LP/41/1999

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – restriction to 1 house per plot under building scheme – application to modify to permit the building of an additional house in rear garden – whether practical benefits of substantial value or advantage secured to objectors – whether injury to objectors – application refused – Law of Property Act 1925, section 84(1)(a)(aa)(c)(1A)(1B)

**IN THE MATTER of an APPLICATION under SECTION 84(1)
of the LAW OF PROPERTY ACT 1984**

BY ZAINEEB AL-SAEED

Re: 44 Parkside, Wimbledon SW19

Before P H Clarke FRICS

**Sitting at 48/9 Chancery Lane, London WC2
on 4-6 March 2002**

The following cases are referred to in this decision:

Re Howard No.1 unreported (LP/67/53)
Re Bass Ltd (1973) 26 P & CR 156
Re Forgacs (1976) 32 P & CR 464
Cryer v Scott Brothers (Sunbury) Ltd (1988) 55 P & CR 183
Re Bushell (1987) 54 P & CR 386
Hunt v Molnar (1956) 7 P & CR 224
Re Hornsby (1969) 20 P & CR 495
Re Devobuilt Investments Ltd (1965) EGD 280
Bell v Norman C Ashton Ltd (1956) 7 P & CR 359
Re Collins (1974) 30 P & CR 527
Re Chandler (1958) 9 P & CR 512

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Re Henman (1972) 23 P & CR 102
Gilbert v Spoor [1982] 2 All ER 576
Re Bromor Properties Limited (1995) 70 P & CR 569
Re Lee (1996) 72 P & CR 439
Re Cartner (1999) unreported (LP/19/98)
Re Ghey and Galton [1957] 2 QB 560
Re Truman, Hanbury, Buxton & Co Ltd [1956] 1 QB 261
Re Martin (1988) 57 P & CR 119
Re Stevens (1962) 14 P & CR 59
Stannard v Issa [1987] AC 175
Gee v The National Trust [1966] 1 WLR 170
Re Snaith and Dolding (1995) 71 P & CR 104
Re Farmiloe (1983) 48 P & CR 317
Re Saviker (No.2) (1973) 26 P & CR 441
Re Sheehy (1991) 63 P & CR 95
McMorris v Brown [1999] 1 AC 142
Re Devas unreported (LP/128/54)
Hunt v Molnar (1956) 7 P & CR 224
Re Howard (No.2) unreported (LP/73/55)
Ridley v Taylor [1965] 1 WLR 611

Mr Joseph Harper QC instructed by Fenwick & Co solicitors for the applicant
Mr Timothy Mould of counsel instructed by Lawrence Graham solicitors for the objectors.

DECISION OF THE LANDS TRIBUNAL

1. This is an application under section 84 of the Law of Property Act 1925 for an order modifying restrictive covenants to allow the building of a further house in the rear garden of a house on the Wimbledon House Estate.

2. Mr Joseph Harper QC appeared for the applicant and called Mr Al-Haddad of 44 Parkside and Mr John F Hearsum BSc FRICS, a director of John F Hearsum and Sons Limited, chartered surveyors of London SW19. Mr Timothy Mould of counsel appeared for the objectors and called Mrs Susan Elizabeth Cooke of 20 Burghley Road, an objector and chairman of Parkside Residents Association; Mr Peter Mitchell of 19 Parkside Gardens, an objector; and Mr Graham Anthony Vivian FRICS, a consultant to Allsop and Co of London SW1.

FACTS

3. The Wimbledon House Estate ("the Estate") is situated immediately to the east of Wimbledon Common, close to Wimbledon Village (High Street and Wimbledon Hill) about one mile from Wimbledon Station and the main shopping centre. It is bounded by Parkside in the west, Calonne Road to the north, Burghley Road to the east and Marryatt Road in the south. The land was sold to The Wimbledon House Estate Company Limited in 1898. The original mansion was demolished, roads laid out and building plots allocated. An Ordnance Survey map of 1913 shows that most of the roads had been built, there were detached houses in Parkside, Parkside Gardens, Marryatt Road and at the southern end of Burghley Road with sporadic development in Calonne Road. The centre of the Estate, including woodland and a lake, was undeveloped. By 1933 there had been further in-fill housing on existing roads, except at the northern end of Burghley Road. The open area in the centre of the Estate was still undeveloped. There was little further change by 1950. There was then further development, particularly on the open land in the centre of the Estate. The lake was filled in and Parkside Avenue, Deepdale, Margin Drive and Windy Ridge Close were laid out and developed with detached houses on the former open land. Land on the north-eastern edge of the Estate is now part of the All England Lawn Tennis Club. A Buddhist temple has been built in Calonne Road.

4. This application concerns land which forms part of the rear garden of 44 Parkside ("the application land"), situated at the northern end close to the junction with Calonne Road. Most of the houses in Parkside (including no.44) face the common. Parkside Gardens runs parallel to Parkside at the rear and the Parkside plots have rear frontages to Parkside Gardens. There are some buildings in the gardens of the Parkside houses; these are described later in this decision. On the east side of Parkside Gardens there are detached houses (some converted into flats) facing the rear boundary walls, gardens and buildings of the houses in Parkside.

5. 44 Parkside is now an L-shaped plot with a wider frontage to Parkside than at the rear to Parkside Gardens. 44 Parkside can be considered in three parts: the main house, the

attached annexe and the application land. The site area of this plot is 0.57 acre. A comparison of Ordnance Survey maps shows that the main house was built between 1913 and 1933, probably after purchase in 1923. It is sited at the front of the plot facing Wimbledon Common with access from Parkside. It is a large detached house comprising lobby, cloakroom, reception-hall, drawing room, dining room, kitchen/breakfast room, conservatory and laundry room on the ground floor, with a master bedroom (with en-suite bathroom) and a five further bedrooms and two additional bathrooms on the first floor. There is a parking area in front of the house and a rear garden. Attached to the side of the house next to 45 Parkside is self-contained residential accommodation variously referred to as a coach house, guest or staff flat or annexe (no.44A). The accommodation comprises four bedrooms, living room/dining room, kitchen, utility room, drying room and bathroom. It is now let as a separate dwelling and is entirely self-contained. A comparison of Ordnance Survey maps shows that this annexe was built after 1950. The application land comprises the rear part of the garden of no.44 with frontage to Parkside Gardens. A wooden fence has been erected to divide this land from the garden to the main house. It is rough grass; trenches have been dug for the foundations of the proposed house. The boundary to Parkside Gardens is an attractive brick wall with foliage on the top for part of the length, with double gates which give access to the former garage, a building in poor condition close to the boundary with 45 Parkside.

6. Under an indenture dated 24 August 1899 made between several purchasers, mortgagees and The Wimbledon House Estate Co Ltd each purchaser covenanted with the other purchasers, the mortgagees and the company to observe the covenants in the First Schedule including the following:-

> "4. BUILDINGS:- No messuage or building of a permanent character shall be erected on the Estate unless the plans drawings and elevations thereof shall have been previously submitted to and approved of in writing by the Company or the Surveyor but such approval is required only for the purpose of preserving some degree of uniformity in the buildings upon the Estate and shall not be unreasonably withheld. A fee not exceeding five guineas per house shall be paid to the Surveyor for approving the said plans drawings and elevations and a copy of the elevations shall be deposited with and retained by the Company. No more than one house with the usual offices is to be built upon each parcel except with the consent of the Company and unless it is distinguished in the Plan by a number distinguished with an asterisk and no closet convenience or privy shall be erected detached from other buildings on any parcel within thirty feet from any adjoining parcel."

7. This is one of the covenants which the applicant seeks to modify. I refer to it as the "1899 restriction". The indenture contained a plan which showed the boundary of the Estate including the land later known as 44 Parkside and the application land. It is common ground between the parties that, although 44 Parkside is not shown as a separate and numbered plot, the restriction was imposed on this land under a building scheme affecting the whole of the Estate. The names of the purchasers are set out in the Second Schedule to the indenture. Parcel 112 was sold to Mr Marshall Vaughan in October 1910. He also bought parcel 112A in March 1912, noted on a later title plan as "included in Plot no.112." Plot 113 as shown on the later title plan was bought by Mr Robert Dashwood in 1923. Plots 112 and 112A comprised the property now known as 45 Parkside (before a small part fronting Parkside was conveyed to the owner of no.44 and on which the annexe has been built). Plot 113 is now 44

Parkside. This property therefore now comprises the former plot 113 and part of 112A. Plots 112, 112A and 113 are not distinguished with an asterisk on the title plans.

8. By a conveyance dated 18 April 1923 further restrictions were placed on plot 113 (44 Parkside) including:-

> "3. Any stable or garden buildings which may be erected on the said property shall be so constructed as not to face towards Parkside Gardens and all such buildings shall be built of red bricks with red tiled roofs."

The applicant also seeks to modify this covenant and I refer to it as "the 1923 restriction".

9. On 1 October 1997 conditional planning permission was granted by the London Borough of Merton for the "erection of a two-storey detached house including retention of existing detached garage" on land at the rear of 44 Parkside. This was a renewal of a previous planning permission granted in 1992. The accommodation in the proposed house comprises hall, lounge, dining room, study, cloakroom and kitchen on the ground floor with the retention of the existing garage and three bedrooms and three bathrooms, cupboard and store on the first floor. The agreed gross internal floor area is 2,355 sq ft (218 sq m). The building plot (the application land) is agreed to have a frontage to Parkside Gardens of 76 ft 6 ins (23.3m) and a depth of 69 ft 2 ins (21.1 m). The site area (including half the width of the road) is 0.156 acre.

10. Most of the Estate (including Parkside and Parkside Gardens) is in the Wimbledon (North) Conservation Area. The current development plan is the Merton Unitary Development Plan adopted in April 1996. Policy H12 is concerned with density of development. It provides that the Council will seek to ensure good quality residential development, having regard to the surrounding density and local scale and general character and other planning policies. Densities should generally be between 51 and 85 habitable rooms per acre. In the subsequent Merton Second Deposit Unitary Development Plan Policy HP.6 is similar to Policy H12 with the further provision that the Council will seek to ensure that proposals for residential development make efficient use of land. Policy BE.1 affirms the policy of the Council to encourage protection of the special character and appearance of conservation areas through the preparation and publication of design guidance and character assessments for each area. Policy BE.3 states that it must be demonstrated that new development within conservation areas is appropriate to the locality and sympathetic to existing buildings, townscape and historic street patterns.

11. On 4 February 2000 the applicant applied to this Tribunal under section 84(1)(a), (aa), (b) and (c) of the Law of Property Act 1925 ("the 1925 Act") for the modification of the 1899 and 1923 restrictions to permit the erection and subsequent use of the house for which planning permission has been granted. The application under section 84(1)(a) relates solely to the requirement for the submission and approval of plans by The Wimbledon House Estate Co Ltd, a company no longer in existence. The application under section 84(1)(b) was subsequently abandoned. Objections were made by 14 owners in Parkside Gardens plus the owners of 9 Parkside Avenue and 20 Burghley Road. All objectors are admitted.

12. I made an accompanied inspection of 44 Parkside, the application land and the Estate, with particular reference to Parkside Gardens, on 15 March 2002.

APPLICANT'S CASE

Evidence

13. **Mr Al-Haddad** said that he purchased 44 Parkside with his wife (the applicant) in 1991. They moved in in 1993. It suited their lifestyle, with an annexe which could be let and a large garden for development. On retirement Mr Al-Haddad and his wife intend to move into the new house to allow their son and future wife and family to live in the main house. They were not told of the restrictive covenants on purchase. Planning permission was obtained for alterations to the annexe to separate it from the main house. Their daughter lived there for a time. It is now let as a separate dwelling. It was originally an annexe to the main house.

14. Planning permission was obtained in 1992 for a cottage in the garden. In 1997 a builder was engaged. The greenhouse next to the garage was demolished and footings dug for the foundations. The garage was originally occupied by a gardener-chauffeur and had a bedroom and kitchenette. On 1 August 1997, four weeks after the commencement of building works, solicitors acting for Parkside Residents Association wrote to Mr Al-Haddad drawing his attention to the covenant and threatening an injunction if the works continued. He instructed his builders to stop work and contacted his solicitor, who was unaware of the restrictions. Negotiations took place with the chairman of Parkside Residents Association, then Mr R A K Wright QC. Mr Al-Haddad understood that Mr Wright would recommend the Association not to oppose the cottage and that the Lands Tribunal would allow it.

15. In 1999 Mr Bashnonga of 27 Parkside Gardens built a new house in his garden which is next door to 44 Parkside. Mr Bashnonga, in reply to Mr Al-Haddad's concern regarding the size of the house, said that he would not oppose an application by Mr Al-Haddad to the Lands Tribunal. Mr Bashnonga said that he ignored the letter he received from the Association. However, he then opposed this current application.

16. The building of a cottage in the garden of 44 Parkside would not alter the aesthetic nature of Parkside Gardens where a precedent has already been set for further buildings on existing plots. Since planning permission was granted for the new house in 1997 the cost has escalated and there has been a financial penalty for delay.

17. **Mr Hearsum** reviewed the history of the Estate to show changing densities: as originally planned, in the 1950s and at the present day. He made a plot by plot analysis of 28-45 Parkside. There have been a number of developments close to the application land, conversions of existing buildings and new buildings. Development along the Parkside Gardens frontage of the Parkside plots has been restrained compared to higher densities to the north of the Estate. Mr Hearsum produced an agreed schedule showing buildings and houses per acre for Parkside and other density figures on the Estate. He analysed past decisions of

the Lands Tribunal on the Estate, consent orders and agreements and other developments, with particular reference to density.

18. Mr Hearsum identified the potential for further building plots in the rear gardens of Parkside. There are four properties, nos.32, 34, 38 and 40 Parkside. (I note that on the agreed schedule nos.37 and 37a are also identified as possible building plots and no.36). Mr Hearsum referred to the absence of other plots on the Estate with potential for further development. The thin end of the wedge argument does not apply to this application for two reasons. First, precedents have already been set for development at higher densities than one house per plot, particularly in Parkside Gardens. Secondly, the potential for further development of existing plots is restricted. The grant of this application would not lead to further high density development and the destruction of the scheme of covenants.

19. Mr Hearsum referred to the statutory development plan and said that planning policies cover substantially the same ground as section 84(1) of the 1925 Act. Development sites are a scarce resource and within the constraints of planning and other policies it is in the public interest to make the most of opportunities such as the development land at the rear of 44 Parkside.

20. The proposed development is modest, at a density in keeping with other developments over the past 50 years. It conforms to densities approved by the local planning authority and sanctioned by the Lands Tribunal. The restrictions have been effective in preventing the high density developments that have taken place over the years on nearby land while allowing building on a modest scale. House building on the Estate since it was first laid out has changed in reaction to the market. This application accords with those changes. It is similar to the development at 42 Parkside Gardens (a consent order of the Lands Tribunal). The decision of the Tribunal in 1954 to allow 61 units to be built on 16 acres of open land in the centre of the Estate (*Re Howard No.1* unreported (LP/67/53)) shows the changes in demand as a result of changing patterns of family life. There have been substantial changes in the character of the neighbourhood and other circumstances. The proposed development will not injure those with the benefit of the restrictions and there is no justification for the payment of compensation.

Submissions

21. **Mr Harper QC** said that two conclusions can be drawn from the wording of the 1899 restriction (apart from the requirement for the approval of plans). First, at no stage in the development of the Estate has there been an absolute bar on more than one house per plot. The restriction refers specifically to "the consent of the Company". Secondly, the Lands Tribunal must exercise its statutory power against the background of a covenant formulated to allow its own relaxation. A further matter as to the meaning of the restriction is that the reference to "usual offices" could properly include a coach house and therefore there has always been the possibility of further building on each plot. There is no distinction between development on the site of a former coach house (or its conversion to independent use) and development on the site of a former garage (as proposed at 44 Parkside).

22. The application land is within a conservation area. This distinguishes the planning permission in this case from other permissions where it might be claimed that the grant of permission is virtually a foregone conclusion and therefore no weight should be attached to it in a section 84 application. The planning permission of October 1997 contains unusually detailed conditions reflecting the fact that the land is in a conservation area.

23. The sole question for the Tribunal is whether the restriction to one house per plot should be relaxed in the circumstances of this case. There has been a gradual relaxation of the covenant to meet the needs of the second half of the twentieth century. The present application must be seen as a logical step in the controlled relaxation of the restriction, a process that has gone on for virtually a century.

24. It is common ground that the Parkside Residents Association cannot object to the application as of right. This right is limited to owners with the benefit of the restriction. From Mrs Cooke's evidence it can be seen that only 172 out of 300 households are members of the Association. Many members live in houses built as a result of earlier relaxations of the covenant. Although this does not remove the legitimacy of the objection by the Association it reduces its force.

25. Mr Harper said that Mr Hearsum's evidence can be accepted in full. It supports the applicant's conclusion that the thin end of the wedge occurred many years ago, but, in any event, the consequences flowing from the modification of the restrictions would be minimal. Mr Hearsum's analysis of densities on the Estate shows that the proposed development and any subsequent development that might occur would sit comfortably with the current position.

26. The ridge height of the proposed house is an irrelevance. The local planning authority did not think it too high when granting planning permission. If it is considered to be relevant a reduction in height can be made as a condition of the modification of the restriction.

27. The evidence of Mr Al-Haddad is that he does not want an independent residential use on the application land. He has been put to the expense of this application when around him in Parkside Gardens there are many examples of what he wanted to achieve. In his discussions with Mrs Cooke he was not told that he could not build but that he should alter his plans. This is therefore not an objection in principle but one based on appearance. The garage to be incorporated in the proposed house has apparently been used for residential purposes. There are three defects in the objectors' case. First, they cannot decide whether their objection is one of aesthetics or one of density. If the former the battle has been lost by the grant of planning permission and is of no concern to the Lands Tribunal. If the latter it involves setting the covenant in stone and represents a failure to come to terms with the decision in *Re Forgacs* (1976) 32 P & CR 464. Secondly, there has been delay. The Association did not object to the grant of planning permission but waited until development commenced five years later. Thirdly, some of the objectors are not members of the Association and live in houses built in consequence of a relaxation of the restriction. This devalues their objection. Typical of the intransigence of the objectors is Mr Mitchell. He holds the view that all change is for the worse and will have far-reaching consequences. He

criticised the original layout and density of the estate. He failed to oppose any previous applications. His evidence should carry little weight.

28. Mrs Cooke's evidence as chairman of the Association contained two matters of note. First, her preparedness to contemplate an alternative form of development shows that density is not the real reason for the objection, it is appearance, which was not opposed at the right time. (i.e. on the grant of planning permission). Secondly, the line taken by the Association is illogical. To allow a two-stage introduction of new dwellings, actual building followed by approval, instead of a one-stage process is a hopeless basis for enforcement of the restriction. Furthermore, it is arguable that the occupation of the proposed house by the applicant and Mr Al-Haddad, while their son lives in the main house, would not be in breach of the restriction in any event.

29. A major flaw in Mr Vivian's evidence is that he said that the proposed house would be the third dwelling on a single plot. This is plainly wrong. The position regarding Plot 112A is not clear. No one can say whether its amalgamation with Plot 112 meant that the combined plot was subject to the restriction. Even if it was, this means that there are now three houses on two plots, not two houses on one plot. This is not development on a greenfield site. There is no evidence that those who originally drafted the restriction would have given any weight to this argument. There is no logic or justice in clinging to the terms of a covenant 102 years old when there has been so much change on the Estate.

30. This application taken in isolation can properly be considered to fall within section 84(1)(aa) and (c): there is no case to the contrary. Under paragraph (aa) it is accepted that the proposed house is a reasonable user of the application land. The question for the Tribunal is whether this undermines any practical benefits of substantial value or advantage to the objectors. On the evidence of Mr Vivian this application does not have that effect. The objectors' case is a fear of future consequences, the thin end of the wedge. Similarly, under paragraph (c), there can be no injury to the objectors. The absence of any claim for compensation establishes the applicant's case. The view of the application land and Parkside Gardens will be unchanged. Those with the benefit of the restrictions will scarcely use Parkside Gardens. There is something to be said for opening up the otherwise dead frontage along the western side of Parkside Gardens.

31. If this application succeeds there are only five or possibly six other plots in Parkside Gardens that could be similarly developed. Planning permission would need to be obtained and would be subject to the strict controls of a conservation area. Even if this further building took place the density of Parkside and Parkside Gardens would be extraordinarily low. The increase in density would be negligible. There would be no more traffic and no detrimental effect on the appearance of Parkside Gardens. The thin end of the wedge argument was considered in *Re Forgacs* and must be borne in mind. The restriction will remain of practical use and benefit even if relaxed on this application. It will continue to prevent more than one house per plot over the Estate in situations which are not analogous to the present circumstances. Each case must be considered on its merits (see *Re Forgacs* and *Cryer v Scott Brothers* (1988) 55 P & CR 183 at 201). To show that the thin end of the wedge argument has merit the objectors must prove that the restriction will be rendered obsolete if it is relaxed. In the present case the 1899 restriction has been gradually relaxed

over the years – by the Company since 1912 and by the Lands Tribunal since 1954. This is not a case where the Estate as originally laid out has remained unaltered. In Parkside Gardens there have already been many breaches of the restriction, with or without agreement, i.e. nos.27, 28, 37, 39, 41, 42 and 46. There is no significant difference between permitting the development of a former coach house for independent residential use (as in *Re Forgacs*) and permitting the same end result in one rather than two steps. Densities will not rise dramatically if this application is allowed; there is limited scope for further relaxation of the covenant. The covenant is not absolute – designed to prevent all change – but intended to prevent uncontrolled change. The proposed development would not undermine the benefits of the covenant.

32. If the arguments in this application are evenly balanced, or even if weighted towards the objectors, the Tribunal should nevertheless permit the modification because this would not add up to a practical benefit of substantial advantage. The application can only fail if the evidence is all one way, that is to say against the applicant.

OBJECTORS' CASE

Evidence

33. **Mrs Cooke** has been chairman of Parkside Residents Association since January 2000. The objects of the Association are to preserve the character and amenities of the Estate and its neighbourhood and to serve and protect the interests of members in relation thereto. There are some 300 properties in the area covered by the Association and approximately 180 are members. The role of the Association includes monitoring compliance with the 1899 restriction and members look to it to support and co-ordinate objections. Not all applications for modification are resisted (e.g. 62 Burghley Road) but the Association consider this current application of importance. Attempts to reach a compromise by the possible modification of the proposed development have failed.

34. The *Re Forgacs* decision related to a situation which was different from the current application. In the former the coach house had been used for many years for residential purposes ancillary to the main house. The Lands Tribunal, in allowing that application, found that the restriction was of continuing value and not obsolete. Since that decision there have been only limited physical changes in Parkside Gardens, i.e. at nos.27, 41 and 42.

35. The current application, by contrast, would be a clear breach of the 1899 restriction. It would be the first time a house has been built in one of the rear Parkside Gardens on a clear site. This would set a precedent and have an adverse effect on Parkside Gardens. Mrs Cooke referred to other plots where there has been development, or applications to develop, in the past, namely 27, 41 and 42 Parkside Gardens and 30, 38 and 44A Parkside. The current application is inconsistent with these developments and would set a negative precedent. The Lands Tribunal has a separate role in determining cases where planning permission has been granted for development infringing the covenant.

36. Residents on the Estate, through the Association, place a high value on the quality of the environment and regularly oppose in-fill development at the planning stage. There is considerable opposition to the proposed house on the application land. Although only 15 formal objections have been lodged members not in the vicinity of the proposed house tend to leave it to the Association to voice their opposition. Mrs Cooke objected as owner of a house in a location where several plots could become vulnerable to in-fill development if this application is successful.

37. Mrs Cooke said that she did not accept Mr Hearsum's opinion that the proposed house is at a density in keeping with other permitted developments on the Estate. The 1899 restriction is a density restriction to one house per plot, not a restriction based on houses or buildings per acre, and has contributed to the preservation of the open character of the Estate. Density was not an issue in *Re Bushell* (1987) 54 P & CR 386. In the context of the visual environment density calculations can be misleading. The presence on the Estate of non-residential uses is not relevant to the value of the restrictions.

38. **Mr Mitchell** is the owner of 19 Parkside Gardens, where he has lived since 1973. He has always been aware of the restrictions and has been active in upholding them. Mr Mitchell particularly values the spaciousness of the plots in Parkside and views with concern any attempt at in-filling with new houses. This would be out of keeping with the atmosphere of Parkside Gardens and lead to an increase in traffic and noise. He strongly opposes the current application, which would be significant overdevelopment and encourage further development along the western frontage of Parkside Gardens.

39. **Mr Vivian** described the present position in Parkside and Parkside Gardens (west side). He said that there are 20 plots between Parkside Avenue and Calonne Road. On two plots (29 and 31 Parkside Gardens) single detached houses have been built facing Parkside Gardens rather than Parkside, 13 plots have no residential development in their rear gardens and seven do have separate development, mainly concentrated at the southern end of Parkside Gardens. If this application is granted it would be the first time that a house has been built on a plot fronting Parkside Gardens which previously had no development on it. Other properties in Parkside vulnerable to further development if this application is successful are 32, 36, 37, 37A, 38 and 40 Parkside, six more houses. The lack of rear garden development contributes to the tranquil atmosphere of Parkside Gardens. There would be a change in the street scene if the proposed house is built and others are built on undeveloped plots. Mr Hearsum has looked at the Estate as a whole and has not considered the special character of Parkside Gardens. The grant of this application would mean the erection of a third house on 44 Parkside. Looked at in isolation the proposed house would be in keeping with the area and not prejudice those with the benefit of the restrictions and not entitle them to compensation, but it should be refused in the wider context of the development of other vacant plots. It would represent the thin end of the wedge. These are practical benefits to those entitled to the benefit of the restriction if this application is refused. The proposed house would have a high profile with a pitched gable roof close to Parkside Gardens.

40. Although planning permission has been granted for the proposed house and it is not contrary to local planning policy, these are not reasons for the modification of the restrictions. If owners were able to rely on the planning process to protect the environment

there would be no point in restrictive covenants, which give greater protection. These are still imposed to give residents of estates that extra protection.

41. The development permitted on the open land in the centre of the Estate (*Re Howard No.1*) was very different from the current application. That land was an area of open land with large houses unsuited to modern conditions. The lake was a source of danger. This was not a precedent for further small scale in-filling, as in the current application. Mr Hearsum's density calculations are two mechanistic in approach; his treatment of flats as separate dwellings artificially increases the density and minimises the visual impact of a house converted into flats compared to a new house on a vacant plot.

Submissions

42. **Mr Mould** said that the objectors' case is set out in their objections to this application, namely that the proposed house breaches the 1899 restriction, which is reasonable and ought to be preserved to prevent sub-division of a plot which would be inconsistent with the low density on the Estate and harm privacy, seclusion, peace and amenity; that the restriction is mutual, well-known and was a factor influencing the objector's decisions to buy their houses; and that the proposed house would be detrimental to character and amenity and represent the thin end of the wedge. The purpose of the restriction is to restrict the density of buildings (see *Hunt v Molnar* (1956) 7 P & CR 224 at 225).

43. In *Re Forgacs* the Lands Tribunal accepted that the 1899 restriction was of continuing value to the residents. The member referred to Parkside Gardens as an attractive locality. He found that the restriction was not obsolete and agreed that a modification under section 84(1))(a) might well have serious consequences elsewhere on the Estate. He recognised that the system of covenants was of considerable importance and that those with the benefit have been vigilant as to breaches and have taken a reasonable view when considering change. Where there had been acquiescence in a breach no harm was done. That is not the position here where the breach would produce immediate detriment and set a precedent for future intensive development. *Re Forgacs* reflected the view expressed earlier by the Tribunal in *Re Hornsby* (1969) 20 P & CR 495 at 502. In *Re Devobuilt* (1965) EGD 610, an application which failed, the member drew a distinction between the special circumstances of *Re Howard No.1* and the remainder of the Estate.

44. The decision in *Re Forgacs* can be distinguished from the present application on the following grounds: there was no new building, there was an existing residential use which had continued for many years, the modification extended only to the sanction of the severance of the property from the main house, it followed earlier limited modifications on other coach houses and there was no objection on the grounds of the thin end of the wedge.

45. The applicant proposes to build a house on unbuilt garden land facing Parkside Gardens. Such a development is unprecedented on this part of the Estate. Ancillary buildings have been converted to residential use and, in one case, replaced by a dwelling, but the applicant's proposal is entirely different. There is already a second house on the plot.

The proposal is harmful in its own right and it would set a precedent which would make it impossible to resist similar proposals elsewhere. Success in this application would emasculate the restriction. The disadvantages cannot be compensated in money.

46. For the application to succeed under section 84(1)(c) the applicant must show that the proposed modification of the restriction will not cause injury to any persons with the benefit. This is clearly not the case. The Lands Tribunal has only been prepared to modify the restriction under paragraph (c) where the circumstances are unique (see *Re Hornsby* and *Re Forgacs*). Mr Mould also referred to *Re Collins* (1974) 30 P & CR 527 at 529-30 and *Re Chandler* (1958) 9 P & CR 512 at 517).

47. When considering section 84(1)(aa) it is clear from previous decisions of the Tribunal that the grant of planning permission is of little significance. Mr Hearsum's evidence based on density is without merit (see *Bell v Norman C Ashton* (1956) 7 P & CR 359). The focus is upon the existence of a clear proprietary advantage to those with the benefit of the restriction in having it maintained, notwithstanding the fact that the modification is acceptable in planning terms (see Preston and Newsom, "Restrictive Covenants Affecting Freehold Land", 9th ed para 14-04). In *Re Hornsby* the Tribunal accepted that the purpose of the restriction was to "preserve the character and amenity of the estate". The Tribunal has been sympathetic to the importance of density restrictions as a means of preserving the essential character and appearance of a private estate (see *Re Henman* (1972) 23 P & CR 102). Loss of that safeguard cannot readily be compensated in money. Either the scheme of control is maintained or it is not. If it is not maintained then the practical benefits of the restriction in securing the particular character of the area will have been lost. The proposed modification goes beyond what has previously occurred on this part of the Estate. Past decisions of the Lands Tribunal show that it is sympathetic to the maintenance of the building scheme, except in exceptional circumstances. There are no such circumstances in this case. Modification will undermine the underlying objective of the restriction without good reason. Weight should be given to the opinions of Mrs Cooke and Mr Mitchell as beneficiaries of the restrictions seeking to retain the character of Parkside Gardens and the Estate.

DECISION

48. Before considering the requirements of section 84(1)(aa) and (c) of the 1925 Act I deal with three general matters. These are the effect of a building scheme and the burden of proof, the effect of the grant of planning permission and the meaning of the 1899 restriction.

49. First, the general building scheme and burden of proof. It is not in dispute that the indenture of 24 August 1899 established a building scheme on the Wimbledon House Estate whereby each owner has the benefit and the burden of the restrictions in the First Schedule including the density restriction (see *Hunt v Molnar* and *Re Hornsby*).

50. In *Gilbert Spoor* [1982] 2 All ER 576 Waller LJ said (at 582b):-

> "If on a building estate a restrictive covenant is broken by any plot-holder it is potentially an interference with the rights of all the other plot owners. It may be such that it is a momentary irritation to the owner of land some distance away. The nearer it is the greater the possibility of it being an interference with the amenities of owners. If a building estate contains a pleasant approach with restrictions on it and some building is done contrary to those restrictions which spoil the approach, if then the owner of a plot complains about that breach, the fact that he does not see it until he drives along the road in my opinion does not affect the matter. He is entitled to the estate being administered in accordance with the mutual covenants, or local law; …"

Thus, the building scheme on the Wimbledon House Estate has established a system of local law so that all owners on the Estate with the benefit of the restrictions can expect to see this local law observed throughout the Estate. They can expect to be able to enforce it even though they may be affected only indirectly or temporarily by a breach. In my judgment the effect of a building scheme is that there is a greater presumption that the restrictions imposed under it will be upheld and there is therefore a greater burden of proof on the applicant to show that the requirements of section 84 can be met (see *Re Bromor Properties Limited* (1995) 70 P & CR 569 at 582-3, *Re Lee* (1996) 72 P & CR 439 at 444 and *Re Cartner* (1999) unreported (LP/19/98) paras 22-26).

51. As to the burden of proof I cannot accept Mr Harper's submissions on this point. He said that the application will only fail if all the evidence is against the applicant: if it is evenly balanced, or even weighted towards the objectors, I should permit the modification because this would not show the existence of substantial practical benefits to the objectors. In my judgment the burden of proof is on the applicant to show that the requirements of section 84(1)(aa) or (c) of the 1925 Act are satisfied. Only then do I have jurisdiction to modify the restrictions and, even then, I have a discretion whether or not to grant the application. In *Re Ghey and Galton* [1957] 2 QB 560, Lord Evershead MR, after referring to part of the judgment of Romer LJ in *Re Truman, Hanbury, Buxton & Co Ltd* [1956] 1 QB 261 at 270, said (at 659-60):-

> "… it indicates that what has to be done, if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called, as such, a good and reasonable thing: he must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is so, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting in his own proprietary interest, is entitled to continue to enjoy that proprietary right."

52. In this application therefore the burden of proof is on the applicant to show that the requirements of paragraph (aa) or (c) are satisfied and that burden is, I suggest, greater due to the existence of a building scheme on the Estate.

53. The second general matter I must deal with is the grant of planning permission for the proposed house on the application land. Most of the Estate, including Parkside, Parkside Gardens and the application land, is in a conservation area and it is argued that the greater care given to the grant of planning permission in such an area should give this permission

greater weight. Mr Hearsum went further in his evidence and suggested that the matters to be considered under section 84(1) cover to a large extent the same ground as the matters and policies to be considered by the local planning authority.

54. I do not give the grant of planning permission, even in a conservation area, the significance suggested by the applicant or the degree of overlap suggested by Mr Hearsum, although I accept some relationship between the two regimes of control.

55. Section 84(1B) of the 1925 Act requires the Tribunal, when considering a case falling within subsection (1A), "to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas". It is now well-established that control of development by the grant or refusal of planning permission and control by restrictive covenant are different and that, "while the two regimes impinge upon each other to some extent, they constitute different systems of control and each has, and retains, an independent existence" (per Fox LJ in *Re Martin* (1988) 57 P & CR 119 at 124-5). The planning permission for the proposed development is not therefore conclusive. It is:-

> "… merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, disruptive of the express statutory jurisdiction conferred by section 84. It is for the Tribunal to make up its own mind whether the requirements of section 84 are satisfied." (per Fox LJ in *Re Martin* at 125).

56. In reaching my decision on this application, therefore, I take into account the grant of planning permission and the policies in the development plan, but the exercise which I have to undertake is quite different from that undertaken by a local planning authority when considering the grant of planning permission. I am concerned with whether the objectors' property rights should be taken away. I have to be satisfied that the requirements of section 84 of the Act are satisfied. The grant of planning permission is a matter to be taken into account but it is not decisive (per Eveleigh LJ in *Gilbert v Spoor* at 34G). In *Re Bass Limited* (1973) 26 P & CR 156 the member (J S Daniel QC) said at 159:-

> "… a planning permission only says in effect, that a proposal will be allowed; it implies perhaps that such a proposal will not be a bad thing but it does not necessarily imply that it will be positively a good thing and in the public interest, and that failure of the proposal to materialise would be positively bad. Many planning permissions have got through by the skin of their teeth, and I think that the assistance derived from a planning permission at this stage of things is little more than the negative assistance of enabling it to be said that at any rate there was not a refusal."

57. I have been referred to the decision in *Bell v Norman C Ashton Limited* (1956) 7 P & CR 359. This case concerned a successful application for an injunction to stop building in breach of a density restriction under a building scheme. The defendants pleaded that there had been substantial breaches of the restriction with consequent changes in the character of

the neighbourhood and that planning permission had been granted for a higher density than permitted by the restriction. Harman J expressed himself strongly as follows (at 369):-

> "[The defendants' surveyor] said that town planning approval had been obtained for houses on this scale of density; modern conditions demand that suburban planning should be on that kind of scale; that is the right density at which suburban people ought to live; and if they do not they are obsolete and they ought to be disregarded as being anti-social persons wanting more room than in a crowded country it is right that they should occupy. I must confess that I was much incensed by this evidence. There does remain in a world full of restrictions and of frustration just a little freedom of contract. I do not see why a man should not contract that he shall have half an acre round him and not four neighbours right on him. I do not see why it is anti-social to wish to have a little longer bit of garden or a little wider bit of frontage. To suggest that because these people live an estate near others where the density is greater their right ought to be disregarded by the court and swept away is a proposal which I reject with some indignation."

58. I have also been referred to *Re Hornsby*, an application on the Estate, where the member (J S Daniel QC) said (at 502):-

> "Vigilant insistence on the covenants has preserved the character and amenity of the estate to a standard which planning control would lamentably have failed to achieve (see the Devobuilt decision)."

59. Thirdly, I deal with the meaning of the 1899 restriction. Mr Harper submitted that at no stage has there been an absolute bar on more than one house per plot. This restriction allows for its own relaxation.

60. The wording of the 1899 restriction, so far as it is material to this issue, is as follows:-

> "No more than one house with the usual offices is to be built upon each parcel except with the consent of the Company and unless it is distinguished in the Plan by a number distinguished with an asterisk …"

In my judgment the restriction is a limitation to one house per plot except with the consent of the Company **and** (my emphasis) where the plot is distinguished by an asterisk on the Estate plan. In other words plots without an asterisk are limited to one house but plots numbered with an asterisk may not be so limited with the consent of the Company. There is no provision for relaxation of the one house per plot restriction where the parcel is not marked with an asterisk on the Estate plan (as is the case with plot 113, part of which is the application land). I cannot therefore accept Mr Harper's submissions on this matter. As a matter of construction the 1899 restriction is limited to one house per plot and does not contain a provision for relaxation by consent, except where the plot number is marked with an asterisk; whether in fact the restriction has been relaxed over the years is a matter which I consider below.

Section 84(1)(aa) of the 1925 Act

61. Against this background I consider the requirements of section 84(1)(aa) of the 1925 Act. These can be stated as a series of questions (see *Re Bass* (1973) 26 P & CR 156 at 157-8). The parties agree that the proposed user of the application land for the erection of one house is some reasonable user of the land which is impeded by the restrictions. No submission was made by Mr Harper that the impeding of this user by the restrictions is contrary to the public interest. No compensation is claimed by the objectors, who accept that the disadvantages which would follow from the modification of the restrictions cannot be compensated for in money terms. This leaves only one question for my consideration, namely whether the restrictions in impeding the proposed user of the application land for the erection of one house secure practical benefits to the objectors which are of substantial advantage to them?

62. The meaning of the phrase "practical benefits of substantial value or advantage" in section 84 (1A)(a) of the 1925 Act was considered in *Gilbert v Spoor*. The words were given a wide meaning. Eveleigh LJ said (at 32F):-

> "The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase 'any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression 'any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis."

A practical benefit may be non-pecuniary (see *Re Bass* at 162 and *Re Stevens* (1962) 14 P & CR 59 at 62). In *Re Bass* the member said (at 162):-

> "I think that the words 'value or advantage' rather emphasise that the benefits are not intended to be assessed in terms of pecuniary value only.

63. I was referred to the decision of this Tribunal in *Re Collins* (1974) 30 P & CR 52, which concerned a residential estate with mutual covenants limiting building to one house per plot. Three applications were made to modify the restriction to allow the erection of 32 houses instead of the four houses allowed under the restriction. (It is relevant to this current application that density figures in terms of houses per acre were referred to in *Collins* but the former President (Douglas Frank QC) commented that " it is not merely the arithmetic of the density which matters, but the general effect on the amenity of the area.") As to the practical benefits arising out of the scheme of covenants he said (at 529-30):-

> "[Counsel for the applicants] posed two questions as a test for deciding whether practical benefits are secured to the objectors. They were: do the covenants maintained the ethos of the Estate and if so would the development destroy it? In my judgment both questions must be answered affirmatively. I further think that the

> covenant are of substantial advantage to the objectors though as Mr Montague, the objectors' expert witness, conceded, the development would not result in any depreciation in market value to the objectors' houses. However, it is clear from those who gave evidence that they regard the covenants as being of substantial advantage to them and indeed some of them bought their houses in reliance upon the covenants. It seems to me that nothing material has changed since the building scheme first started and it is fair to assume that it was effected for the purpose of giving substantial advantages to the purchasers by reason of the restrictive covenants."

64. The mere existence of a restriction, however, cannot in itself be a practical benefit otherwise it would be impossible for an application under section 84 to succeed. A practical benefit is secured by a restriction when it flows directly from the observance of that restriction. It is the prevention of the consequences of breach of a restriction which may secure a practical benefit. In *Stannard v Issa* [1987] AC 175, Lord Oliver posed the question (at 188): does the restriction achieve some practical benefit? In *Gee v The National Trust* [1966] 1 WLR 170, Davies LJ said (at 177A):-

> "It seemed from the attractive argument of [counsel for the respondents] that he was suggesting that any interference with the right of a covenantee under such a covenant as this would ipso facto result in injury or loss to him. That I think cannot be so. For that really would mean that no covenant could ever be modified, … The mere making of the modification cannot in my view amount to an injury to the covenantee."

65. The major practical benefits claimed by the objectors are the maintenance of a low density of housing on the Estate resulting in a sense of spaciousness and, in relation to Parkside Gardens, the maintenance of the existing street scene. The objectors say that the low density and spaciousness are achieved by the 1899 restriction limiting density to one house per plot.

66. The maintenance of a stipulated density can be a substantial practical benefit where the results are beneficial to the covenantees. This is seen in *Re Collins* above. I was also referred to *Re Chandler* where application was made to modify covenants which restricted the use of a large house to a single private residence to enable conversion into three dwellings and the building of a house in the grounds. The estate had been developed under a system of covenants not constituting a scheme of development. The application was refused. The member (J P C Done) said (at 517):-

> "The objectors are clearly entitled to ask for the enforcement of restrictions calculated to retain the status quo, and any action which would facilitate a change would deprive them of something which they value. In this connection, the injury envisaged in the section is not limited by statute to the effect on market value; it may be related to something entirely personal and, even if a general relaxation of the restrictions would in fact facilitate the sale of properties and enhance market values, if the personal convictions and wishes of the objectors are seen to be sincere and

well founded, and their objections not tinged with ulterior motive, to reject them would be injurious within the terms of the section.

I cannot in this case find anything unacceptable in the objectors' evidence. Any change would affect the character of the neighbourhood, they would resent it, and would injured if it were allowed. It seems to me that the practical benefit which is secured to them is the power left in their hands to scrutinise and if necessary veto any proposals tending to alter the character of the neighbourhood and I do not think the Tribunal's discretion extends to depriving them of that measure of control when objections to a proposal are practically unanimous and appear to be reasonable."

67. In *Re Henman* a consolidated application was made to modify a restriction on the Wentworth Estate under a scheme of covenants limiting density to one dwellinghouse and a lodge for servants. A former President (Sir Michael Rowe QC) held that the continuance of the scheme of covenants secured practical benefits to the Estate Company and Roads Committee as elected representative of the owners. In *Re Forgacs*, which I look at in more detail below, the member (J H Emlyn Jones) accepted that the continuation of the system of covenants on The Wimbledon House Estate "is of considerable importance to those local residents who are entitled to the benefit of the restrictions" (at 466) and "in so far as they protect the concept of 'one plot, one house', are of continuing value to the objectors" (at 467).

68. The objectors also say that the building of a house in the rear garden of 44 Parkside would establish a precedent leading to further in-fill development on the Estate, particularly in Parkside Gardens. This is the thin end of the wedge argument.

69. The position adopted by this Tribunal as to the thin end of the wedge was explained in *Re Snaith and Dolding*(1995) 71 P & CR 104. The former President (H H Judge Marder QC) said (at 118):-

"The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see *Re Ghey and Galton* and *Re Farmiloe*. It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example *Re Henman*; *Re Saviker (No.2)* and *Re Sheehy*.

Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

This part of Judge Marder's decision was adopted "as correct in principle" by the Privy Council in *McMorris v Brown* [1999] 1 AC 142 at 151-2.

70. I have been referred to three other decisions of this Tribunal (two on the Estate) concerning the thin end of the wedge. In *Re Devobuilt Investments Limited* (1965) EGD 280, application was made to modify the 1899 restriction to allow five houses to be built on 45 Parkside. The member (Erskine Symes QC) said, that "if this application is granted, it is difficult to conceive of any other similar application in relation to the Estate being rejected." In *Re Henman*, referred to in *Re Snaith and Dolding* above, Sir Michael Rowe QC in rejecting the application said (at 109):-

> "Further, I think 'the thin end of the wedge' argument in this case, whatever its lack of force in many cases, has some real force: for in these days quite a lot of owners might be tempted to use the 'in-filling' argument and to grant this application would give them encouragement to do so and thereby ultimately wreck the whole of a carefully work-out development."

In *Re Forgacs*, however, which related to land in Parkside Gardens, the member (J H Emlyn Jones) rejected the thin end of the wedge argument due to the particular circumstances of that case. He said (at 468):-

> "If this proposed modification causes no injury in itself – as is conceded – it cannot in my judgment be used in the future in support of an application under paragraph (c) for a modification which does cause injury."

71. The applicant says that the proposed house is not objectionable in itself and will not affect the spaciousness and appearance of Parkside Gardens and, with reference to the wedge argument, says that the wedge has already been driven into the scheme of restrictions, precedents for in-fill development having already been established. I consider the conflicting views.

72. As to the effect of the proposed house, I am not persuaded that in itself it would result in a loss of spaciousness on the Estate as a whole or even in Parkside Gardens. I do not think that, due to the screening by the rear brick wall and foliage, it will have an adverse effect on the street scene. However, I think that there is force in the objectors' argument, and this is the nub of their case, that this modification will be the thin end of the wedge and lead to further in-fill development in Parkside Gardens, and possibly elsewhere on the Estate, which will adversely affect density, the sense of spaciousness and the street scene. The applicant says that precedents have already been established and much evidence was given on this point, which I now examine. It falls into three categories which, in descending order of weight, are: decisions of the Tribunal and in one case of the Chancery Division on the Estate, consent orders and agreements, other developments and possible breaches of the restrictions. The objective of this examination is to see whether there have been changes in the past and whether the current application will be part of a continuing trend, or whether the current application represents a new departure and will be the thin end of the wedge for further in-fill development.

73. First, I look at decisions of this Tribunal and, in one case, the High Court. In *Re Hornsby*, decided in 1968, the member (J S Daniel QC) carried out a similar exercise and I am able to obtain from this decision much information on early changes on the Estate.

74. The first application to the Tribunal was in 1952 and concerned the conversion of a large house in Marryatt Road (Margin House) an the building of new houses on backland. This application did not proceed.

75. Application was made in 1953 (*Re Howard No.1*) for the modification of the 1899 restriction in respect of Plot 85* in the centre of the Estate. Many, but not all, of the objectors came to terms with the applicants and in July 1954 an order was made permitting 18 houses and garages. Other modifications affecting other plots were granted in these proceedings. The overall effect was the opening up for development of an area which previously comprised a lake and extensive gardens or pleasure grounds belonging to the larger and older houses fronting adjoining roads.

76. There were two further applications by Howards in 1955 and 1957. Both concerned a property known as Lampton in Parkside Gardens. In *Re Howard No.2* unreported (LP/73/55) two houses were permitted (14 were applied for) and in *Re Howard No.3* (LP/31/57) there was a consent order for a further 8 houses.

77. In 1954 application was made to allow the conversion of a house in Peek Crescent into three flats. This was refused in 1956 (*Re Devas* unreported LP/128/54).

78. In 1956 in *Hunt v Molnar*, Roxburgh J in the Chancery Division granted an injunction restraining the defendant from converting a garage at the rear of his house in Parkside into a dwellinghouse. The judge concluded that a decline in the quality of the district was not sufficient to render the covenant unenforceable. He said (at 225):-

> "To my mind the fact that some of the large dwellings on this estate are now being occupied as several dwelling-houses does not render less valuable a covenant which is intended to restrict the density of buildings on the estate. It is absurd to suggest that because some of the houses have been converted into flats, there is now no point in preventing people putting up a lot of small bungalows. There is no suggestion that this is what the defendant wants to do. His intention is, however, immaterial. The question is what would happen if this breach of covenant were permitted. It seems to me that this would reduce the character of the neighbourhood to a greater extent than anything which has happened so far.
>
> On looking at the evidence I cannot see that there has been any substantial departure from the prohibition in relation to the erection of buildings and it does not seem to me that, prima facie, there has been any sufficient change in the character of this neighbourhood to justify the court in saying that the covenants are unenforceable."

79. In 1965 application was made for the modification of restrictions to permit the building of five houses on 45 Parkside, next door to the application land (*Re Devobuilt Investments Limited*). This was refused on the grounds that the proposed development was unattractive and overcrowded. I have already referred to the member's comments on the setting of a precedent for other development on the Estate. He noted that no change of any significance, other than the Howard development, had taken place since the decisions in *Hunt, Devas* and

Re Howard No.2. Furthermore, the Howard development has had no effect on the rest of the Estate which could be said to have rendered the covenants obsolete (at 283).

80. In 1968 *Re Hornsby* concerned an application to allow a further house to be built on the Howard No.1 land. This was allowed. The application land was an unexplained gap in the formerly authorised scheme "which cried out for development". It would be a rounding off of the development authorised by the Tribunal in 1954. The circumstances were exceptional. The special facts of this case made it highly unlikely that a modification would weaken the objectors' case in any subsequent application (at 503). Despite some changes in the neighbourhood the covenants were not obsolete and were still of great advantage to those persons entitled to the benefit (at 502). I referred earlier to the member's comments on the observance of covenants which had preserved the character and amenity of the Estate compared to the failure to do so under planning control (at 502).

81. I now consider *Re Forgacs*, decided in 1976, which is much relied upon by the applicant. This case concerned 42 Parkside, very close to the application land, a plot on which had been built house known as "Snettisham" together with a rear building, formerly a coach house with stabling and living quarters above. In 1951 part of the ground floor and the whole of the first floor were used as living accommodation and by 1976 the whole building was so occupied by servants of the owner of the main house. Application was made for the modification of the 1899 restriction to enable the whole building to be occupied as a private dwellinghouse in separate ownership from the main house. The application was granted. The member, while recognising the importance of the covenants, took the view that no injury would result from the modification sought. The coach house had been used for residential purposes for many years and, under the modification, would continue to be so used, the only difference being that the future occupiers will no longer be servants of the owners of the main house. The thin end of the wedge objection did not have force due to lack of injury by the modification and the almost unique circumstances of this particular case.

82. In my judgment, *Re Forgacs* can be distinguished from the current application. In the former there was an existing building with an established residential use; in the latter a new house is proposed to be built on open garden land. The former could not set a precedent due to the almost unique circumstances; in the current application a precedent could be set (or at least confirmed) for new building on unbuilt land.

83. In *Re Bushell* (1987) 54 P & CR 386, an application to permit the building of a further house in the garden of 25 Calonne Road was refused on the grounds of the intrusion of the roofline of the proposed house into the unusually fine view enjoyed by one of the objectors and a subsequent loss in the air of spaciousness surrounding the houses of the other objectors.

84. Mrs Cooke said that the Tribunal refused an application to allow a further house in the rear garden of 119 Church Road, with access from Burghley Road. I have no further information. Mrs Cooke also gave evidence regarding development at 41 Parkside Gardens, which is behind 29 Parkside at the southern end of the road. A garage serving no.29 was converted into a cottage in the 1950s and then further converted and extended in the 1980s to the existing bungalow. Mrs Cooke believes that the Association negotiated a reduction in

size with the developer and did not oppose an application to the Tribunal on the grounds that this involved the extension of an existing residential building and use. At 38 Parkside an application to the Tribunal was made, but not pursued, for a further house in the rear garden fronting Parkside Gardens.

85. Overall, I do not find in the above decisions of the Tribunal any indication that a wedge has already been driven into the scheme of covenants. The only decisions which could possibly support this view are *Re Forgacs* and that relating to 41 Parkside Gardens (if a decision was actually given by the Tribunal). Both can be distinguished having regard to the important fact that they related to the residential use of existing buildings and not to a new building on open garden land, as in the current application. In my view, they do not set a precedent for the building of a new house on open garden land.

86. I turn now to consent orders of the Tribunal and other agreements relaxing covenants on the Estate. Mr Hearsum in his evidence referred to non-residential uses on the Estate including Hamptons' Estate Office on the corner of Marryatt Road and the High Street. Mrs Cooke said that Hamptons were the original agents for the Estate and have had an office in that location since 1900. This was Plot 2 sold to Hamptons in 1903 with a covenant allowing "one house or a block of buildings". Present use is not considered to be in breach of that covenant. In *Re Howard No.3* application to the Tribunal was made in 1957 relating to the property known as Lampton in Parkside Gardens. It resulted in an agreed order of the Tribunal permitting 8 houses (see *Re Hornsby* at 499). In *Re Hornsby* it is noted that between 1959 and 1964 under six deeds owners with the benefit of the restrictions "had rigidly control the release of covenants in certain suitable cases. These deed mostly permitted conversion to flats but in a few cases extended to permit building" (at 500). I have no further evidence on this relaxation of the covenants.

87. On 18 June 1990 the Tribunal made a consent order in respect of 42 Parkside Gardens modifying the 1899 restriction to permit the demolition of a building occupied as a garage and staff accommodation ancillary to the main house at 31 Parkside and its replacement by a dwellinghouse. Mrs Cooke said that she believes that negotiations took place between the developer and the Association which led to the consent order.

88. A second house has been built in the garden of 62 Burghley Road. Mrs Cooke said that this plot had a very large garden with a lengthy frontage to Burghley Road. The Association and local residents took the view that this large plot could easily accommodate two houses and no objection was made to a modification of the 1899 restriction. It is believed that a consent order of the Tribunal was made.

89. At Greenoak Way, off Calonne Road and close to the application land, four houses have been built on land within the Estate. Mrs Cooke said that these are on Plot 109* where the one house per plot restriction does not apply. This plot was sold in 1911 and two houses were permitted. The Association negotiated with the developers from an early stage and obtain a reduction in the number of houses and other concessions. The site was an eyesore and considered to be on the edge of, and distinct from, the remainder of the Estate.

90. In my view the above consent orders and agreements do not produce any examples of a departure from the 1899 restriction in circumstances which can be said to set a precedent for this application. The nearest examples are 42 Parkside Gardens and 62 Burghley Road. The former is similar to the circumstances in *Re Forgacs* and can be distinguished from the present application on the same grounds, discussed above. The garden at 62 Burghley Road is particularly large with a long frontage. It is physically dissimilar from the backland development proposed in the current application.

91. Finally, I consider a miscellaneous group comprising developments on the Estate which may have been carried out without a consent order or agreement or where the facts are unclear. I look first at those examples in Parkside and Parkside Gardens.

92. At 44 Parkside (the applicant's house) the annexe or coach house (44A) attached to the north side of the main house and built after 1950 was originally staff accommodation but has now been physically separated from the main house and is separately let. No consent order or agreement appears to have been given for the creation of a second dwelling on 44 Parkside.

93. Next door to the application land (27 Parkside Gardens) a former coach house attached 43 Parkside has been extended within the last three years. Mrs Cooke said that the plot containing the coach house was separated from 43 Parkside about 40 years ago and has been in separate use for many years. She is unaware of any consent order or agreement to this separate residential use. The building is set back from Parkside Gardens, within a larger plot, and has little visual impact. In view of the time which has elapsed and other distinguishing factors, Mrs Cooke doubted whether there would have been significant opposition from other residents to an application to this Tribunal.

94. At 30 Parkside planning permission was granted for a house on this plot and the owner may have taken some preliminary steps towards an application to the Lands Tribunal. The matter was, however, resolved by the owners of 4 Parkside Gardens, situated opposite, purchasing the plot to avoid the risk of development to the detriment of their house.

95. At the rear of 36 Parkside planning permission was granted in August 2001 for the erection of a building to provide a garage and ancillary accommodation subject to a condition that it shall only be occupied for purposes ancillary to the residential use of the main house.

96. Old Lodge Cottage (37 Parkside Gardens) was originally built as a coach house on a separate plot. No objection was taken when a house was built on the other part of the plot, fronting Parkside (35 Parkside).

97. Mr Hearsum referred briefly to several non-residential uses on the Estate. Mrs Cooke was able to provide helpful information from her extensive knowledge of the Estate. In Calonne Road there is a Buddhist temple on a large site owned by the Government of Thailand. When the temple was built doubts were expressed whether the 1899 restriction

could be enforced for reasons of diplomatic immunity. Furthermore, the proposed development was thought to be preferable to flat development, for which the land might have been sold. The monks live in a house on the Calonne Road frontage and the temple is set well back from the road in attractive grounds. In Peek Crescent there is The Study School which was built in 1903 in keeping with the adjoining houses. It is well-regarded and no objection is taken to it. The All England Lawn Tennis Club own land on the corner of Somerset Road and Marryatt Road in the north-eastern corner of the Estate. It is believed that the land was purchased in the 1920s. Part of the land is occupied by a covered tennis court and the remainder is not built-upon.

98. Mrs Cooke was also able to give me information about other developments on the Estate briefly referred to by Mr Hearsum. Land in Atherton Drive, on the northern edge of the Estate, was bought in 1930s by a builder, who built five houses on the land (Plot 200). There is no indication on the title that the land on purchase was subject to a density restriction (although in my view it is likely that this was the case) but a restriction of one house per plot was imposed on the sale of the houses. A few years ago three houses were built on 6, 8 and 10 Marryatt Road (Plots 59, 60 and 61). Mrs Cooke said that these houses appeared to be in accordance with the 1899 restriction. Two houses were built 25 years ago on Plot 38* (1 and 2 Marryatt Place). When the plot was sold in 1901 a covenant was imposed limiting development to one house or two semi-detached houses. The plot was enlarged by a footpath diversion. Mrs Cooke acknowledged that the erection of two detached houses instead of a pair of semi-detached houses may technically have been in breach of the covenant imposed in 1901.

99. From my consideration of the last category above I cannot find any precedent for the building of a new house on open garden land in similar circumstances to this current application. The nearest example is Old Lodge Cottage at 37 Parkside Gardens where a house was later built fronting Parkside (35 Parkside), probably breaching the one house per plot restriction. The facts relating to the building of these two houses on one plot, however, are very sketchy. This property was only dealt within passing at the hearing and I found the brief details above in *Re Forgacs*, where it was referred to as a breach which was permitted or acquiesced in where no harm was done (at 466-7). I think that is the correct approach and do not treat it as a precedent for the current application.

100. Overall, looking at the three categories above, I am not persuaded that a precedent has been set for the building of a new house on open garden land unconnected with an existing building and an existing residential use. There are several precedents for this latter form of development. In my view, there is a distinction between a new house in a garden and the extension or modification of a building previously in ancillary residential use in a garden (as in *Re Forgacs*). I think that the Association and the objectors can legitimately draw the line between a new building and what is, in effect, the consolidation and extension of an existing building and use. The current application falls within the former category notwithstanding the incorporation of an existing garage. I was told that this had once had living accommodation but the extent of this has remained unclear. I do not think that I should look at this garage in the same way that the member looked at the coach house in *Re Forgacs*.

101. Mr Harper, however, had another string to his bow when countering the thin end of the wedge argument put forward by the objectors. He said that, even if the new house does set a precedent, the effect would be minimal. The number of other plots where an additional house could be built would be small. During the hearing it was agreed that five or possibly six plots in Parkside Gardens could accommodate an additional house. I am not persuaded by this argument that the thin end of the wedge objection does not have merit. Even if only five further houses could be built in Parkside Gardens this would, in my view, diminish the appearance of this pleasant, quiet and relatively short road. It would spoil the street scene and lead to an increase in traffic and activity. I think that the objectors, most of whom live in Parkside Gardens, can legitimately say that the prevention of the risk of further development near their houses is prevented by the 1899 restriction and that it therefore secures practical benefits of substantial advantage to them. I heard no evidence as to the possibility of further building on other plots on the Estate but I would be surprised if there are no others on the remainder of this large estate capable of accommodating another house. The danger of setting a precedent by the grant of this application is likely to extend beyond Parkside Gardens.

102. Much of Mr Hearsum's evidence was concerned with densities on the Estate in terms of dwellings and buildings per acre. There is agreement on a range of these density figures. The thrust of Mr Hearsum's evidence is that the building of the proposed house would produce a minimal increase in densities measured as dwellings or building per acre. In the context of this application I do not find this evidence persuasive. The measure of density in the 1899 restriction is related to plots not acreage – the permitted density is one house per plot. It is that density which would be exceeded by a substantial amount if the proposed modification is granted. There are now three houses on 44 and 45 Parkside, and whether 44 is treated as one and half plots (113 and half of 112A) or one plot, there are already two houses on this land. A further house would mean three houses on the applicant's land (which I note is only 0.57 acre) when, at the most, there should be two or more likely only one because Plot 112A was sold to the owner of plot 112 (and amalgamated with it), thus providing for only one house on Plot 113 (no.44) and one house on Plot 112 incorporating 112A (no.45). It is not necessary for me to decide this point, however, because looking at it in the best light from the applicant's viewpoint, she is at her limit on the permitted density. If I had been considering the question of a further house on 44 Parkside as a planning appeal, Mr Hearsum's density figures would have been relevant, but I find them of no assistance when considering a density of one house per plot under a restrictive covenant.

103. In summary, I find that the maintenance of the density in the 1899 restriction of one house per plot secures to the objectors benefits which are of substantial advantage to them. The proposed modification would set a precedent which could lead to further development in Parkside Gardens and possibly elsewhere on the Estate to the detriment of those with the benefit of the restriction. The benefits secured are the preservation of the status quo, spaciousness and open character and the prevention of unsuitable backland or garden development by the maintenance of a density of one house per plot and the avoidance of the establishment of a precedent for further backland or garden development. The requirements of section 84(1)(aa) are not satisfied.

Section 84(1)(c) of the 1925 Act

104. The application is also made under paragraph (c) of section 84(1), namely that the proposed modification will not injure the persons entitled to the benefit of the restrictions.

105. In *Ridley v Taylor* [1965] 1 WLR 611, Russell LJ said (at 622) that paragraph (c) is "so to speak, a long stop against vexatious objections… designed to cover the case of the proprietarily speaking, frivolous objection." I do not find the objections to this application frivolous or vexatious. It was, in my view, sensible for the objectors to allow the Parkside Residents Association to manage their case. They were able to instruct counsel. I found the evidence of Mrs Cooke helpful having regard to the depth of her knowledge of the Estate and the reasonable and objective way in which it was given. The Association and those with the benefit of the restrictions have adopted a reasonable and flexible attitude to breaches in the past but I think that they are right to view this application as a danger to the maintenance of the scheme of covenants on the Estate, requiring firm opposition.

106. I have found that the 1899 restriction maintains the status quo, including the preservation of a sense of spaciousness with a density of one house per plot, preventing unsuitable and cramped garden or backland development and that the proposed modification in respect of 44 Parkside would set an undesirable precedent which would be likely to lead to further modifications of the covenant and the building of houses in gardens in Parkside Gardens and possibly elsewhere on the Estate to the detriment of appearance, density and spaciousness. In my view, it must follow that the proposed modification will injure the objectors. The requirements of section 84(1)(c) of the 1925 Act are not satisfied.

Conclusions

107. The requirements of section 84(1)(aa) and (c) of the 1925 Act are not satisfied for the reasons given above and, accordingly, I have no jurisdiction to modify the 1899 and 1923 restrictions. I am not now required to deal with the application under paragraph (a) which related solely to the approval of plans. I refuse the application. I should add that, even if I had been persuaded that I had jurisdiction, I would have exercised the jurisdiction which I have in this matter against the applicant and would have refused the application.

108. This decision concludes my determination of the substantive issues in this case. It will take effect as a decision when the question of costs has been decided and at that point, but not before, the provisions relating to the right of appeal in section 3(4) of the Lands Tribunal Act 1949 and order 61 rule 1(1) of the Civil Procedure Rules will come into operation. Costs are outstanding. The parties are invited to make submissions as to the costs of this application and a letter accompanies this decision which sets out the procedure for submissions in writing.

DATED: 24 April 2002

(Signed): P H Clarke

ADDENDUM

109. I have received written submissions on costs. The objectors ask for their costs on an indemnity basis. The applicant agrees to pay the costs of the legitimate objectors but not the costs of Parkside Residents Association who were not a party to the proceedings.

110. The objectors have been successful and should have their costs. I cannot agree that these should be on an indemnity basis. The Residents Association was not an admitted objector.

111. I order the applicant to pay the admitted objectors' costs of this application, such costs, if not agreed, to be the subject of a detailed assessment on the standard basis by the Registrar of the Lands Tribunal.

DATED: 16 May 2002

(Signed): P H Clarke