**REF/2016/0879**

**IN THE PROPERTY CHAMBER (LAND REGISTRATION)**

**FIRST-TIER TRIBUNAL**

**(TITLE NUMBER SL147821)**

**MICHAEL MOORE**

***Applicant***

**-and-**

**(1) ANTHONY LIGHTFOOT**
**(2) HELEN LIGHTFOOT**

***Respondents***

# APPLICANT'S STATEMENT OF CASE

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**Name and address of Applicant**

Michael Moore, 8 Phoenix Rise, Pipe Gate, Market Drayton TF9 4HQ

**Applicant's address for service**

Hatchers Solicitors LLP, Welsh Bridge, 1 Frankwell, Shrewsbury SY3 8JY

DX: 722160 SHREWSBURY 10

Ref. MOOR115/1.ER.ZW

**Name and address of Respondents**

Anthony Lightfoot and Helen Lightfoot, 22 East View, Pipe Gate, Market Drayton TF9 4HX

**Respondents' address for service**

Knights Professional Services Limited, The Brampton, Newcastle-under-Lyme, Staffordshire ST5 0QW

Ref. RJON/1

## Interpretation

"**the Applicant**" is Michael Moore of 8 Phoenix Rise, Pipe Gate, Market Drayton TF9 4HQ.

"**the Respondents**" are Anthony Lightfoot and Helen Lightfoot of 22 East View Pipe Gate, Market Drayton TF9 4HX

"**the Disputed Land**" is land at Pipe Gate, Market Drayton registered at HM Land Registry under Title Number SL147821.

"**Phoenix**" means Phoenix Rubber Limited, a company which was dissolved on 6 February 2014.

"**NSDC**" means North Shropshire District Council.

"**Wimpey**" means George Wimpey Midland Ltd.

"**The section 106 Agreement**" means a Planning Obligation agreement made between (1) NSDC and (2) Phoenix dated 3rd September 2007.

"**LRA 2002**" means the Land Registration Act 2002

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## Background

1. The Disputed Land lies just off the A51 London Road at Pipe Gate, Shropshire. It was formerly part of a larger site owned by Phoenix, who were rubber manufacturers.

2. The Phoenix site was bisected by a public footpath. To the east of the footpath was an area of approximately 2.7 hectares of brownfield land that was occupied by Phoenix's rubber manufacturing works. To the west of the footpath was the Disputed Land, which at all material times has been open, greenfield land extending to around 6 acres[1].

3. Phoenix's rubber production on the site ceased in about 2001. Phoenix then applied for outline planning permission to redevelop the brownfield land to the east of the footpath ("the Development Site"). This was the first of a series of planning applications relating to the Development Site that were made between 2002-2007. In all of these applications the Disputed Land was designated as proposed amenity land or recreational space.

[1] See Important Documents: A

4. In December 2005 NSDC adopted a new Local Plan, releasing the Development Site for residential development. As for the Disputed Land, the Local Plan stated that "*Development* [of the Development Site] *will be subject to ... the provision of open space/recreation land on the non-brownfield site element of the land to the west of the footpath..*"

5. On the 11 January 2006 Phoenix applied for outline planning permission (N/06/25/WO/39 OUTLINE) for the redevelopment of the Development Site to provide 25 new dwellings and ancillary estate roads. In his report recommending granting permission, the Planning Officer said this in relation to the Disputed Land: "*The land to the west of the footpath is to be allocated as open recreational land... The provision of both open space and play provision and their future maintenance will need to be considered as part of a future legal agreement under s106*".

6. On 3 September 2007 Phoenix were granted planning permission in respect of application (N/06/25/WO/39 OUTLINE)[2]. On the same day Phoenix entered into the section 106 Agreement with NSDC[3].

7. By clause 2 of the section 106 Agreement Phoenix covenanted with NSDC "*in the terms set out in Parts I, II, and III of the Schedule so as to bind each and every part of the [Disputed] Land*". Under Part II of the said Schedule, Phoenix covenanted in the following terms:

*The Open Spaces and Play Area*

*1. In this part of the Schedule "Recreation Scheme" means the details of a scheme to provide a Local Amenity Area and play area including the details listed in paragraph 3 of this Part of the Schedule and which shall be submitted by [Phoenix] to the Council for its approval prior to Implementation of the Planning Consent and undertaken in accordance with this Part II of the Schedule*

*2. [Phoenix] covenants with [NSDC]*

[2] See Important Documents: B
[3] See Important Documents: C

2.1 *to provide a Local Amenity Area on the green hatched land.* The green hatched land was a reference to the Disputed Land.

2.3 *not to use or allow or permit to be used any part of the Land designated as a Local Amenity Area or play area in any approval of any reserved matters application pursuant to the Planning Consent and laid out as such except as a Local Amenity Area or play area respectively.*

3. *A Recreation Scheme shall include the following details:*

3.2 *the design of the Local Amenity Area...*

8. Phoenix/Wimpey submitted a Recreation Scheme in respect of the Disputed Land to NSDC on 20 September 2007, as part of a reserved matters application. The plans submitted in connection with the Scheme show a laid out footpath through the Disputed Land with surrounding grassed areas, and the removal of 2 ponds. The reserved matters application for the Recreation Scheme was approved on 10 December 2007[4].

9. Phoenix sold the Development Site to Wimpey on 1 October 2007 ("the 2007 Transfer")[5]. By clause 13.5 of the 2007 Transfer (TP1) Phoenix entered into the following covenant with Wimpey:

*The Transferor covenants with the Transferee to the intent that the burden of this covenant may run with and bind the Retained Land in each and every part thereof and to the intent that the benefit of this covenant may be annexed to and run with the Property and each and every part thereof:-*

(i) ***Not to use nor permit the Retained Land to be used for any purpose other than the use permitted by the Planning Consent and the Section 106 Agreement*** (emphasis in bold added).

10. In this covenant (hereafter "The Restrictive Covenant") the "*Retained Land*" meant the Disputed Land; "*the Property*" meant the Development Site; "*the Planning Consent*" meant the consent dated 3 September 2007 together with any ancillary approvals or reserved matters; and "*the Section 106 Agreement*" has the same meaning as in this Statement of Case.

[4] See Important Documents: E
[5] See Important Documents: D

11. Upon the subsequent registration of this disposition in favour of Wimpey the Land Registry failed to note the burden of The Restrictive Covenant against the Charges Register for the Disputed Land. By their letter to the Applicant dated 29th April 2016 the Land Registry appear to accept that this was an oversight, or mistake, on their part[6].

12. Following the 2007 Transfer Phoenix laid out the Disputed Land in accordance with the approved Recreation Scheme and the general public began to use it for ordinary recreational purposes.

13. As a result of the financial crisis that began in or about 2008 Wimpey put the proposed development "on hold". Eventually, in 2010, the planning consent granted in 2007 lapsed. In 2010 Wimpey applied to renew the planning permission for a 25 dwelling scheme (10/02544/OUT) and at the same time it applied for full planning permission for a 35 dwelling scheme (10/02935/FUL).

14. In a Planning Statement (9 July 2010) made in support of the 35 dwelling scheme Wimpey stated that: "*The development proposes a large area of open space to the west of the site, adjacent to the existing footpath.... in addition a further 2.4 ha of dedicated amenity space to the opposite side of the footpath*".

15. Planning permission for application ref. 10/02935/FUL (ie. the 35 dwelling scheme) was granted on 17 December 2010.

16. At or about this time the Applicant visited Wimpey's offices to view its plans for the Pipe Gate development (which was then known as "Priory Gardens"). He was particularly attracted to the plots which overlooked the Disputed Land, which was laid out as local amenity land. He was given an explanatory leaflet which stated that it was a condition of the planning consent that the Disputed Land was to be used as a "Local Amenity Area"[7]. The Applicant decided to buy a plot overlooking this land (which subsequently became known as 8 Phoenix Rise), and he completed his purchase on 30 November 2011.

17. Wimpey completed the majority of the Phoenix Rise development in 2012. There are 38 homeowners within the development – thus (but for the Land Registry's error) 38

[6] See Important Documents: F
[7] See Important Documents: G

parties (and a management company) who are potential beneficiaries of The Restrictive Covenant.

18. Phoenix continued to maintain the Disputed Land as a local amenity area and, it would seem, agreed in principle that Woore Parish Council could make use of it. On 23rd March 2012 Woore Parish Council applied for planning permission to allow sports and recreational use of the Disputed Land, including the provision of ancillary facilities[8]. The existing use of the Disputed Land was described as "*open space open to the public*".

19. On 8 October 2013 Phoenix sold the Disputed Land to the Objectors for £6,000 (ie.approximately £1,000 per acre)[9]. The Objectors live at Pipe Gate, approximately 100m away from the Disputed Land.

20. Pursuant to the terms of the Transfer to the Objectors they covenanted with Phoenix as follows (section 11 of the TR1):

> "**The Transferee shall observe and perform [the Restrictive Covenant]** so far as such covenant is still subsisting and capable of being enforced or taking effect and will keep the Transferor indemnified against all losses costs claims expenses liabilities and demands arising from any future breach or non-observance of it." (emphasis in bold added).

21. At the time of this Transfer in 2013 the Second Objector (Mrs Helen Lightfoot) was a Woore Parish Councillor. 6 days after buying the Disputed Land she attended a parish council meeting at which the provision of recreational facilities in the parish were discussed. The Draft Minutes of this meeting, held on 14 October 2013, record the following: "*Cllr Lightfoot reported that she and her husband had bought the public open space in Pipe Gate from the ex owner of the Phoenix Rubber Company and planned to maintain it as public open space…*"[10]

22. The approved Minutes of the next parish council meeting, held on 11 November 2013, record as follows: "*Following the rewording of this item in the approval of the Minutes, to "open space", Cllr Moore questioned if Cllr Lightfoot and her husband were aware of their obligations upon purchase of the open space in Pipe Gate, Cllr Lightfoot said*

[8] See Important Documents: H
[9] See Important Documents: I
[10] See Important Documents J

*they were very aware of what they had purchased and their obligations with the land.*"[11]

23. By a Deed of Discharge dated 26 January 2015 between (1) Shropshire Council and (2) the Objectors the former agreed to discharge the latter from any continuing obligations under the section 106 Agreement[12]. The Recitals to this Deed record that it was prompted because the planning permission to which it related had expired before being implemented.

24. On 16 April 2015 the Objectors applied for planning permission to erect an equipment storage shed on the Disputed Land, with a vehicular access and the installation of solar panels[13]. The application described the existing use of the site as "*Maintained open land*". In an accompanying Design and Access Statement, it was stated that the Disputed Land "*is used by the public as open land, on a "permissive" basis*". *The current landowners have no issues with the public crossing it in order to enjoy the countryside or to walk their dogs*"[14].

25. On 8 May 2015 the Applicant wrote to the Objectors, pointing out the existence of The Restrictive Covenant and suggesting that the proposed development on the Disputed Land would be a breach of it.

26. On 9 May 2015 the Objectors and/or their contractors erected a barbed wire fence along the east boundary of the Disputed Land, parallel to the public footpath, but so as to maintain pedestrian access into the Disputed Land. The same day the Applicant wrote to the Objectors again, suggesting that the barbed wire fence was a breach of The Restrictive Covenant.

27. The Objectors' planning agent replied to the Applicant's letters on 11 May 2015, as follows: "*...this covenant relates to a planning permission that was never implemented and therefore has no effect in law...The housing developers did not pursue the Local Amenity Area as part of their subsequent planning application for a different housing*

[11] See Important Documents: K
[12] See Important Documents: L
[13] See Important Documents: M
[14] See Important Documents: N

*scheme. This land was subsequently sold to my clients, it remains private land and therefore the authorised use of the land is, as it was, prior to 2007.*"

28. On 15 July 2015 the Applicant sent a "Letter of Claim" to the Objectors, complaining about the actual and/or threatened breach of The Restrictive Covenant. Whether or not it was in response to that letter is unclear, but on 7 September 2015 the Objectors withdrew their planning application.

29. On 14 October 2015 Messrs FBC Manby Bowdler wrote on behalf of the Objectors to solicitors then appointed by the Applicant (Stephensons Solicitors LLP), confirming that pedestrian access to the Disputed Land would be maintained.

30. On 2 December 2015, in response to a formal complaint made by the Applicant, Shropshire Council advised that the Deed of Discharge referred to in paragraph 23 above was invalid and that the section 106 planning covenants remained extant[15].

31. On 7 December 2015 the Applicant was informed by the Objectors that the burden of The Restrictive Covenant was not recorded against the title to the Disputed Land and that they were therefore not bound by it.

32. On 17 December 2015 the Applicant made an application in Form AP1 to rectify the register.

**The proceedings so far**

33. On 22 February 2016 the Land Registry advised the Applicant that the failure to protect The Restrictive Covenant was in effect fatal, and his application to rectify in that regard would be rejected. The Land Registry was willing to alter the register to set out personal covenants given by the Objectors to Phoenix, but as Phoenix had been dissolved this offer was of no real benefit.

34. The Applicant took issue with the Land Registry's stance by letters dated 29 March and 28 April 2016. In view of those letters, and especially the latter, the Land Registry reversed their decision and accepted his application to note the burden of The Restrictive Covenant against the Objectors' title.

[15] See Important Documents: O

35. Upon being notified of this, the Objectors objected by letter dated 23 June 2016. In summary, their objection letter made the following points:

(1) As the Objectors are in possession, and do not consent to the rectification of their title, no rectification can take place save in the circumstances set out in either Schedule 4 paragraph 3(2)(a) or (b) to the LRA 2002.

(2) Paragraph 3(2)(a) cannot be satisfied because the mistake happened in 2007, well before the Objectors purchased the Disputed Land.

(3) As for paragraph 3(2)(b), that cannot be satisfied because:

(a) The planning consent referred to in the section 106 Agreement was never implemented and lapsed. The Phoenix Rise development took place under a different, later planning permission.

(b) The section 106 agreement has been discharged. It is thus not possible to comply with it.

36. A Case Summary was produced by the Land Registry on 17 October 2016, and on 27 October 2016 the dispute was then referred to the Property Chamber First-Tier Tribunal (Property Chamber).

**The applicable statutory provisions**

37. Section 65 of the LRA 2002 is as follows:

"*Schedule 4 (which makes provision about alteration of the register) has effect.*"

38. Schedule 4 to the LRA then provides as follows:

*Alteration pursuant to a court order*

*2 (1) The court may make an order for alteration of the register for the purpose of—*

*(a) correcting a mistake,*

*(b) bringing the register up to date, or*

*(c) giving effect to any estate, right or interest excepted from the effect of registration.*

*2 (2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.*

*3 (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.*

*3 (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—*

*(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or*

*(b) it would for any other reason be unjust for the alteration not to be made.*

*3 (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.*

39. It used to be thought that rectification could not operate retrospectively so as to adversely affect the interest of a person who has taken free of an unprotected covenant (Freer v Unwins [1976] Ch 288). That is no longer the case after Gold Harp Properties Ltd v MacLeod [2015] 1 WLR 1249, in which Underhill LJ explained the following:-

"*The primary effect of paragraph 8 [of Schedule 4 LRA 2002] is to confirm that the power of the Court or Registrar in that situation is not limited to restoring interest A to the Register but "extends" to changing what would otherwise be the priority as between it and interest B – in other words, to giving it the priority which it should have had but for the mistake.*" [16]

40. At paragraph 21 of his Judgment in Gold Harp, Underhill LJ also usefully summarised the effect of the above statutory provisions:

*"(1) Paragraph 2 confers the basic power to alter the Register in the specified circumstances. In this case we are concerned with head (a), i.e. alteration for the purpose of correcting a mistake.*

*(2) Paragraph 3 prescribes how that power is to be exercised in the particular case of rectification, as defined in paragraph 1, i.e. an alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor. In such a case the approach which the Court should take depends on whether the proprietor of the estate is in possession.*

*(3) If the proprietor is in possession, then sub-paragraph (2) provides for a presumption against rectification, at least without his consent, although the presumption is rebuttable if either head (a) or head (b) applies.*

[16] Paragraph 93

*(4) If the proprietor is not in possession (and also, strictly, if he is but one of the exceptions at (a) or (b) applies), then sub-paragraph (3) provides for a presumption in favour of rectification."*

**The issues clarified**

41. The existence of a "mistake" for the purposes of Schedule 4 paragraph 2(1) seems to be (i) clear, (ii) recognised by the Land Registry and (iii) a fact not disputed by the Objectors.

42. The Applicant takes no issue with the Objectors over their claim to be in possession of the Disputed Land. Nor does the Applicant contend that the Objectors have by fraud or lack of proper care caused or substantially contributed to the mistake. The issues for determination therefore appear to be:

    (1) Whether it would be unjust for the alteration not to be made, and if so

    (2) Whether there are exceptional circumstances which justify not rectifying the register.

**Whether it would be unjust for the alteration not to be made**

43. The evidence clearly establishes that from 2001 onwards it was the intention of Phoenix, the Objectors' predecessor-in-title, that if the Development Site were to be developed the Disputed Land would be provided as local amenity land, to be used by the public for recreational purposes.

44. From the adoption of the North Shropshire Local Plan in 2005 onwards it was equally plainly the intention of the local planning authority that if the Development Site were to be developed the Disputed Land should be maintained as local amenity land, to be used by the public for recreational purposes. In 2007 the local planning authority was able to ensure the protection of the Disputed Land because the party to whom planning permission was then granted (Phoenix) also owned the Disputed Land and was willing to enter into appropriate planning covenants. But when planning permission was granted in 2010 the applicant (Wimpey) did not own the Disputed Land and so was unable to enter into planning covenants relating thereto.

45. It was, at all material times, the understanding of the developer, the local community and in particular the local parish council (Woore Parish Council) that the Disputed

Land was protected as maintained open space which the owners for the time being were obligated to preserve and protect.

46. The Objectors, as purchasers of the Disputed Land in 2013, expressly agreed with Phoenix that they would observe and perform The Restrictive Covenant, so far as the same was still subsisting and capable of being enforced or taking effect. The Parish Council minutes referred to above indicate that the Objectors had bought the land as public open space. They paid a price for it (approximately £1,000 per acre) that was commensurate with the land being burdened by an obligation to maintain it as local amenity land. According to the Parish Council minutes they were "very aware of what they have purchased and their obligations with the land". Everything points to the fact that the Objectors knew of The Restrictive Covenant and had the intention (if not a willingness) to assume the burden of it.

47. Not to rectify the register would be unjust because it would allow the Objectors to take advantage of the Land Registry's mistake in 2007 and gain a windfall that they clearly did not bargain for. That windfall would be gained at the expense of 39 potential beneficiaries of The Restrictive Covenant, some of whom (including the Applicant) will likely have been influenced in their purchasing decisions by the continued availability of the Disputed Land as a local amenity area.

48. It is a misunderstanding of the situation for the Objectors to contend that The Restrictive Covenant cannot be enforced because the 2007 planning permission lapsed, the development proceeded under a fresh planning permission granted in 2010, and the section 106 Agreement was (arguably) discharged in 2015. The dispute is not about whether the planning covenants subsist. It is about whether the Applicant and others may rely upon The Restrictive Covenant. The Restrictive Covenant requires a party burdened by it to use the Disputed Land only for the purposes permitted by the 2007 planning consent and the Section 106 Agreement. If that consent and that agreement come to an end it obviously affects the position as between the local planning authority and the owner of the Disputed Land, but it does not affect the fact that the party burdened by the covenant can only use the land for the purposes that were identified and permitted in those documents.

49. The Section 106 Agreement expressly permitted the Disputed Land to be used as a local amenity area, and prohibited any other use. A local amenity area for these purposes is an open area of land accessible to the public for recreational purposes. Any other use is forbidden by The Restrictive Covenant. The reference to the planning consent and the section 106 Agreement was thus an effective "shorthand" for defining what was and was not permitted by The Restrictive Covenant. The efficacy of the covenant was not made conditional upon or coextensive with the implementation of the planning consent granted in 2007, nor was it dependent on the survival of the section 106 Agreement.

50. If the title were to be rectified the financial loss to the Objectors (if any) would appear to be modest and capable of being compensated for by an indemnity from the Land Registry. They bought the Disputed Land for a price that was commensurate with the limited uses contended for by the Applicant. On the other hand the loss (or potential loss) of amenity suffered by the residents of Phoenix Rise, some of whom who will have been influenced in their purchasing decisions by the availability of the Disputed Land as recreational land, is not something that can easily be calculated in financial terms.

**Exceptional circumstances**

51. If it would be unjust not to order rectification of the register, there is a presumption in favour of doing so that should only be rebutted if "exceptional circumstances" exist. The Applicant has made his application promptly, as soon as he became aware of the non-registration of The Restrictive Covenant and no circumstances have been identified by the Objectors that would amount to "exceptional circumstances". In the circumstances an order should be made directing the Chief Registrar to alter the register for Title No. SL147821 by adding the following entry into the Charges Register:

"A Conveyance of other land dated 1st October 2007 made between Phoenix Rubber Limited and George Wimpey Midland Limited contains the following covenant by the Transferor:

*13. 5 The Transferor covenants with the Transferee to the intent that the burden of this covenant may run with and bind the Retained Land in each and every part thereof and*

*to the intent that the benefit of this covenant may be annexed to and run with the Property and each and every part thereof:-*

(i) *Not to use nor permit the Retained Land to be used for any purpose other than the use permitted by the Planning Consent and the Section 106 Agreement*

Definitions:-

"Planning Consent" means the Outline Consent numbered N/06/25/WO/39 dated 3 September 2007 and any subsequent reserved matters or ancillary approval.

"Section 106 Agreement" means the Agreement made pursuant to section 106 of the Town and Country Planning Act 1990 dated the 3rd September 2007 and made between Phoenix Rubber Limited and North Shropshire District Council

NOTE 1: The "Retained Land" referred to is the land in this title.

**MARC WILKINSON**

**NO. 5 CHAMBERS, BIRMINGHAM**

Counsel for the Applicant

5th December 2016

The Applicant believes that the facts contained in this Statement are true.

Signed: Esther Richards – Hatchers

Esther Richards – Hatchers Solicitors LLP

Applicant's Solicitor

Date: 7 DECEMBER 2016

**Important documents**

A. Aerial photograph of Development Site and Disputed Land, c.2009 (pre-development)

B. Planning permission (06/00102/OUT), 3rd September 2007

C. Section 106 Agreement, 3rd September 2007

D. TP1 Transfer between (1) Phoenix (2) Wimpey dated 1st October 2007

E. Detailed soft landscaping proposals (AAJ4783/01/B) (stamped as approved by NSDC)

F. Land Registry letter to Applicant dated 29th April 2016

G. Leaflet relating to "Priory Gardens" prepared by Whiteheads Solicitors

H. Planning application dated 23rd March 2012

I. TR1 Transfer of Disputed Land between (1) Phoenix (2) the Objectors dated 8th October 2013

J. Minutes of Woore PC meeting 14th October 2013

K. Minutes of Woore PC meeting 11th November 2013

L. Deed of Discharge, 26th January 2015

M. Planning application relating to Disputed Land dated 16th April 2015

N. Design and Access Statement relating to Disputed Land, dated 29th May 2015

O. Shropshire Council letter dated 2nd December 2015

END