

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*RESTRICTIVE COVENANTS – MODIFICATION – practical benefits of substantial value or advantage – demolition of house and replacement with a building comprising five flats in breach of covenant – work substantially completed before application made*

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

**BETWEEN:**

(1) **STUART HERBERT MORRIS**  
(2) **CHRISTINA ANNE MORRIS**

**Applicants**

**and**

**BROOKMANS PARK ROADS LIMITED  
AND OTHERS**

**Objectors**

**Re: 11 Brookmans Avenue,  
Brookmans Park,  
Hatfield,  
Hertfordshire  
AL9 7QH**

**Upper Tribunal Judge Elizabeth Cooke and Mark Higgin FRICS  
14-15 April 2021 by remote video platform**

Andrew Francis for the applicants, instructed by Rossano Cifonelli  
Martin Hutchings QC for the objectors, instructed by Naylor Solicitors LLP

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The following cases are referred to in this decision:

*Alexander Devine Children's Cancer Trust v Housing Solutions Limited* [2020] UKSC 45  
*Edgware Road (2015) Limited v The Church Commissioners for England* [2020] UKUT 104  
(LC)  
*Re O'Callaghan's Application* [2020] UKUT 77 (LC)

## **Introduction**

1. This is an application for the Tribunal to modify restrictive covenants that burden the title to 11 Brookmans Avenue, Brookmans Park, Hatfield in Hertfordshire, not to enable development but to legitimise development that has already been carried out. The applicants, Mr and Mrs Morris, demolished their home early in 2018 and replaced it with a building containing five flats. They now live in one of the flats and intend to sell the other four on long leases. The building has the appearance of a large, detached house with red brick elevations and a pitched, tiled roof. The former front garden is now a block-paved forecourt containing eight car spaces.
2. All but one of the 58 objectors are residents of Brookmans Park; the other is Brookmans Park Roads Limited which owns Brookmans Avenue itself. It is agreed that some at least of the objectors have the benefit of the relevant covenants, and that whether all or some of them have the benefit makes no difference to the Tribunal's decision.
3. We made an unaccompanied visit to Brookmans Park in the morning of Monday 12 April 2021, and we say more about that later. We heard the application by remote video platform on 14 and 15 April 2021, because in the present circumstances and with so many objectors it would not have been practicable to hold a hearing face-to-face. The applicants were represented by Mr Andrew Francis of counsel, and the objectors by Mr Martin Hutchings QC; we are grateful to them both.
4. Our decision is structured as follows. First, we look at the factual background insofar as it is not in dispute, describing Brookmans Park and the development that the applicants have carried out. Second, we set out the legal background: the covenants to which the property is subject, the provisions of section 84 of the Law of Property Act 1925, and the matters that the Tribunal has to consider in deciding whether there is jurisdiction to modify the covenants. Third, we turn to the evidence of fact and the expert evidence given for the parties. We then explain our decision that there is no jurisdiction to modify the covenants.

## **The factual background**

### *Brookmans Park*

5. Brookmans Park is a village in Hertfordshire. It is built on the land of two ancient manors. The Manor of Mimmshall was held by John Brokeman who died in 1415 and became known as the Brookmans Estate. More Hall was the home of Sir John More, father of Sir Thomas More, Henry VIII's Lord Chancellor (remembered in the name of the village secondary school, Chancellors School), and its land now forms the Gobions Open Space. Local legend says that the area was once home to Patience Moffatt, daughter of the entomologist Thomas Moffatt, whose encounter with a spider inspired a nursery rhyme; she is commemorated in a spider's web on the badge of the Brookmans Park Primary School.
6. In 1926 Brookmans Park Railway Station was built. In the years that followed the present village was developed, and we are told that today it comprises about 1500 dwellings, with shops and local facilities near the station and a frequent train service to London. It includes,

and is bordered by, green spaces, including the Golf Course and the Gobions Open Space on which sheep graze.

7. Around 800 of the dwellings in the village derive their title from land sold in a number of parcels in the 1920s by Brookmans Park (Hatfield) Estate Limited. The sales brochure in 1926 claimed that “Particular care will be taken that all houses will reach a certain well defined standard and conform to type so that surrounding property is not depreciated or the amenities of this ideal residential estate in any way curtailed. Above all there will be no overcrowding.” It is not in dispute that the conveyances of the various parcels imposed covenants restricting the number of houses that could be built; some, including the application land, are also subject to a restriction preventing a house being let in “separate tenements”, which it is agreed prevents the division of a building into flats to be let separately. The estate plan depicted an area smaller than the present village, and we refer to it as the 1926 estate; thus not all the properties in today’s Brookmans Park were sold by Brookmans Park (Hatfield) Estate Limited and not all are subject to the covenants that that company imposed. Moreover, the pattern of covenants is uneven because of the way in which the 1926 estate was sold, first in large parcels and then in smaller ones, so that it is not always obvious which properties have the benefit of particular restrictive covenants.
8. Today, Brookmans Park is composed almost exclusively of large and spacious single dwelling houses on substantial plots, the exceptions being in the commercial part of the village where there are flats over shops, and in a limited area on the western side of the village near the railway line, which did not form part of the 1926 estate. Brookmans Avenue is the principal road, with very large houses, generous gardens and some huge trees. It runs from east to west across the middle of the original estate and its houses on the northern side back on to the Golf Course. Mymms Drive and Georges Wood Road also contain large detached houses but they tend not to be on the scale found in Brookmans Avenue.
9. Some of the houses appeared to us, as we walked around the village, to be original; some have been rebuilt in recent years, and the newest houses tend to be larger and more dominant in their space than many of the older ones. Most of the older houses were built in the late 1920s or 1930s, and their roofs and frontages are now ripe for renewal. It is evident that the village has evolved considerably since its beginnings in the 1920s and continues to do so. However, its original character still prevails especially in the most prestigious parts.
10. Brookmans Avenue (the road) is owned by Brookmans Park Roads Ltd which in turn is owned by Mr Ajay Rajpal who lives at 22 Brookmans Avenue. Responsibility for the management of the road (which includes the verge and footpath on the northern side) rests not with Mr Rajpal but with the Brookmans Park Roads Committee which looks after maintenance issues and holds a fund to which all residents contribute on a voluntary basis.
11. Eight properties in the village are what the parties have referred to as “flatted developments”; that is not an elegant expression, but we use it so as to avoid the term “block of flats”, because most are not blocks.
12. Two were built in breach of covenant, namely Brookmans Manor at 1-3 Georges Wood Road, comprising nine flats, and Brookwood at 2 Georges Wood Road with 12 flats. A release of the

covenant was purchased from the John White Trust which has the benefit of the relevant covenants; the price included consideration for access across the verges (see the evidence of Alan Perkins at paragraph 49 below). These two developments stand at the eastern edge of Brookmans Park where the private estate road meets the A1000 Great North Road.

13. Five more were built on land that is not subject to restrictive covenants; they are all either next-door to shops or within the western area of Brookmans Park where housing is generally smaller than in the 1926 estate:
  - a. 2 Bradmore Way, containing five flats immediately adjoining a parade of shops.
  - b. Marlborough Court, a development of recently constructed flats in Green Close adjoining the railway bridge next to Brookmans Park Station.
  - c. Brookmans Place at the end of Green Close, again adjacent to the railway line.
  - d. Bluebridge Court at 9 Bluebridge Road, a scheme with four flats on the corner of Oakland Avenue opposite the United Reformed Church.
  - e. 58 Bluebridge Road, a development of 4 flats at the southern boundary of the village.
14. Finally, 9A Brookmans Avenue is a development of three flats completed in 2019 next door to the applicant's property. Brookmans Avenue runs across the centre of the 1926 estate; but this plot was originally intended to be the entrance to the Golf Club and is therefore not subject to restrictive covenants. Of the eight flatted developments this is the only one that is neither outside the 1926 estate nor in a "gateway" location. Planning permission for this development was granted in 2017, after the approval of the application for three flats at 11 Brookmans Avenue.
15. Planning permission was granted in January 2019 for the demolition of the house at 77 Brookmans Avenue and the construction of a building containing eight flats, with underground parking for 15 cars. That property is subject to restrictive covenants; we were told that if the present application is successful the proprietors of 77 Brookmans Avenue will also apply for the covenants to be modified.
16. 101 Brookmans Avenue is a very large plot at the eastern end of the road, on the corner with Golf Club Road; it is not subject to a "one house one plot" covenant, and planning permission has been obtained for the demolition of the existing single house and the construction of six houses. We saw the building work in progress; the size of the plot is such that the six houses will each be generously spaced. They will be modest in size in comparison with their neighbours in Brookmans Avenue but not out of context with those in Georges Wood Road which lies immediately to the east.
17. It is against that background that the applicants apply for the modification of the covenants that burden 11 Brookmans Avenue.

### *The development at 11 Brookmans Avenue*

18. Mr and Mrs Morris first conceived the idea of re-developing their home in 2014. Their children had left home and their existing house was too large for their needs. Having owned and lived in the house since 1980 they wished to remain in the village amongst their friends but could not find a smaller property that met their requirements. Mr Morris in his witness statement explained what happened next; he was not able to attend the hearing due to ill-health and so was not cross-examined, but we believe that his account of the chronology of the development is not in dispute except where we indicate to the contrary. Mrs Morris confirmed at the hearing that Mr Morris owned Morris Estates Limited, a company which owns and manages an industrial property. He was also the owner of JS Services Hitchin, a company that he set up with his son, James to manage the construction process at Brookmans Avenue.
19. In October 2014 Mr and Mrs Morris applied for planning permission for the demolition of the existing house and its replacement with a new building containing three flats. The application was refused by the Local Planning Authority, Welwyn Hatfield District Council, but Mr and Mrs Morris appealed the decision and in January 2016 the planning inspector found in their favour and consent was granted.
20. At about this time Mr and Mrs Morris approached a local firm of estate agents who advised that the flats were too large for people seeking to downsize, and so they decided to apply for planning permission for five smaller flats. The application was again refused but consent was granted on appeal in July 2017. Mrs Morris told us that several prospective buyers approached them before the development took place, and four paid deposits to reserve a flat.
21. We pause at this point in the chronology to consider the planning context in a little more detail. Welwyn Hatfield District Council refused the first three-flat development in January 2015, commenting that it would be:
  - ‘1. ....a significant departure from the prevailing character, pattern and form of Brookmans Avenue which comprises large detached houses on generous plots where no other flatted developments exist within the context of the application site. The proposal therefore fails to respect and relate to the character and context of the locality and would have a material harmful effect on the character of the area contrary to save Policies GBS P2 and D2 of the Welwyn Hatfield District Plan 2005 and the NPPF.
  2. Given the identified harm to the character of the area, the proposal fails to satisfy the principles of sustainable development and fails to accord with the objectives and policies of the Local Plan contrary to saved Policy SD1 of the Welwyn Hatfield District Plan 2005 and the NPPF’.
22. In granting consent the Inspector acknowledged the Council’s concerns:

“10. I appreciate the Council’s concern that this development could set a precedent that could have a cumulative and detrimental effect on local character, although no similar sites or applications to which this might apply have been put forward. Furthermore, each

application and appeal is considered on its own merits and I find that such a generalised fear of precedent can only be given limited weight.”

23. However, the Inspector did not address issues not specifically raised by the Council:

15. Representations from neighbours and North Mymms Parish Council have raised concerns regarding the height and mass of the development and the potential adverse effect on nearby occupants with particular regard to residential amenity. Whilst I acknowledge these concerns, the design of the development has not been raised as a specific concern by the Council, and consequently, I have not considered it in any depth in my reasoning....

16. With regard to traffic generation, the highways authority has not found any potential adverse effects, and consequently I have not considered this issue in my reasoning.’

24. At this time the planning applications for the three-flat development at 9A Brookmans Avenue and the eight-flat building at number 77 had not yet been made.

25. Permission for the five-flat development was refused by the Council in March 2017; the application was called in by a Councillor, after the Case Officer had recommended approval of the application. The refusal was on the following terms:

“Insufficient parking would be provided in an area where there is a high parking demand. The proposal fails to respect and relate to the character and context of the locality and would have a material and harmful effect contrary to saved policies GBSP2 and D2 of the Welwyn District Plan 2005 and the NPPF”.

As we said above, the application was granted on appeal. We say more about planning, and about that second appeal decision, later (see paragraph 79 below) and revert now to Mr Morris’s account of the development process.

26. Demolition of the old house was delayed by the presence of long-eared and pipistrelle bats which had taken up residence in the loft. Bats mate between May and September, and so it was not until the Autumn of 2017 that the bat inspector confirmed that they had gone. Demolition was completed in March 2018. Mr and Mrs Morris approached Brookmans Park Road Committee for permission to dig up the road to enable the existing gas and electricity supplies to be disconnected. The Applicants claim permission was granted but, in the event, both utility companies were able to cap the services within the site itself.

27. Construction of the new building then proceeded with the steel work for the roof being craned into position in September 2018. In November 2018 the roof was battened and felted, providing some protection from the forthcoming winter weather. At this point in the programme of works it was necessary for the lift to be installed, which meant that the electricity supply needed to be reconnected. Mr Morris’s electrical and mechanical consultants contacted the electricity supplier who advised that the connection could not be made as permission to do so had been denied by Brookmans Park Roads Ltd. Mr Morris went back to the Brookmans

Park Road Committee and was told that they could no longer give the go-ahead and that he should seek permission from Mr Rajpal.

28. Mr Morris said he went to see Mr Rajpal three times during October and November 2018. At the second meeting Mr Rajpal referred to the covenants (Mr Morris said this was the first he had heard of them; the objectors say that that is not true); at the third Mr Rajpal showed him a copy of the covenants.
29. Mr Rajpal's witness statement exhibited a letter dated 17 October 2018 sent by Brookmans Park Roads Limited to Mr and Mrs Morris at 11 Brookmans Park Avenue. The letter is headed "Note of alleged breach of restrictive covenant"; it set out the objections of Brookmans Park Road Limited to their land being excavated and stated that the development was unlawful. Mr Morris's witness statement does not mention the letter and at the hearing Mrs Morris said she had no recollection of it.
30. Mrs Morris's witness statement exhibited a letter addressed to Mr Morris dated 1 February 2019 from Brookmans Park Estate Residents Committee, a group chaired by Graham Nicholas, one of the objectors, and which was formed after the planning appeal relating to 77 Brookmans Avenue in order to oppose new flatted developments on the estate. The letter pointed out that 11 Brookmans Avenue was subject to restrictive covenants, and also that the road is owned by Brookmans Park Roads Limited which was not willing to grant easements to facilitate the new development. It noted that the development was at an early stage, asked for it to stop, and threatened enforcement action; and it promised support for a planning application to amend the design to a single dwellinghouse.
31. Work continued on the property during 2019 and following the connection of temporary water and electricity services to the building Mr and Mrs Morris moved into the top floor flat in October of that year. Mrs Morris explained at the hearing that they needed to leave the property they had been renting, and they accepted that if they failed to secure a modification of the covenants they would have to convert the property back into a single dwelling. Pending the outcome of this application the remaining parts of the property were initially left unfinished. However, one of the first floor flats appears to have been completed to the extent that it has been occupied on a gratuitous licence by a couple who had put down a deposit in the expectation of being able to buy one of the flats when the scheme was finished.
32. The front forecourt area is also, to our eyes at least, almost complete. It is surrounded on three sides by brick walls topped with railings. It has two access points but, owing to the dispute with Brookmans Park Roads Limited, the new vehicular access point remains unfinished.
33. In November 2019 Mr and Mrs Morris received a letter of claim from the objectors' solicitor; in March 2020 they made the present application to the Tribunal.



## The legal background

### *The restrictive covenants*

34. 11 Brookmans Avenue is subject to restrictive covenants imposed by three conveyances. That is because it formed part of a relatively large area sold in 1928 by Brookmans Park (Hatfield) Estates Limited and was then the subject of sales of smaller areas in 1929 and 1931.
35. First, a conveyance dated 11 December 1928 from Brookmans Park (Hatfield) Estate Limited and others to Brookmans Buildings Limited imposed the following restrictions:

*6. There shall not be erected more than 80 dwellinghouses on the premises and no additional buildings or addition to an existing building shall at any time be erected on the premises unless set back to the building line as aforesaid and in accordance with plans and specifications to be previously approved in writing by the Architect for the time being to [Brookmans Park (Hatfield) Estate Limited] in the manner and situation to be approved by him.*

*10. No house shall be let out in separate tenements and no hospital lunatic asylum or factory of any kind or retail shop or shops shall be erected upon the premises and no fair show or public entertainment shall be held thereon or on any part thereof and no hoarding shall be erected on the premises for advertisement nor shall the premises or any part thereof be used for advertising purposes.”*

36. The application states that 56 houses were eventually built on the land conveyed in 1928 and no evidence has been adduced to contradict that; but as we noted above it is agreed that the sale of flats on long leases would be a breach of covenant.
37. Second, a conveyance dated 2 March 1929 from Brookmans Buildings Limited to John White required the purchaser:

*“Not to erect more than eighteen dwellinghouses on the premises hereby transferred.”*

38. The application stated that 18 dwellinghouses have indeed been built on the land conveyed in 1929 (which was, of course, part of that conveyed in 1928). At the hearing Mr Perkins (see paragraph 40 below) gave evidence that in fact 17 have been built, because the land conveyed in 1928 extends over 17 plots and over only part of the garden of an 18<sup>th</sup>; but of course 11 Brookmans Avenue now contains five dwellings, which takes the total above 18.
39. Third, a conveyance of the plot for 11 Brookmans Avenue dated 2 April 1931 from John White to George Scales stipulated:

*“Not more than one private dwellinghouse shall be erected on the premises”.*

40. The property has been released from that covenant by the John White Trust by a deed dated 19 February 2020; however, it is not in dispute that other parties also have the benefit of that covenant and no others have granted a release. We heard evidence from Alan Perkins, one of the trustees, who explained that the trust is the successor in title to John White (the purchaser in the 1929 conveyance and the vendor in the 1931 conveyance); the trust still owns about 180 acres of land in Brookmans Park, at present subject to an agricultural tenancy but with potential for development later.
41. The objectors are, with one exception, the freehold owners of houses in Brookmans Park. The exception is Brookmans Park Roads Limited, as we have already noted. Some of the objectors own land that was sold in the 1928 conveyance; others own land that remained in the ownership of Brookmans Park (Hatfield) Estate Ltd when the 1928 conveyance took effect (as we can see from the extent of the land seen in the 1926 sales (plan)). It would be awkward to work out precisely which objectors have the benefit of which covenants, and the applicants' representatives, in correspondence with the objectors, with the Tribunal and with third parties have maintained that the covenants are unenforceable; but it is now agreed, as Mr Francis puts it in his skeleton argument, that "the relevant covenants are enforceable by the objectors – and if not all of them, then sufficient as makes no difference to the issues which the Tribunal has to decide in this application." The Tribunal is grateful for that sensible and realistic admission.

*The statutory provisions*

42. Section 84 of the Law of Property Act 1925 reads, so far as relevant, as follows:

(1) The [Upper Tribunal shall ... 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

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified;

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 under one, but not both, of the following heads, that is to say, either—

- (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
- (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

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

- (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
- (b) is contrary to the public interest;

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

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

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition.

43. The applicants in their Statement of Case relied upon section 84(1)(a), (aa), (b) and (c), and sought both discharge and modification, in respect of different provisions within the covenants; however, Mr Francis in his skeleton argument says that the applicants seek only to modify the relevant covenants, insofar as they prevent the building and letting of five flats on the application land, and only on ground (aa) of section 84(1).

44. It is well-established that the relevant provisions of section 84 require the Tribunal, in deciding whether to modify the covenants, to consider:

- 1) Whether the proposed user of the application land is reasonable;
- 2) Whether the covenants impede that user;
- 3) Whether the impeding of the proposed use secures practical benefits to the objector;

4) Whether, if so, those benefits are of substantial value or advantage;

5) If they are not, whether money would be an adequate compensation.

45. The applicant does not rely on the public interest point in sub-section (1A). If the covenants, in preventing the flatted development at 11 Brookmans Avenue, give the objectors any practical benefits of substantial value or advantage, then the Tribunal has no jurisdiction to modify them. If they do not, then there is jurisdiction to modify them only if the applicants can show that money will be an adequate compensation for any loss the objectors will suffer from that modification. If there is jurisdiction to modify the covenants then the Tribunal must decide whether to exercise its discretion to do so.

46. In order to answer those questions we now turn to the evidence.

### **The evidence**

#### *The evidence of fact*

47. Evidence of fact for the applicants was given by Mr and Mrs Morris. Their evidence informed our account of the development at 11 Brookmans Avenue, as well as explaining their motivation, and their views about the character of Brookmans Park and the demand for smaller properties for older people who wish to downsize. Their son Mr Christopher Morris provided evidence of the distance between the objectors' houses and his parents' house; since we have walked round the estate and past the houses of most of the objectors we feel that we have a clear picture of the position of the various properties. They are all within just over a mile of 11 Brookmans Avenue, most much closer, many on Brookmans Avenue itself. The applicants' son Mr James Morris assisted his father with the development; he explained how the utilities were connected and exhibited correspondence with the utility companies. Mr Dennis Roberts who managed the building project at 11 Brookmans Avenue, gave evidence about the timetable of the development.

48. Some of that evidence of fact is relevant not to the question whether there is jurisdiction to modify the covenants but to whether the Tribunal, if it has jurisdiction, should exercise its discretion to do so, in light of the applicants' conduct and their decision to continue the building project once they knew about the covenants. There is controversy over that aspect of the evidence, and we come back to it later; but there is no dispute about the process of the building works and the state of the development now.

49. We have already mentioned the evidence of Mr Alan Perkins, which he gave as trustee of the James White Trust and which provided some interesting historical background. There is no dispute that the Trust has released the applicants from the burden of the 1931 covenant. Mr Perkins also gave us his views about the benefit of the restrictive covenants on the estate, and about whether there is a building scheme – a question which is obviously of great interest to the Trust because of the development potential of its own land but which is not relevant to this application.

50. For the objectors, evidence of fact was given by Mr Anthony Miller, Mr Paolo Giambrone, Mr Jeremy Ward, Mr Anthony Green, Mr Scot Larden, Mr Graham Nicholas, Ms Marla Coutts, Mr Simon Hill and Mr Ajay Rajpal. They all gave evidence as home-owners in Brookmans Park, and Mr Rajpal in addition gave evidence as owner of the company that owns the estate roads. They all gave evidence about Brookmans Park as an aspirational place to live, characterised by exclusive, low-density housing for single family units with appropriately spacious gardens. All explained their concerns about the effect upon the estate both of the flatted development at 11 Brookmans Avenue and of similar flatted developments which they expect to follow in the future. They are troubled by development designed to maximise profit, by the potential increase in population density on the estate, in noise, in traffic, in parking on the roads and in wear on the roads, and by the disappearance of gardens and their replacement by parking spaces. They believe the single houses will be devalued as flats proliferate. There is a concern that eight spaces for parking for five households will be inadequate so that parking will spill over on to the roads. Ms Coutts lives at 5, The Close, which is a short cul-de-sac immediately opposite 11 Brookmans Avenue; she points out that extra cars parked on Brookmans Avenue near the development will obstruct the vision of drivers turning into and out of The Close, which she regards as already dangerous.
51. A number of the witness commented on the obstruction of the footpath and verges by construction traffic and works while the development was carried out.
52. All the witnesses expressed concern about future flatted developments. There is planning permission for eight flats at 77 Brookmans Avenue and it is believed that the owner is waiting for the outcome of the present application before seeking to modify the covenants on that property. Mr Ward lives at 43 Brookmans Avenue and noted that the properties on either side of his are in need of refurbishment. 41 is for sale; the owner of 45 is very elderly and at some stage his house will be sold. Developers are likely to want to maximise returns by building flats. Mr Ward said he anticipated that his house will be surrounded by at least ten flats, his garden overlooked, and his property devalued.
53. In his capacity as a home-owner Mr Rajpal echoed the concerns of the other witnesses of fact. He also gave evidence as director and owner of Brookmans Park Roads Limited.
54. Mr Rajpal explained that a number of the roads in Brookmans Park, including Brookmans Avenue, are private and unadopted. After he and his wife bought their home in 2010 on Brookmans Avenue he became concerned about the increase in on-street parking outside his home caused by the introduction of parking charges at the station; so he formed Brookmans Park Roads Limited and it purchased the private roads in the estate. He did not seek funds for the purchase from any other residents. He then negotiated with Welwyn Hatfield Borough Council which agreed to introduce parking restrictions on Brookmans Avenue if funding could be provided; and Mr Rajpal conducted a survey of residents to ask for funds and raised £10,000 which enabled the introduction of restrictions in 2015. All residents have a free parking permit, and parking is not permitted on Brookmans Avenue without a permit between 11.00 and 12.00 on weekdays.
55. Mr Rajpal expressed concern about parking on the road once there are five households at 11 Brookmans Avenue; he regards the provision on the forecourt as inadequate (since it allows

fewer than two spaces for each flat) and feels that the work and money put into getting the parking restrictions in place will have been wasted. He is also concerned that people living in the flats at number 11 and subsequently at number 77 will be less likely to contribute to the road fund (to which, as we mentioned, residents contribute voluntarily) so that the maintenance of the roads will become unmanageable. He also thinks that the proliferation of flats and the resulting increased traffic will make it more likely that the local highways authority will seek to adopt the estate roads.

56. Mr Rajpal pointed out that the Company has not given permission to carry out works on the Company's land to upgrade the utilities for the property. On Saturday 14 December 2019 the road and verge outside number 11 was excavated to connect the gas supply for the flats. Mr Rajpal happened to drive past and noticed; he pointed out that there was no consent for the excavation and asked for it to stop; the person supervising agreed to stop, Mr Rajpal left, and then he says the work continued under Mr Morris' supervision. Moreover, the verge was impassable to pedestrians on many occasions during the demolition and construction work.
57. Although the work is finished, it is the objectors' case that there is an ongoing trespass on the verges. Brookmans Park Roads Limited has not given permission for cars to cross the verges to get in and out of the forecourt to the property at the new entrance and exit (see paragraph 32 above); it is accepted that the property benefits from an easement to cross the verges, but only at the old entrance and only to the extent necessary for a single household.
58. By agreement, not all the witnesses gave evidence at the hearing; Mr Nicholas, Mr Hill, Ms Coutts and Mr Rajpal were cross-examined. They agreed that they were particularly concerned about the prospect of development at 77 Brookmans Avenue, but did not withdraw anything they had said about number 11.

#### *The expert evidence*

59. Expert evidence was given for the applicants by Ruaraidh Adams-Cairns BSc(Est Man) FRICS, a Director of Savills UK Limited, head of Savills Litigation Support Department and past head of both Residential Valuations and the Savills Valuation Group.
60. Mr Adams-Cairns' instructions were to answer the questions that the Tribunal has to ask (see paragraph 44 above). In his report he said that he and the objectors' expert Mr Maunder-Taylor had agreed "that there is no loss of amenity to any of the Objectors from the Property" and that that rendered much of his instructions obsolete. He went on to say that Mr Maunder-Taylor had explained that he would be addressing the wider precedent which would be set by a modification of the covenant and that he accordingly had addressed only that issue.
61. That said, Mr Adams-Cairns made a number of comments about amenity. He observed that Local Planning Authorities have regard to the amenity of both local residents and the immediate area, and that considerations, he told us, include traffic, parking, noise and disturbance. He noted the objectors concerns that congestion in Brookmans Avenue will be made worse by roadside parking but said that parking is controlled by the Local Authority and that there is adequate provision at the property. He concluded that the modification of the

covenants would not have any material impact on the objectors' properties and would cause no diminution in their capital value or amenity.

62. In cross-examination Mr Adam-Cairns accepted that Brookmans Park is characterised by large houses, exclusivity, prestigious development, aspirational, and low density. He was asked if the flatted development at 11 Brookmans Avenue would clash with those attributes; he did not accept that it would "clash" but agreed that it was different. As to parking, he said that he did not disagree with Mr Maunder-Taylor's view that "parking around the Property will in my view result in increased highway issues related to vehicles entering and leaving The Close." He conceded that there will be occasions when there will not be enough spaces on site and that visitors will be forced to park on the Avenue. He also agreed that it was right for the objectors to be worried about the unknown parking situation, describing it as "a reasonable fear of the unknown but not necessarily a reality".
63. Turning to the fear that the development would set a precedent, Mr Adams-Cairns in his report expressed the view that the "the small development at 11 Brookmans Avenue is not in any way directly comparable to the development at 77 Brookmans Avenue." He also commented that number 77 "poses a greater danger being larger ... and including more car parking." In cross-examination he agreed that a developer interested in number 77 would take comfort if the covenants on number 11 were modified, and he agreed that developers are "circling" round Brookmans Park, but he did not agree that there would be a "snowball effect" in flatted developments.
64. Nor did he agree with Mr Maunder-Taylor (see below) that the modification of the covenants at number 11 would lead to an immediate drop in value of the houses on either side of 77 Brookmans Avenue, nor that there would eventually be a drop in the value of the houses generally once more flatted developments appear. In cross-examination he drew attention to South Kensington, originally built as a development of single-family residences of which many are now divided into flats; the presence of flats nearby has not devalued properties that remain as single homes nor, said Mr Adams-Cairns, is the presence of on-street parking a concern for purchasers in that area.
65. For the objectors, evidence was given by Mr Bruce Maunder-Taylor FRICS, MAE, partner since 1970 in the firm of Maunder Taylor, Chartered Surveyors, Estate Agents and Property Managers. Although Mr Maunder-Taylor lives in Brookmans Park and had been a resident of the village for a period of 20 years at another address, we are satisfied that there is no conflict of interest in him providing expert evidence, since on both occasions he has lived outside the boundary of the 1926 estate.
66. In his report Mr Maunder-Taylor summarised the history of Brookmans Park and described the estate as it stands today. He pointed out that there are many examples of the original 1920s and 1930s houses having been demolished and modern high-quality detached residences built in their place, and noted the flatted developments that we have described above. He described the development at 11 Brookmans Avenue and suggested that planning conditions requiring the construction of a bin area and a bike store had not yet been complied with. This point was challenged in cross-examination and the position is not clear to us. He noted the planning permission for number 77 and the construction in progress at number 101.

67. At paragraph 4.8 of his report Mr Maunder-Taylor confirmed his agreement with Mr Adams-Cairns "... that there is no loss of amenity with regard to windows, overlooking, privacy and matters of a neighbourly nature so far as the immediately-adjoining houses are concerned. My agreement excludes any question of loss of amenity so far as the road itself is concerned." It appears that Mr Adams-Cairns was not aware of that exclusion, but as he has given his views about the effect of the development on the roads the misunderstanding is immaterial.
68. The report then discussed the precedent effect of the development, expressing the view that if, as Mr Maunder-Taylor would expect, this development sets a trend of houses being replaced by flats, the character of Brookmans Avenue would substantially change and that the covenants have a significant value in preventing or slowing any trend towards flatted developments. Moreover, the covenants as they stand give confidence to purchasers that it is worth buying a house on the estate and redeveloping it as a high quality single residence; once flats proliferate, the standard of the single houses will drop as that confidence falls away.
69. Accordingly, Mr Maunder-Taylor expressed the view that if the present application is successful the houses on either side of 77 Brookmans Avenue would suffer an immediate loss in value of 5% to 10%. Other home-owners would then be encouraged to maximise profits by selling their homes for development as multiple dwellings. Accordingly, the modification of the covenants on 11 Brookmans Avenue will have "an important market effect on the future direction of redevelopments in Brookmans Avenue" as well as a "ripple effect" on the remainder of the village.
70. Mr Maunder-Taylor went on in his report to express concern about the increase in vehicle movement and in parking on Brookmans Avenue as a result of the development at number 11, which he said would be at a level with which this road is not designed to cope and which would significantly affect the amenity of objectors living in Brookmans Avenue. There will also be highway safety issues related to vehicles entering and leaving The Close, just across the road and there are likely to be difficulties with the maintenance charges for the road – again, as a result of this one development alone. Once more flats are developed there will be further pressure on the roads.
71. Mr Maunder-Taylor expressed the view that once more flatted developments are built the value of the recently built or improved houses in Brookmans Avenue would suffer a 10% reduction in value. He was pressed to justify his figure of 10% for loss in value, and explained that it represented his professional view in an area where no direct comparables are available. In other roads he would expect the effect to be less marked but there would be what he again called a ripple effect as purchasers take into account the presence of flats. "Overall the Estate will become less desirable, as the high-end exclusive qualities that the Estate presently possesses diminish over time".
72. In relation to the wider, long term impact Mr Maunder-Taylor raised the example of Cockfosters Road, Hadley Wood where over time a number of large houses had been redeveloped into flatted schemes. He said that this particular example showed how an area could be negatively impacted; but he was not able to offer a view of the effect of that on value.



### **Does the Tribunal have jurisdiction to modify the covenants?**

73. We set out at paragraph 44 above the questions that the Tribunal must address in order to ascertain whether it has jurisdiction to modify the covenants. Only if it has jurisdiction can it then go on to consider whether or not to exercise its discretion to do so.

#### *Whether the proposed user of the application land is reasonable*

74. This point is often conceded by objectors, but it is not in this case.

75. The proposed use of the land is for a single building containing five flats suitable for retired people (with lift access to the upper floors). It is very difficult not to regard good quality housing, which has planning permission, and for which there is demand, as a reasonable use of land.

76. We accept that, as Mr Hutchings QC argues for the objectors, the grant of planning permission is not conclusive. But the Tribunal consistently regards it as important.

77. Section 84(1B) requires the Tribunal, in determining whether a case is one that falls within subsection (1A), to take into account “the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas”. Mr Hutchings QC suggested that in the absence of evidence about the local plan and about that pattern it cannot be shown that the development at 11 Brookmans Avenue is a reasonable use of the land. We disagree; we take the view that we have sufficient evidence about those matters.

78. Mr Maunder-Taylor has helpfully provided with his report a schedule of planning applications on Brookmans Avenue from 2007 onwards, the vast majority of which relate to single dwellings and extensions. We are aware of the permissions for flats at the properties we have already described. There is a clear pattern of single dwellings, and flats are very much the exception. That does not make them an unreasonable use of land.

79. The development plan in this case is the Welwyn Hatfield District Plan of 2005, of which we do not have a copy. We do have the Case Officer’s report in respect of the planning application for the five-flat development, which refers to the wider planning context including the National Planning Policy Framework 2012 and also to the development plan and its policies relating to the acceptability in principle of residential development, the quality of the design and the impact on the character and appearance of the area, the impact on residential amenity of future occupiers and neighbouring properties and the impact on highway safety, parking provision and cycle storage. The Case Officer concluded that the proposal was in accordance with the relevant policies and compatible with the earlier appeal decision, and while the Committee decided against the proposal it was allowed on appeal. The Inspector identified two primary issues; whether there would be adequate car parking on site and the effect the development as a whole would have on the character and appearance of the area. In relation to parking he noted that the Council’s standards were almost met and that the County Highways Authority had raised no objections. As to the impact on the area he found that the scale, height and position of the proposal reflected the character of the quite closely arranged detached houses along the street. He also found that there was no policy to restrict flat developments to gateway positions.

80. Taking into account the pattern of planning decisions in Brookmans Avenue, and the Inspector's conclusions about the five-flat development, it appears to us that the use of the property as five flats cannot be said to be unreasonable by reason of planning considerations.
81. For the objectors. Mr Hutchings QC further argues that the use of the property for flats will be in breach of a further covenant in the 1928 conveyance of which no modification is sought, namely restriction 8 which states that "the premises shall not be used or let for any other purpose than that of a private dwellinghouse." He refers to *Re O'Callaghan's Application* [2020] UKUT 0077 (LC), where the Tribunal (the Deputy President) refused to modify a covenant to enable a garage to be extended because it was "a breach of covenant in the making". The extension to the garage involved the addition of a further storey which was going to be used either as a gym or as a residential flat; any use other than as a garage or for the storage of garden equipment was going to be in breach of covenant and no application had been made to modify the covenant to permit a different use.
82. In response Mr Francis argued that the modification of the covenants for which the applicants have applied would by implication modify the relevant part of restriction 8. We would not go that far; but we suspect that the failure to apply for a modification of restriction 8 was an oversight on the part of the applicants' representatives and, had we been minded to modify the restrictions that the application does encompass, we would have allowed a late amendment of the application to encompass the relevant part of restriction 8. It has the same effect as the ones included in the application, and if the latter could be modified then so could the former. In *O'Callaghan*, by contrast, the future breach of covenant was going to be a different one (a change of use of the garage, rather than its extension), its nature as yet unknown, and the discharge of the restriction in order to permit the change of use would not follow from the arguments made in the application for a modification to permit the extension even if those arguments had been successful.
83. Finally, Mr Hutchings QC points to the fact that the planning permission for the flats at number 11 involved the construction of a new crossover, for which permission has not been given by Brookmans Park Roads Limited and will not be given. Furthermore, it is only by means of trespass on and under the verges that the utilities have been connected. We see the force in this argument. However, all construction and excavation on the verges has ceased. The only remaining issue is whether the flat dwellers will have an easement to drive onto the road over the verges. Whether there will be an infringement, on the basis of excessive use, of the rights already appurtenant to number 11 by virtue of long use is not yet known and we are not persuaded to regard the use of the property for flats as unreasonable on that basis.
84. Accordingly, we conclude that the use of the property that is impeded by the covenants is a reasonable one.

*Whether the covenants impede that user*

85. It is not in dispute that the flatted development at 11 Brookmans Avenue is in breach of all the restrictive covenants set out at paragraphs 35 to 39 above.

*Whether the impeding of the proposed use secures practical benefits to the objector and, if so, whether those benefits are of substantial value or advantage?*

86. We take the next two questions together, and they take us to the heart of what the Tribunal has to decide.
87. Mr Hutchings QC lists seven main practical benefits that the covenants secure. Crucial to this case is the distinction between two different kinds of objection to the application. First, there are the objections to the development of number 11 by itself, and second there are the objections based on concern about future development on the basis that if these flats are permitted, more will follow. We begin with the former group.
88. First, it is said that the development at number 11, by itself, will lead to a change to the street scene in view of what is said to be its unappealing frontage as well as the conversion of the front garden to a parking area.
89. As we have noted, a number of the houses on Brookmans Avenue have already been rebuilt as single houses. It is true that the design ethos of the original estate has to some extent been lost and that the piecemeal redevelopment of Brookmans Avenue has caused some erosion of the architectural signature of the 1920s. There are now some disparate themes in play. Nevertheless, the wide verges, the set-back nature of the houses and the arcadian setting are still very much evident. Our conclusion is that with the exception of the view from The Close – which is dominated by the frontage of number 11 - the redeveloped number 11 does not either harm or enhance Brookmans Avenue.
90. But in any event, none of the covenants protects the appearance of what is built. Nor do they prevent the conversion of front gardens to parking areas, and a number of houses in Brookmans Avenue have concreted the front garden so as to allow parking for a number of vehicles.
91. Second, it is said that the flatted development at number 11 will lead to more traffic on the estate roads, more on-street parking, and more hazards. Mr Adams-Cairns conceded as much. We think it obvious that five households are likely to own more vehicles between them than one. Looking at it in the most rough-and-ready fashion, if most households have two cars, then the flats will bring an extra eight cars on to the estate. If each flat has two cars then only two of those cars will have to park on the road. Delivery vehicles may also do so, but many will drive into the front parking area to unload. The entrance to The Close is directly opposite number 11 and we agree that there may be some congestion around that entrance at times, which may limit visibility. The covenants, in limiting the number of households on the plot, do secure a practical benefit in limiting the traffic, parking and congestion. But that benefit, when number 11 is looked at in isolation, cannot be said to be of substantial value or advantage. The effect on traffic, parking and congestion of the development at number 11 alone will be minimal.
92. The same can be said of the resulting wear and tear on the roads. Eight additional cars, again using a rough and ready reckoning, is not going to have a significant effect. We do not accept Mr Rajpal's concern that the people living in the flats at number 11 are less likely to

contribute to the upkeep of the roads than people living in the houses on the estate; nor do we think it a likely consequence of this development alone that the local authority may decide to adopt the road.

93. Next, it is said that the development at number 11 will lead to overcrowding and overdevelopment on the estate. From this one development, that will not happen.
94. What the covenants protect are density of occupation, directly, and indirectly the intensity of use of the roads for parking and travelling. The relaxation of the covenants on one property alone will certainly have a minor effect upon those two factors, in bringing a few more people to live on the estate and a few more cars to the roads. When 11 Brookmans Avenue is looked at in isolation, the covenants in preventing the flatted development secure a small practical benefit to the objectors but it is not of substantial value or advantage.
95. However, when we turn to the objectors' other arguments the picture changes.
96. Mr Hutchings QC argues that the development at number 11 represents a break in the scheme or web of covenants that have successfully preserved the character of the estate for many years. He says it is for the applicants to show that the proposed relaxation of the covenants, and the 1928 covenant in particular (we take it he refers to the prohibition on letting in separate tenements), will not constitute a real risk as a precedent to further intrusion into the scheme. As things stand, the scheme is intact. Several of the objectors gave evidence that they bought their houses with knowledge of the covenants, and redeveloped their houses in conformity with the covenants.
97. In reality, it is argued for the objectors, the development at number 11 will set a precedent for the proliferation of flats on the estate; as it is commonly put, it will be the thin end of the wedge. The owner of 77 Brookmans Avenue stands poised to make an application if this one is successful. Planning permission for 9A and for 77 was granted in the light of the permission already given for five flats at number 11. It is thought that the owner of number 13 is reviewing their options. Mr Nicholas referred in his witness statement to a neighbour who did not join the objectors because she is minded to sell her own property for development and then move away "so as not to experience the impact of the flats". There is clearly a demand for flats on the estate, as is clear from the applicants' own evidence and the ease with which they secured potential purchasers; they may well be right that there are numerous older residents looking to down-size without moving away. Mr Maunder-Taylor's opinion was that the development of number 11 "sets a trend of houses being replaced by blocks of flats." The continuation of the trend would substantially change the character of the estate and the covenants have a significant value in preventing that.
98. Mr Hutchings QC points out that the thin end of the wedge argument is not limited to cases where there is a building scheme, and we agree; it is one to be taken seriously in any case where there are covenants affecting all or most of an area which have the effect of controlling and preserving its character, as is the case here despite anomalies such as 9A Brookmans Avenue where there are no covenants, and 101 where apparently no covenants are being breached by the construction of six houses.

99. It is further argued that if the present application succeeds, with the Tribunal having been presented with a *fait accompli*, future developers will not wait to secure a modification of the covenants before developing. They will forge ahead, and apply for modification only if an injunction is threatened, knowing the strong likelihood that an application would succeed.
100. Mr Francis in response argues that the precedent effect is illusory. The breaking of one thread does not damage the web. The objectors retain the right to object to future developments. Future applications will be considered on their own merits and will not be influenced by the modification in the present case. Developers are not going to take the risk of building without securing a modification of the covenants; they will not want their operations delayed by a late application.
101. Whether developers are more likely, if this application succeeds, to develop first and seek modification later is a matter for speculation. There are obvious risks involved in doing so and we think it is impossible to predict whether that will happen. The important issue is not so much the behaviour of developers but the likely response to future applications by this Tribunal. Mr Francis' strongest point is this: that even if it can be shown that there is a demand for flats in the village, and even if the granting of the present application will give comfort to developers and will result in more applications for the modification or discharge of covenants, the issue is not whether there will be more applications but whether the granting of the present application will have the effect that more applications will be granted in future. As the Tribunal (Mr Peter McCrea FRICS) put it in *Edgware Road (2015) Limited v The Church Commissioners for England* [2020] UKUT 0104 (LC) at paragraph 137:
- “...the thin end of the wedge question is not whether others might seek to relax covenants elsewhere on the Estate, but whether the relaxation of these covenants to permit this development will make it more likely that other applications will succeed...”
102. We take the view that it will. True, the Tribunal is not bound by its previous decisions and it looks at each case on its own merits. But the merits of each case depend upon the context for the application. Each modification of the covenants to allow a flatted development to proceed has an effect, however small, upon the estate as a whole and the levels of population, traffic, congestion and noise overall. Each modification changes those levels and therefore changes the context in which the next application is considered and ensures that the effect of the next flatted development is, likewise, only marginal.
103. We can see this in Brookmans Park. There are flats there already at 9A. The flats at number 11 therefore do not stand in isolation and, by themselves, they make little difference to the road, let alone to the estate. But if the covenants on number 11 are modified so that the flats can remain, then the next application for modification – and we make no assumption that it will be number 77 – will be made in the context of a road that already has two flatted developments. The construction of, say, four flats in place of one of the houses will not double the number of flats on the road; it will increase their number only by 50%. And so on. Each time it looks a little easier and a little more

marginal. But at some point the cumulation of the marginal effects of each development will make a substantial change in the road and in the estate. There will come a time when there are too many cars; when the number of residents to be canvassed for a contribution to road maintenance is more than the residents' association can manage; when roadside parking becomes a serious problem; when many properties are overlooked by first floor flats. There will come a time when this is no longer a spacious road dominated by large and exclusive single houses. It will, as Mr Maunder-Taylor predicts, cease to be a road on which developers want to build substantial luxury single dwellings.

104. In conclusion, this is not a pure thin end of the wedge case where the proposed development does no harm at all and the only issue is whether modification pursuant to the present application will lead to more successful applications in the future. The flatted development at number 11 will cause a small increase in population, traffic, wear on the roads and so on. But by far the most significant effect of the relaxation of the covenants on number 11 will be the perceived green light to other developers, the likely proliferation of future applications, and the manifest likelihood that more applications will succeed. And the effect of the driving in of the wedge, whether it takes two years or twenty, will be the loss of the current character of the estate. That character is a practical benefit of substantial advantage that is secured by the covenants on the individual houses, including number 11.
105. That being the case there is no jurisdiction to modify the covenants.
106. For the sake of completeness, we should consider the objectors' further argument that the practical benefits secured by the covenants are of substantial value. Mr Maunder-Taylor gave evidence of his opinion both that the modification of the covenants on number 11 would immediately devalue 75 and 79 Brookmans Avenue by 5% to 10% because of the increased prospect of modification of the covenants on 77, and also that the objectors' properties in general would suffer a 10% loss in value if further flatted developments were to proliferate.
107. In cross examination Mr Maunder-Taylor was referred to Brookmans Manor and Brookwood at the eastern end of Georges Wood Road where new flatted development had occurred immediately adjacent to established detached houses. He was unable to say whether the houses had suffered any loss of value. However, he had no such reticence in relation to number 77 where he judged the effect on its neighbours to be immediate. Mr Adams-Cairns' view, expressed in cross-examination when Mr Maunder-Taylor's view was put to him, was that the value of numbers 75 and 79 would be enhanced because they would themselves have more development potential.
108. We disagree with Mr Adams-Cairns on this point. We take the view that modification of the covenants at number 11 to allow the flats to remain will have an adverse effect on numbers 75 and 79. The prospects of development at number 77 will be improved and a loss of amenity for those living next door will take a step closer to becoming reality. However, we depart from Mr Maunder-Taylor's conclusion that the effect on value will be 5 to 10%. In our view the effect would be muted and likely to fall short of the lower end of Mr Maunder-Taylor's range.

109. We doubt that the relaxation of the covenant to allow the flatted development at number 11 will, on its own, have any effect on the wider estate. The same could be said for number 77 were its redevelopment to proceed. However, we take the view that should the replacement of houses with flatted schemes gain momentum there will come a time when the character of Brookmans Avenue and the other roads in the original estate would be altered to an extent that values move in a way hitherto not experienced. We find it difficult to conceive that there will be a decline in real terms; that is an unrealistic prediction for good quality housing in North London. But the rate of growth in value of the modern, high-quality homes in the village will diminish. Equally, at that stage, the value of older, unrefurbished houses could be enhanced by their development potential. Mr Adams-Cairns relied upon the example of South Kensington to support his view that there would be no impact. We do not find this comparison helpful; Brookmans Park is a village, not a part of central London. The market dynamics are fundamentally different and no inference about what happens in South Kensington can be of assistance when reaching a conclusion in this case. Mr Maunder-Taylor's approach is simplistic and unsupported by evidence but there is a kernel of authenticity in his conclusion that values will in time be affected. Putting a precise percentage on it remains however, a matter of speculation.
110. Accordingly, we do not find that the covenants that prevent the redevelopment of 11 Brookmans Avenue secure to the objectors a practical benefit of substantial value; but we have already found that they secure a practical benefit of substantial advantage.

*If they are not of substantial value or advantage, whether money would be an adequate compensation*

111. In the light of what we have said above this question does not arise, but it will be obvious from what we have said above that the nature of the benefits is such that money would not be an adequate compensation. That scarcely needs spelling out; the advantages secured are both of a long-term nature, and impossible to quantify. To attempt such an exercise would involve the identification of a 'tipping point' in the timeline of development at which the effect of the various changes begin to impact on value, to put a figure on that impact, and then translate it into today's values. We cannot do that. We are satisfied that the scenario depicted by Mr Maunder-Taylor is a reasonably foreseeable conclusion, but it is not possible to arrive at a figure that would truly compensate for the gradual erosion of the village-like quality of Brookmans Park, the gradual spread of flatted developments, the steady increase in traffic and parking over the years and the increase in population. So even if we had decided that the practical benefits are not of substantial value or advantage, we would take the view that there is no jurisdiction to modify the covenants.

### **The Tribunal's discretion to modify the covenants**

112. In the light of our conclusion above the Tribunal has no jurisdiction to modify the covenants and it is not necessary for us to decide whether we should exercise our discretion to do so. It would be unrealistic to comment on that aspect of the evidence. The focal point of the objectors' argument that we should not, as a matter of discretion, modify the covenants was that Mr and Mrs Morris knew about the covenants all along and embarked on a what has been termed a "cynical development"; they demolished the old house and constructed the

new building in full knowledge of the breaches of covenant and in the hope that if they were challenged they would be able to present the Tribunal with a *fait accompli* so that it would be difficult to refuse the application. Mr Hutchings QC referred, of course, to *Alexander Devine Children's Cancer Trust v Housing Solutions Limited* [2020] UKSC 45; Mr Francis pointed out various respects in which the present case differs from the facts the Supreme Court had considered.

113. Mr and Mrs Morris' evidence was that they knew nothing about the covenants until Mr Rajpal pointed them out at the end of 2018. We accept Mrs Morris' evidence that she knew nothing about them. We are unable to reach any conclusion about Mr Morris' evidence on this point because he was not able to attend for cross-examination. In the absence of that crucial ingredient we are not able to reach a conclusion as to whether when the development began Mr Morris knew about the covenants.
114. The objectors point to other aspects of the applicants' behaviour, including their deliberate trespass on the verges in order to install the utilities, their blocking of the footpath for many months, their delay in applying to the Tribunal and their continuing with the development after the covenants were drawn to their attention at the end of 2018. As to that last point, Mrs Morris's explanation was that the building needed at that point to have its roof put on and that she and Mr Morris needed to move back in after being in rented accommodation for so long. She said that they accepted that if they were not able to get the covenants modified, they would convert the building into a single residence. We accept that explanation of the completion of the building after the end of 2018. As to the other points, the applicants' behaviour was not helpful to their neighbours, but, again, in the absence of the ability to reach a conclusion on Mr Morris' evidence we have insufficient material on which to decide whether we would have exercised our discretion in the applicants' favour had that issue arisen. But it does not.

## **Conclusion**

115. In conclusion the application fails and the covenants remain unchanged.

Judge Elizabeth Cooke

Mark Higgin FRICS

24 May 2021