I have referred to above, I accept the applicant's submissions. This is not a case for indemnity costs.

42. The applicant will pay the objectors' costs, such costs if not agreed to be the subject of detailed assessment by the Registrar on the standard basis.

Dated 8 June 2004

George Bartlett QC, President