Case No: C3/2015/1035

Neutral Citation Number: [2017] EWCA Civ 202
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Lands Chamber)
Mr P R Francis FRICS
[2015] UKUT 82 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2017

Before :

LADY JUSTICE ARDEN
and
LORD JUSTICE SALES

- -

Between :

	Stafford Flowers	**Appellant**
	- and -	
	Linstone Chine Management Company Limited	**Respondent**

- -
- -

Stephen Cottle (instructed by **South West Law**) for the **Appellant**
Stephen Jones (instructed by **Scott Bailey**) for the **Respondent**

Hearing date : 15 March 2017

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Judgment **Lady Justice Arden :**

Issue on this appeal

1. The appellant appeals against the dismissal on 5 March 2015 by the Upper Tribunal (Lands Chamber) ("the UT") (P R Francis FRICS) of his application to discharge a

covenant ("the covenant") on his holiday bungalow, 182 Brambles Chine Estate ("the property"). The property forms part of the Chine estate, a development of bungalows constructed in the 1980s for holiday use on the Isle of Wight. The property, like other bungalows on the Chine Estate, is held subject to a restrictive covenant ("the covenant"), reflecting a condition of the original planning permission, against use of the property during certain weeks of the year. By consent the Upper Tribunal modified the covenant to limit the restriction to overnight use during these weeks but otherwise it stands. The result is that the current continuous occupation by the appellant and his wife, Mrs Stafford Flowers, of their bungalow is in breach of covenant. So long have they been in full time occupation there that they have obtained a Certificate of Existing Lawful Use under section 191 of the Town and Country Planning Act 1990 ("TCPA").

2. There are comparatively few people in the same position as the appellant and Mrs Stafford Flowers, but nonetheless the UT principally found that the discharge of the covenant was "the thin edge of the wedge" which would lead to a change in the character of the Chine Estate. The application was therefore refused. The appellant contends that the UT misunderstood the planning position which could be used to protect the character of the Estate from all save a very few bungalow owners. In consequence, on the appellant's submission, the UT misdirected itself alternatively did not sufficiently analyse the situation so that its order should be set aside.

3.For the reasons given below, I do not consider that the UT misdirected itself. The thin edge of the wedge was made up not just of the few bungalow owners in the same position as the appellant but also of those who would seek to do as he has done and purchasers from those who decided to sell in consequence. The UT analysed the position carefully and there is no basis on which its order can be set aside. In the circumstances, I would dismiss this appeal.

History of the covenant and the planning restrictions affecting the property

4. The bungalows on the Chine Estate were built in the 1970s and 1980s. There are now over 250 bungalows. The respondent is the management company and the members of the company are bungalow owners. The management company owns the freehold to all of the common areas, and the bungalow owners own the freehold of the footprint of their bungalow on the land. Most (if not all) bungalows are subject to the covenant. The covenant constitutes the bungalow owner's agreement**:**

> not to use the land or the bungalow other than as a holiday bungalow for leisure purposes only and not to occupy or allow the bungalow to be occupied during the periods from 15 November to 19 December and from 4 January to 14 February in any year.

5. I will call the periods mentioned in the covenant "the restricted periods". The covenant mirrors a condition ("Planning Permission Condition 3") which was attached when planning permission was granted to build the Chine Estate.

6. The appellant purchased the freehold of the property in 1998. He and Mrs Stafford Flowers occupy the property all year around in breach of the covenant. There are a few other bungalow owners in the same position, and they are known as the "livers-in".

7. In 2011, the respondent sought an injunction against the appellant, Mrs Stafford Flowers and another bungalow owner to prevent them from living in their bungalows in breach of the covenant. The matter came before Recorder Belben in the Newport County Court, and he made an order dated 25 January 2012 which has been stayed pending this application.

8. In the course of his judgment, the Recorder found that that it had not been shown that the character of the estate had so fundamentally changed over the years that it would be redundant to grant an injunction, that the nature of the accommodation was not that of permanent living accommodation and that if people were allowed to live there all year round, the character of the area would deteriorate. He also held that it was not likely that the local planning authority would take enforcement action:

> 30. In addition to the Lawful Development Certificate Appeal there has been other correspondence concerning this matter. At various times the Claimants have sent letters to the Isle of Wight Council identifying "livers in" and asking the Council to take appropriate action. There have been responses from the Council and letters from the Council to "livers in". There have been Notices served by the Council on "livers in" alleging breach or breaches of Planning Conditions. There have been questionnaires served and responses sought. In some cases responses were not sent in and fines were levied but not enforced. The history of this is set out conveniently and compactly in the Claimants chronology together with appropriate references and it is not necessary for me to refer to it further other than to say to date it appears that the Council has not taken enforcement action through to its logical conclusion. There is a letter at (A315) dated 20 November 2009 from the Council attaching its current policy on enforcement and it is clear from that and the evidence before me that the Isle of Wight Council attaches a low priority to enforcement action at [the Chine Estate and the neighbouring Brambles Chine Estate]. That is the

> probable explanation for its seeming inactivity. Indeed, the most recent application for Lawful Development Certificates seem to be in response to enforcement notices served (C41) and (A326).
>
> 31. Thus I conclude (a) that any occupation by any of the defendants during the out of season period would not only be *prima facie* a breach of covenant but also a breach of the condition attached to the Planning Permission under which the chalets were erected (b) it is unlikely that further enforcement action will be taken in the foreseeable future and that (c) any such notice will trigger a further application for Lawful Development Certificates.

9. The Recorder also held at paragraph 56 of his judgment that there was no evidence that the character of the site had so fundamentally changed over the years that to grant an injunction would be redundant.

10. Until 2012, the appellant was also in breach of Planning Permission Condition 3. However, on 29 March 2012, the Isle of Wight Council issued to the appellant a Certificate of Existing Lawful Use or Development in accordance with section 191 TCPA stating that it was satisfied that the property had been occupied continuously for ten years in breach of Planning Permission Condition 3 and that this use was therefore lawful for planning purposes.

11. On 3 June 2013, the appellant applied to the UT to discharge the covenant under section 84(1) of the Law of Property Act 1925 ("LPA"). Section 84(1) gives the UT power to make such an order in limited circumstances:

> 84 (1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction ... on being satisfied—
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes ... or, as the case may be, would unless modified so impede such user; or …

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

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award …

(1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—
(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; …
and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

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

12. The respondent objected to the discharge of the covenant. In June 2013, the respondent sent a circular to its members with the following report about the appellant's application:

"Livers In"
As you are aware the Court case against the livers in is still on going. We won the case to enforce the Restrictive Covenant but now the defendants have applied to the Court to have a cost determined for the buyout of the covenant. We were due to return to Court on the 4 July.

In the meantime the defendant, Mr. Flowers, has also submitted an application to the Upper Tribunal (Lands Chamber) to have the Covenant restrictions discharged. The application is only for their property but it is the opinion of our solicitor that, if this application is successful, it would mean that the covenant would no longer be enforceable on any of the bungalows on the site as similar applications would be approved by the Upper Tribunal.

UT's reasons for rejecting the application

13. Before the UT the appellant argued that the covenant was no longer appropriate given the changes in circumstances affecting the Chine Estate since the bungalows were originally built. The original planning permission was given to enable the bungalows to be let as holiday accommodation but that was increasingly difficult to do. The appellant contended that the respondent was wrong to suggest that the discharge of the covenant would be "the thin edge of the wedge". On the contrary, the character of the Estate had already changed. The removal of the covenant would merely regularise the position which had existed for many years.

14. The appellant called a considerable number of witnesses in support of his case. His own evidence was also that most bungalows were now owned and occupied in one form or another by middle aged people and pensioners, many of whom use them as their principal residence for long periods during the year, only moving out during the restricted periods. The appellant told the UT that there were about ten other properties on the Chine Estate and a neighbouring estate where the owners, like himself and his wife, occupied their units throughout the year.

15. According to the evidence of Mr Neil Cain, owner of 176 Brambles Chine, some 20% or so of the properties were owned by "livers in" for either 42 or 52 weeks of the year (some going abroad for the winter) and, as he had discovered when he bought a second unit on the Estate, returns from holiday lettings were becoming increasingly poor. It was his view that there was no point in continuing to try to enforce the covenant because of the changes in the market. Mr Graham Collett, owner of 102 Brambles Chine, gave evidence that he would occupy his bungalow throughout the year if it were not for the covenant.

16. The principal witness for the respondent was Mr Hawkins, the general manager of the respondent. He said that neither the bungalows nor the infrastructure were suitable for full residential use. He explained in his evidence that he had written to "livers-in" to remind them of the covenant but breaches continued. He thought that there were only about ten such owners. He also gave evidence that the local planning authority had not enforced the conditions of the original planning permission despite his requests. Some twenty-two bungalows either had no planning restrictions in terms of user or occupation or had obtained certificates of existing lawful use and according to Mr Hawkins it was relatively easy for a bungalow owner who had been the owner for more than ten years to obtain such a certificate.

17. Mr Hawkins' main concern was that, while the discharge of the covenant for just one property would make little overall difference, it was the "thin edge of the wedge". He considered that "it would undoubtedly lead to an avalanche of further applications". He considered that there was little that the respondent could do to prevent the estate potentially becoming a housing estate. "The peaceful nature of the site would be entirely lost, and the whole character would change."

18. Mr David Slade, owner of 168 Brambles Chine, and Mrs Gabrielle Dean, owner of 247 Brambles Chine, gave evidence that the bungalows were not suitable to be permanent residences and that the present site had a peaceful nature as a holiday park.

19. The appellant initially relied on paragraph (a*)* of section 84(1) (obsolescence). However, as the members of the respondent accepted that daytime use in the restricted periods was not occupation in breach of the covenant, the respondent conceded during the trial ("the concession") that the covenant should only forbid occupation from 5pm to 10am in the restricted periods. The appellant accepted that, given the concession, the argument on obsolescence had been overtaken.

20. The UT nonetheless addressed the evidence that related to the issue of the obsolescence of covenant and concluded that the evidence did not show that there had been any change in the character of the neighbourhood or that there had been any other material changes of circumstances leading to the conclusion that the covenant was obsolete. The key point was that the site had remained a peaceful holiday park the nature of which would alter very much for the worse if, eventually, it became a standard residential estate with full-time occupation of many more of the units. The UT agreed with the conclusions of the Recorder.

21. At paragraph 84, the UT concluded:

> 84. In my judgment, retention of the overnight restriction is the anchor by which the nature of the site can continue to be maintained, and will ensure that it does not eventually become a housing estate for full time occupation for which it is undoubtedly most unsuited.

22. The UT therefore dismissed the appellant's case based on obsolescence.

23. As to paragraph (aa) of section 84(1) of the LPA (reasonable user). The UT accepted that "residential occupation of a residential property was reasonable user", and that the covenant impeded such use. However, the real issue was whether the grant of the discharge would have a precedential effect and thus deprive the other bungalow owners of a practical benefit of substantial value or advantage to them (see subsection (1A) of section 84).

24. Mr Stephen Cottle, who appeared before the UT as well as on this appeal for the appellant, argued that the respondent's concern:

> that the restriction would become unenforceable in respect of the other properties on Chine Estate was unfounded. It was, it was suggested, notable that [the respondent] had not advanced any

> argument in respect of the thin end of the wedge issue other than the expression of those concerns. The fact was that only a limited number of the units were in a similar position to the applicant (in planning terms) and therefore it would be most unlikely that the situation would ever arise where all of the units took steps to have the restriction on overnight occupancy removed. Thus, it could not be argued that the ability to avoid that potential scenario was a practical benefit of substantial value or advantage.

25. The appellant pointed out that Mr Hawkins had accepted in his evidence that the peaceful nature of the site would not be destroyed if a few bungalow owners could use their properties overnight. The appellant argued that there was not "a scintilla of evidence" to suggest that allowing the appellant's application would mean that the night time restriction would become unenforceable and that full-time occupation would therefore be possible for all the bungalows.

26. The respondent agreed that the thin end of the wedge principle was of key importance in this case. It prayed in aid the fact that the majority of the members who had voted on a resolution about the respondent's objection to the application supported it, and the fact that it was unlikely that planning permission would be given to turn the Chine Estate into permanent living accommodation.

27. Mr Stephen Jones, who appeared then as in this Court for the respondent, submitted to the UT that the discharge of the covenant on the appellant's application would be the thin edge of the wedge and lead to a change in the character of the site. Not only would the ten "livers in" follow suit and make their own applications for certificates of lawful use and for discharge of the covenant as it applied to their property, but there were others who might well make such applications. Mr Jones instanced bungalow owners who lived there throughout the year save for the restricted periods. They might well find the requirement to move out during the restricted periods inconvenient and disruptive. There was also the risk that those who bought their units purely for holiday purposes would themselves become disgruntled and, thinking that their holiday home was likely to be degraded by more and more full-time occupiers would then want to sell. The purchasers would most likely be people who wanted to occupy their bungalow as their permanent home. The respondent was insisting on the maintenance of the covenant because that was the only way of preventing the Estate from becoming a normal, fully unrestricted, housing estate.

28. The UT expressed its conclusions on these arguments as follows:

> 95…I have considerable sympathy with [Mr Hawkins'] concerns and do not accept Mr Cottle's argument that only a few (a maximum of 20) owners would follow suit. Whilst in the short term that might well be the case, I find I am altogether more

> persuaded by Mr Jones's arguments on the thin end of the wedge situation.
>
> 96. …
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> 97…On the facts and merits of this particular case I am entirely satisfied that the ability of the company to impede the applicant's proposed full time use of his property constitutes a practical benefit of substantial value or advantage for all the reasons that Mr Jones set out in his closing submissions, and which it is not necessary to repeat at length here.
>
> 98 Suffice to say that despite all of Mr Cottle's arguments I am certain that, as I said above, whilst there would be unlikely to be an instant effect upon the overall character of the site, the implications of there potentially being a large number of people wanting to follow the applicant's lead are severe. I am mindful of the fact that although the applicant garnered a reasonable level of support, there was a significant majority of those who voted (116 for and 51 against) in favour of the company lodging a formal objection. Whilst that was not a majority of the total number of Members who were entitled to vote, it was significant proportion and was certainly not indicative of there being a major desire amongst owners for change.
>
> 99 Although it is clear that the Company may have difficulty in raising the required level of funding, to be in a position to move forward with its plans for tidying up the area formerly occupied by the leisure facilities, and undertake a further scheme of development (to which Mr Hawkins said similar restrictive covenants would be applied), I am satisfied that the steps he referred to in planning and designing such a scheme seem appropriate. I accept his evidence on the potential pitfalls and problems that could well arise if the application succeeds and determine therefore that the application under ground (aa) must fail.

29. In the closing submissions to which the UT referred at paragraph 97 of its decision, the respondent stated that if the covenant were discharged as against the appellant, the ten "livers in" were likely to be seen by many others as exemplars and that there was a large category of occupants who may well be described as "disgruntled compliers". They suffered inconvenience because they had to move out during the restricted periods. They would regard a successful application by the appellant as a green light to do the same and rid themselves of the inconvenience of having to move out in the restricted periods. There would be a growing perception that living full-time in the Chine Estate was permissible and the market would change and purchaser of bungalows would not be

purchasing for holidays. The onus was on the appellant to show there was no risk of this, which he could not do.

30. It followed that the claim based on paragraph (c) of section 84(1) was also bound to fail.

31. The UT, therefore, dismissed the application. The only modification made to the covenant by the order was a modification to implement the concession.

submissions on this appeal

Appellant's submissions

32. Mr Cottle prefaces his submissions with a reference to the speech of Lord Cooke delivering the judgment of the Privy Council in *McMorris v Brown* [1999] 1 AC 142, 151. This concerned the power of the courts of Jamaica to discharge or modify a restrictive covenant and the legislation in force in Jamaica was to all intents in the same form as section 84 LPA. The Privy Council held that the court could decline to exercise a power to modify a restrictive covenant which might lead to further applications of the same kind where the covenant was imposed to ensure the integrity of a building scheme and those entitled to the benefit of the covenant wished to uphold the integrity of the condition. Lord Cooke, giving the judgment of the Privy Council, held that the harmful result was that it became "generally allowable" to do similar things:

> These decisions [decisions applying in Jamaica] have accepted that cases may arise in which it is very difficult to say that the particular thing that the applicant wishes to do will of itself cause anyone any harm; but that harm may still come to the persons entitled to the benefit of the restriction if it were to become generally allowable to do similar things.

33. Mr Cottle submits that so too here it had to be shown that it would become generally allowable to make a successful application to discharge the covenant. That was not shown in this case and the UT was wrong to say that the covenant was the "anchor" by which the character of the neighbourhood was maintained. The respondent could prevent other bungalow owners from breaching the covenant either by taking steps to enforce it or by asking the planning authority to enforce Planning Permission Condition 3 (which the UT had to consider under section 84(1B) of the LPA 1925).

34. Moreover, as Planning Permission Condition 3 had been lifted only for a few residents of the estate, the Upper Tribunal would, on Mr Cottle's submission, decline to discharge the covenant in the generality of cases. Injunctions and (in the end) enforcement notices had been obtained in this case. Planning Permission Condition 3 would be a deterrent, and a second "wall of defence".

35. So the UT was wrong to conclude that lifting the covenant would lead to, over time, the estate changing its character. Mr Hawkins was also wrong to say that there would be an "avalanche" of successful applications, and the UT was mistaken in accepting his evidence. There was simply no evidence or analysis to justify the UT's conclusion. The UT had not sufficiently analysed the matter.

36. On Mr Cottle's submission, the UT was making its evaluation as at the time of the application. It was not, submits Mr Cottle orally, looking at the possibility of a change in the situation over a period of time.

37. Mr Cottle further submits that the question whether the discharge of the covenant would be the thin edge of the wedge is an inference of fact and not a finding of primary fact and so this Court can more readily intervene than if it were a finding of primary fact (*Assicurazioni General SpA v Arab Insurance Group* [2003] 1 WLR 577, 584GH).

Respondent's submissions

38. Mr Stephen Jones, for the respondent, submits that Planning Permission Condition 3 is unlikely to be enforced and that, if the appellant succeeds, the covenant is increasingly likely to be ignored. The UT formed the view, as it was open to it to do, that there was a sufficient level of bungalow owners who would decline to comply with the covenant if it was shown on this application that a discharge would be possible. It was sufficient to show that bungalow owners would take it as a green light not to comply with the covenant. The waters released by opening the flood gates were currently being held back by the covenant. The UT had not misunderstood the point about an avalanche and the UT did not fall into error.

39. Although the respondent had taken proceedings in the County Court, the application was costly. This was a form of injury to those entitled to the benefit of the covenant.

40. Moreover, if bungalows are occupied full-time the infrastructure will need to be improved and that will be costly also. So injury could clearly be shown by discharge. The conclusions of the UT were logical. This was a proper case where there was a danger of success under the present application being the thin end of the wedge.

Discussion

41. The appellant lost in the UT principally because it held that he had not satisfied one of the requirements of subsection (1)(aa) and (1A) of section 84 LPA, namely that by impeding the user proposed by the appellant the covenant did not secure to the beneficiaries of the covenant "any practical benefit of substantial value or advantage".

He had succeeded in showing the other requirement of those provisions, namely that the covenant impeded some reasonable user of the land, and there is no cross-appeal by the respondent on this issue.

42. In this case, the UT held that the relevant requirement was not satisfied because the appellant's application was the "thin edge of the wedge" and therefore the discharge of the covenant would deprive the beneficiaries of a practical benefit of substantial value: see paragraph 97 of the UT's decision, set out at paragraph 28 above.

43. There is no doubt that the "thin edge of the wedge" argument can in an appropriate case lead to this result. In *McMorris*, the Privy Council approved as correct in principle a passage on this point from the judgment of HHJ Marder QC as President of the Lands Tribunal in *Re Snaith and Dolding's Application* (1996) 71 P&CR 104. The applicants in *Snaith* sought the modification of a covenant against subdivision of a plot to enable them to build a second house on a single plot within a building scheme imposing mutually binding covenants. The fact that the covenant was imposed as part of a building scheme was held to give the beneficiaries of the covenant a particular practical benefit from the covenant because of the adverse effect discharge would have on the integrity of the scheme as a whole. The effect was not compensatable in money terms. HHJ Marder QC held at page 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… 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…
>
> 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.

44. That passage contains two further important points. First, the UT deals with each application for discharge of a covenant on its own – the fact that it is discharged in the one case, even within the same building scheme, does not mean that it will be discharged

in the next. On the other hand, if an order for discharge is made in one case, it will alter the environment in which the application is made in the next case, though it may not do so initially to any material degree. Second, HHJ Marder also makes the point that applications fall to be determined on their facts and merits. Mr Cottle submits that the reasons given by the UT could be reviewed by this Court, but in many cases this Court would exercise caution in so doing, given that the UT (Lands Chamber) is a specialist tribunal with a wealth of experience in these matters and because the UT's reasons are in some cases not pure inferences of fact but rather the evaluation of a number of different facts, involving the exercise of judgment as well as the making of inferences.

45. Carnwath LJ, with whom Latham and Mummery LJJ agreed, approved the passage from the judgment of HHJ Marder QC (cited above) in *Shephard v Turner* [2006] 2 P & CR 611. At paragraphs 25 to 29 Carnwath LJ made some helpful observations which endorse and explain the evaluative nature of the decision to accept or (as in that case) reject the "thin edge of the wedge" argument:

> **Thin edge of the wedge**
>
> [25] The appellants said that, in considering the possible effects of future development, the tribunal applied the wrong test. As it is put in their skeleton argument:
>
> The Tribunal should have assessed the importance to the appellants of maintaining the integrity of the building scheme (in terms of density, character and tranquillity). The Tribunal should further have considered whether the grant of the application, by opening a breach in a carefully maintained and successful scheme of development, would deprive the objectors of the substantial practical benefit of the assurance of the integrity of the scheme, and whether it could materially alter the context in which future applications would be considered.
>
> In submission, Mr Guy Fetherstonhaugh QC referred to the "ratchet effect" that would result from a modification, in that any new proposal would be considered in the context where a modification had already been allowed. It was necessary, therefore, to look at the totality of the effects of the existing proposal and any future proposals, both in general and in relation to their specific effects.
>
> [26] It is not in dispute that one material issue (often described as the thin end of the wedge point) may be the extent to which a proposed development, relatively innocuous in itself, may open the way to further developments that taken together will undermine the efficacy of the protection afforded by the covenants….

> [27] In the present case, the tribunal clearly had this point in mind. The summary of the objectors' case referred to the argument that they would lose "the assurance of the integrity of a well-maintained and successful building scheme". The tribunal addressed the point in [25[iii]]. It was thought "extremely unlikely" that the proposed modification would lead to more than the possibility of one further unit in the close. The tribunal evidently took the view that the larger plots of no 3 and no 4 represented a special case within the close, because of their relative size and their position away from the main part of the close.
>
> [28] I find it hard to see in what way it is said that the tribunal applied "the wrong test". He clearly took this issue into account; how he did so was a matter, not of law, but of professional judgment on the facts. His consideration could be only in general terms, since the specific effects would depend upon the nature of the particular proposal in the future, which in turn would be subject to detailed control by the planning authority and the tribunal. Furthermore, as Mr George Newsom said, the effects of the first modification might not be all one way. For example, it might be that, in the future, in resisting further development behind no 3, the objectors' case might be strengthened by the support of the occupant of a new house at the rear of no 4.
>
> [29] To summarise, the thin end of the wedge argument is relevant, but the issues that it raises are ones of fact, not law. The tribunal considered the issue in this case. I find it impossible to say that his conclusion was irrational, so as to give rise to any possible challenge under the limited grounds available in this court.

46. Mr Cottle cited a number of other authorities but without intending any discourtesy I do not propose to cite them as they do not add any new propositions not found in the authorities already cited.

47. Mr Cottle's principal argument is that the UT misunderstood the planning position, and that applications to discharge the covenant would be "generally allowable" only in a small number of cases where the bungalow owner had obtained a Certificate of Lawful Use. Mr Cottle did not show us any authority to the effect that the UT could never exercise its powers where there was a breach of planning law or of the covenant sought to be modified.

48. However that may be, there are two answers to this point. First, the UT made it clear throughout that it was looking to the future: see, for example, the UT's use of the word "eventually" in paragraph 84 of its decision, set out in paragraph 20 above. Second, the UT clearly found that there was a practical benefit or advantage in being able to enforce the covenant against those who might otherwise not comply with Planning Permission Condition 3, or who became concerned that the character of the site was changing and sold to a person who was willing to acquire a bungalow on an estate where some people were using their bungalows as their principal homes.

49. Mr Cottle submits that there was insufficient analysis on the part of the UT to justify this decision, but there was witness evidence from which the UT could draw these inferences: see the summary of evidence given to the UT and set out above in paragraphs 13 to 17 above. The UT also had an evidential basis for holding that the planning authority was unlikely to be of any real help to the respondent in enforcing the covenant: see, for example, the evidence of Mr Hawkins summarised in paragraph 15 above.

50. If further evidence of harm were needed, there was evidence of harm in the shape of the legal costs of any application to enforce the covenant, and additionally there was evidence from several witnesses that the existing roads were not adequate for the increased use that there would be if there were significantly more permanent residents.

51. The appellant's third ground of appeal argued that the UT's determination of the appellant's case under paragraphs (aa) and (c) of subsection (1) of section 84 was unreasonable but in the light of my conclusions on paragraph (aa) this ground of appeal cannot assist the appellant.

52.For these reasons I would dismiss this appeal.

Lord Justice Sales

53. I agree