

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 214 (LC)
UTLC Case Number: LC-2020-197
(Formerly LP-26-2020)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – covenant restricting obstruction above boundary wall height – planning consent for conversion to seven flats including three storey rear extension and single storey outbuilding for cycle and refuse storage – whether covenant secures practical benefits of substantial value or advantage – s.84(1)(aa), Law of Property Act 1925 – application granted – compensation awarded to 11 objectors

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

BETWEEN:

EMIL MOSKOFIAN

Applicant

-and-

MS ANITA VANDA FOSTER
AND 16 OTHERS

Objectors

Re: 59 Eaton Rise,
Ealing,
W5 2HE

Diane Martin MRICS FAAV
27-28 July 2021
Royal Courts of Justice
and by remote video platform

Mr Andrew Francis for the applicant, instructed by Croft Solicitors
Ms Anita Vanda Foster and Ms Saira Malik for themselves and the other objectors

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The following cases are referred to in this decision:

Re Bass Limited's Application (1973) 26 P&CR 156

Re Zopat Development's Application (1966) 18 P&CR 156

Shephard v Turner [2006] 2 P&CR 28, [\[2006\] EWCA Civ 8](#)

Introduction

1. Mr Emil Moskofian (“the applicant”) is the freehold owner of 59 Eaton Rise, Ealing, London W5 2HE (“the property”), a detached Victorian house over four floors including a lower ground floor flat. It occupies a corner position next to the entrance to Elmcroft Close, which is an L-shaped cul-de-sac of three storey terraced houses built in the mid-1960s on the site of the former 63 Eaton Rise.
2. On 4 February 2020 the applicant received planning consent (“the planning consent”) from Ealing London Borough Council (“the council”) to convert the property from two dwellings into seven self-contained flats. The conversion works would include three storey and single storey extensions to the rear, a three storey infill extension to 57 Eaton Rise, and construction of a single storey outbuilding at the foot of the garden for storage of bicycles and refuse bins (“the store”). Three of the new flats would only be accessible from the corner of Elmcroft Close, through a re-located pedestrian gate beside the store. Under a s.106 agreement with the council, no additional parking permits would be issued for the additional dwellings.
3. The 20 freehold owners of property in Elmcroft Close, and the freehold owner of garden land occupied with 39 Mount Park Road, benefit from a covenant (“the covenant”) in a deed of grant dated 12 May 1965. The deed was entered into by a previous owner of the property, Mrs Joan Knowles, with Henry Davies Developments Limited (“the company”) which developed 63 Eaton Rise. The company retains freehold title of part of the drive in Elmcroft Close thus also benefits from the covenant.
4. No copy of the deed of grant has been retained by the Land Registry but the entry in the charges register for the property states (so far as is relevant):

“... Mrs Knowles hereby covenants with the Company and its successors in title and all others the owners or occupiers of 63 Eaton Rise or any part thereof for the benefit of 63 Eaton Rise and every part thereof that she will not by herself or her successors in title or persons holding under her permit any vegetation trees or other obstruction (whether animate or inanimate) to grow project or be above the height of the wall ...”

and

“NOTE: The wall referred to is the boundary wall between 59 Eaton Rise and 63 Eaton Rise.”

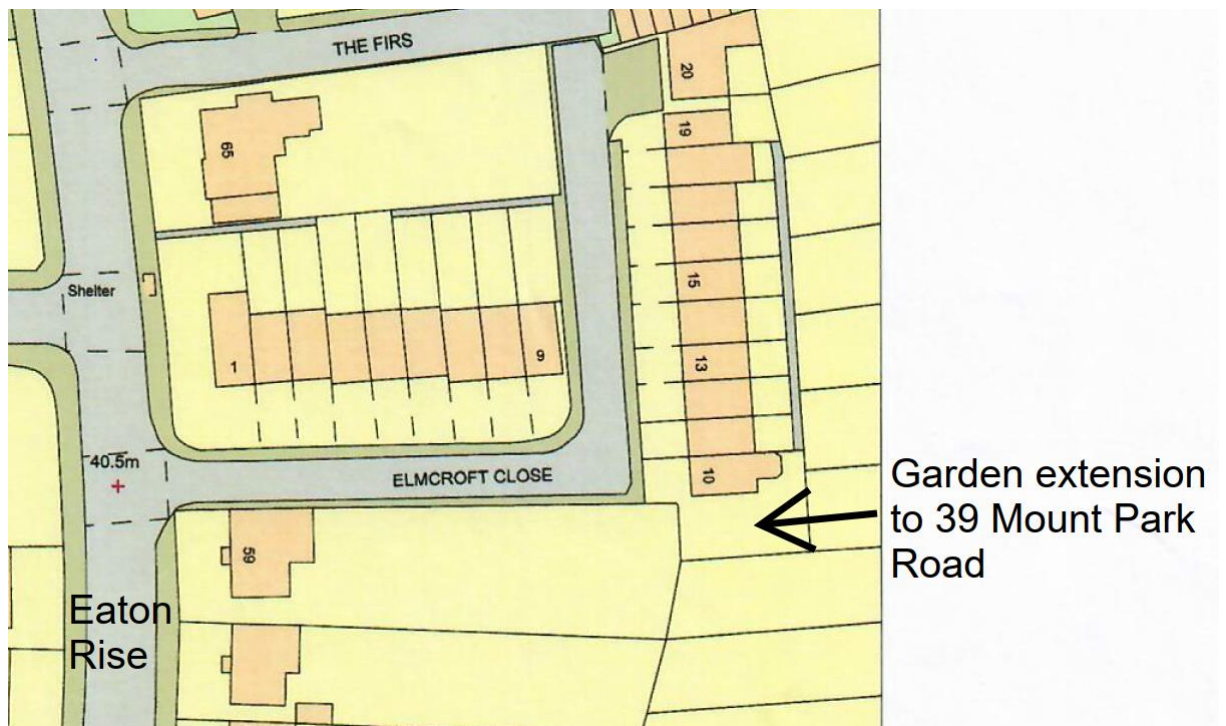
There is no record of the height of the boundary wall at that date.

5. The applicant made an application to the Tribunal on 12 October 2020 seeking modification of the covenant, on grounds (aa) and (c) of s.84(1) of the Law of Property Act 1925, to permit implementation of the planning consent. The owners of Nos 1 – 11, 13 and 16 – 19 Elmcroft Close, and the owner of 39 Mount Park Road have objected to the application without making any claim for compensation should it be successful.

6. A hearing of the application took place at the Royal Courts of Justice on 27 July 2021 and continued by remote video platform on 28 July 2021. The applicant was represented by Mr Andrew Francis, who called Mr Malcolm Kempton FRICS as an expert witness. The objectors were represented by two of their number, Ms Anita Vanda Foster and Ms Saira Malik, who called Mr Terry Hodder, Mrs Unaiza Malik, Dr Rajni Dogra, Ms Neeta Amin and Ms Saira Malik as witnesses of fact. They called Mr Gary Sinton as an expert witness.
7. I made an inspection of the property, and the properties of the objectors, on 29 July 2021, accompanied by Mr Francis and Ms Foster. The applicant had arranged for measured poles with yellow material at the top to be sited in his garden as indicative markers of the height and position of the ridge and eaves of the three storey extension (“the extension”). The objectors provided poles outside the boundary with orange windsocks at the top to indicate the height, but not position, of the proposed eaves and ridge. Neither party agreed the accuracy of the other party’s markers.

Factual background

8. The locations of the property and the objectors’ properties are shown on the plan below.



9. The property is a detached Victorian villa, typical of the houses lining Eaton Rise, which sits within the Mount Park Conservation Area. The property is not a statutory listed building but was described by the council’s planning officer as a locally listed heritage asset. The house is three bays wide with steps up to a pillared entrance porch at the raised ground floor level. The accommodation is set over four floors, including the lower ground floor and attic. The lower ground floor is occupied as a separate flat. The applicant and his wife acquired the property in June 2010, the applicant becoming the sole registered proprietor from 21 November 2017.

10. The large plot of land on which Elmcroft Close was built is the site of the former 63 Eaton Rise. There is no record of any former property numbered 61. The 19 terraced houses are in two blocks; the first block of nine (Nos 1 to 9) running eastwards off Eaton Rise and the second block of ten (Nos 10 to 19) running northwards from the corner. The houses are of three stories with the principal living areas on the first floor. They were designed with four bedrooms, but in many instances walls have been removed to create larger rooms. In some properties the integral ground floor garages have been converted to living accommodation. The front gardens are unfenced and provide parking for at least one car per house. Many of them have mature trees and shrubs. No 20 was built later than the original 19 houses, on land which had previously remained undeveloped and had been used as a turning area at the end of the cul-de-sac. Elmcroft Close is an adopted highway, although title to it remains with the original developer.
11. The original plot of 10 Elmcroft Close, as shown on the plan above, included a large area of garden to the south of the house, which adjoined the extensive garden of 39 Mount Park Road to the east. In 1983 the owners of 10 Elmcroft Close sold the majority of the garden, including an access strip to the corner of Elmcroft Close, to the owners of 39 Mount Park Road. The present owner of the garden land thus benefits from the covenant.
12. Each limb of Elmcroft Close has along the side opposite the houses a council designated parking area, subject to the conditions of the local controlled parking zone (“CPZ”) that requires a permit to park between 9.00am and 10.00 am and between 3.00 pm and 4.00 pm from Monday to Friday. Pavements run on the other side of the road along the frontage of the houses.
13. In February 2018 an application was made for planning consent for conversion and extension of the property to provide eight flats. This was withdrawn in July 2018 and a revised application was submitted in October 2018 for conversion and extension to provide seven flats. On 6 December 2019 the council’s planning officer recommended grant of consent, subject to conditions and a s.106 agreement. That agreement requires payment of a “trees contribution” of £26,773 and agreement to a restriction preventing occupation of five of the seven units by anyone holding a parking permit for the local CPZ.
14. The features of the seven proposed flats can be summarised as follows:

Number	Floor level/s	Bedrooms: max occupants	Access from	Within extension
1	Lower ground	1: 2	Elmcroft Close	Yes
2	Basement + Lower ground	2: 4	Elmcroft Close	Yes
3	Lower ground	2: 4	Elmcroft Close	No
4	Ground	1: 2	Eaton Rise	No
5	Ground	2: 3	Eaton Rise	Partly
6	First	2: 3	Eaton Rise	Partly
7	First + Second	2: 4	Eaton Rise	No

15. The extension would be constructed of materials to match the existing house and would measure 7.65 metres wide (east elevation) and 6.7 metres deep (north elevation). It would have a hipped roof measuring 7.26 metres to the eaves and 9.82 metres to the ridge, taken from the ground level of the footpath of Elmcroft Close. The ridge would sit 2.5 metres below the ridge of the existing building. The north elevation, alongside Elmcroft Close, would be set back from the boundary by 1.8 metres, at a distance of 18 metres from the south west corner of the No 4 Elmcroft Close, the nearest property. This elevation would include two opaque bathroom windows, one on the ground floor and one on the first floor. The east elevation of the extension would have new windows at each floor and include two “Juliet” balconies at first floor level.
16. Implementation of the consent in accordance with the submitted and approved plans would require seven trees to be removed; six in the garden of the property and one in Elmcroft Close adjoining the boundary. The approved mitigation measures require new trees to be planted in the remaining garden of the property, subject to approval by the council’s tree and landscape officer, in addition to payment of the s.106 trees contribution.
17. Access for construction would be solely through the existing access to the rear of the property from Eaton Rise. Construction works would be limited to the hours of 8.00 am to 6.00 pm on Mondays to Fridays and 8.00 am to 1.00 pm on Saturdays.
18. The height of the boundary wall at the date the covenant was entered into was unspecified so the applicant had commissioned a professional interpreter of aerial imagery, Ms Christine Cox BA MA MCIF FSA, to source and examine aerial photographs of the property from the time of the deed of grant in order to comment on its likely height at that date. Her report, which was provided as an appendix to Mr Kempton’s expert report, referenced a stereo pair of vertical aerial photographs taken on 23 July 1966 by Fairey Surveys Ltd, which had been sourced and authenticated by Air Images Ltd. She concluded from her analysis that the boundary at that date was a linear structure at or below 1.0 metre in height. This height assessment was not in dispute and was relied on by the objectors in their submissions.
19. The boundary between the property and Elmcroft Close is currently formed of 1.9 metre high timber fence panels, with arched trellis above reaching 2.77 metres at the top. Mid-way down the boundary there is a timber gate giving pedestrian access through the fence from the garden of the property into Elmcroft Close. The approved plans include a replacement fence of the same structure and scale, with the pedestrian access relocated to the corner of Elmcroft Close.
20. The new gate, of iron railings, would lead into a recessed walled area from which further access would be gained on the left to the store standing 2.4 metres high. Straight ahead, access would be gained to the garden through a 2.5 metre high brick wall with a buzzer-controlled gate. This gate would be the only access for Flats 1, 2 and 3 and would be used by the occupiers of Flats 4 to 7 for access to the shared garden. The store would have capacity for 12 bikes, sufficient for all seven flats at a standard rate of one per bedroom, and five bins of 360 litre capacity, sufficient for Flats 1 to 3.

21. The garden of the property, including the terrace, extends to 769 square metres and would be reduced by 22.5% to 596 square metres as a result of the extension. Two new terraces within the garden would be at or below current garden level and the terrace to the southern side of the property would not be visible from Elmcroft Close.
22. The majority of houses in Elmcroft Close are owner occupied, with the exception of Nos 1, 5, 9 and 11 which are let. No 1 is divided into two flats.
23. The experts agreed the range of market value (a low figure and a high figure) for each objector's property in Elmcroft Close. Across the 16 properties the range of low values was from £735,000 (No 3) to £825,000 (No 10) and the range of high values was from £750,000 (No 3) to £835,000 (No 10).
24. The experts also agreed that the houses in Elmcroft Close would let for rents in the range of £2,600 to £2,800 per calendar month depending on internal condition.

The law

25. Section 84 of the Law of Property Act 1925 provides, so far as is relevant:

“84(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-

...

(aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

...

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

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award 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 the 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 section (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 the restriction without some such addition.”

The application

26. The applicant seeks modification of the covenant under grounds (aa) and (c), to allow implementation of the planning consent, including any subsequent planning consent which is a renewal of the original and any minor amendments approved or ordered by the council.
27. Mr Francis acknowledged that success under ground (c) is conditional on success under ground (aa), so focused his submissions on the questions to be considered under ground (aa), as set out in *Re Bass Limited's Application* (1973) 26 P&CR 156. He emphasised that only that part of the covenant which imposes a negative restriction has to be considered by the Tribunal. The part which restricted the permitted height of vegetation and trees imposed a positive obligation on the original covenantor and cannot run with the land so does not bind the applicant. Thus the covenant which impedes implementation of the planning consent is that which prevents an inanimate obstruction from projecting above the height of the wall.
28. In his submissions Mr Francis assumed that the objectors would not dispute that that the planning consent represented a reasonable use of the applicant's land, but they did dispute this in closing and I will return to the matter in my discussion section.
29. It was not in dispute that the covenant impedes implementation of the planning consent, but there was a difference of opinion as to which elements of the planning consent would contravene the covenant and were therefore to be taken into account in considering the

benefits derived from the covenant. Mr Francis directed my attention in particular to the three storey extension, and emphasised the fact that the covenant was not expressly drawn to prevent nuisances or annoyances. He accepted that it would have been designed to protect the amenities of Elmcroft Close, but submitted that after 56 years the situation had changed with trees and shrubs and the current fence all above the height of the original wall. Moreover, in 2002 planning consent was granted for a rear staircase and first floor balcony, which over-looks Elmcroft Close but has given rise to no objections, showing that the practical benefit derived from the covenant is not of substantial value or advantage.

30. Mr Francis submitted that the property and the objectors' properties are part of a conventional 1960s development set in an urban environment, with all the concomitants of daily living in such an environment. The fears of the objectors were over-stated when considered against the reality. To quote the Tribunal (Erskine Simes QC) in *Re Zopat Development's Application* (1966) 18 P&CR 156, "... the prospect terrifies while the reality will prove harmless...". Any practical benefits derived from the covenant in impeding implementation of the planning consent would not be substantial, or "considerable, solid, big", as described by Carnwath LJ in *Shephard v Turner* [2006] 2 P&CR 28, when judged against the existing traffic, deliveries and noise generated by a close where 50 to 60 people live.

The objections

31. Witness statements were received from each of the 17 objectors. In their joint statement of case of case the objectors summarised the practical benefits secured to them by the covenant as including: preservation of a light, open and leafy outlook; protection from overlooking from overbearing and obtrusive buildings; privacy and lack of intrusion; protection against overcrowding – a sense of space; preservation of the peaceful character of the surroundings; protection of peaceful and quiet enjoyment of their homes and land, in particular against noise, bustle and increased traffic; protection from dust and noise pollution during the construction phase. They were also concerned that excavation to construct the basement flats would affect drainage in the local area, particularly impacting the garden of 39 Mount Park Road.
32. These practical benefits were believed by the covenantees to be of substantial advantage to them. If it was found that the benefits were of less than substantial advantage and value, the special circumstances of residents at No 2 and No 10 meant that money would not be adequate compensation.
33. With regard to precedent having been set by their lack of previous objection to the height above the boundary of the garden trees, and construction of the first floor balcony, the objectors made a number of points. First, they were unaware of the covenant until alerted to it by a neighbour in March 2018. Second, the external stairs and first floor balcony to the rear of the property were installed in 2002 as a fire-escape, for which objections were not raised. Third the mature trees are protected because they are in a conservation area. Moreover, the balcony structure and the mature trees are not comparable with the extension which would be large, bulky and overbearing.

34. In closing it was submitted that planning consent is not determinative of reasonable use and the planning process could not have taken account of the disability of some objectors who benefit from the covenant. It was also submitted (for the first time) that the covenant impedes any obstruction over 1.0 metre above ground level, which would include the three storey extension (9.8 metres) and the associated single storey extension (1.7 metres), the store (2.4 metres), the metal railings (1.9 metres) and the side gate (2.5 metres).

Expert evidence for the applicant

35. Mr Malcom Kempton is a fellow of the RICS and an RICS Registered valuer. In 1986 he was a founding director of Kempton Carr Croft and is based at their head office in Maidenhead. He has advised on valuations of commercial and residential property for over 30 years, and in valuation disputes for over 15 years. In his report, and under cross-examination, Mr Kempton acknowledged that he was not completely familiar with the local market in Ealing, but confirmed that he had long experience of valuing properties in Greater London and was familiar with the effects of covenants on burdened and retained land, having undertaken numerous expert witness appointments in that regard. He had consulted Mr Nick Fleming of the Ealing Broadway office of Dexters for local market information.
36. Mr Kempton was instructed to report on whether the owners and occupiers of Nos 1 – 20 Elmcroft Close, and the garden land with 39 Mount Park Road, would lose any practical benefits of substantial value or advantage from the proposed development. He was also asked to consider whether the proposed development would cause diminution in value to any of the objectors' properties, to comment on the concerns raised by the objectors and comment on the likely rental value of their properties. He had inspected the property and the properties of the objectors, internally and externally, on various dates in late April 2021. He had inspected again externally shortly before the hearing.
37. Mr Kempton and Mr Sinton (for the objectors) submitted a helpful joint statement of agreed facts, which included agreement on market values and rental values for the objectors' properties in Elmcroft Close.
38. In his report, Mr Kempton dealt with each of the practical benefits listed by the objectors and I will take these in turn before summarising his conclusions.

Preservation of a light and leafy outlook

39. Mr Kempton included in his report the Daylight, Sunlight and Overshadowing Assessment, prepared by WYG Environment Planning Transport Limited in January 2019 and submitted in support of the application for planning consent.
40. The daylight assessment included stage 1 screening for compliance with the Building Research Establishment ("BRE") 25 degree test at the centre of ground floor and first floor windows in Nos 1 to 6 Elmcroft Close, which face south towards the extension. The test was met for first floor windows but not for ground floor windows, which were therefore assessed using a stage 2 vertical sky component ("VSC") method. The VSC criteria were met for all

ground floor windows but, for completeness, the ground floor bedroom of No 2 was assessed to stage 3 using a “no sky line” analysis. The recommended criteria at stage 3 were met.

41. A stage 2 sunlight assessment was also undertaken for ground and first floor windows in Nos 1 to 6 Elmcroft Close, which confirmed that sufficient sunlight would be received with the extension in place.
42. An overshadowing assessment was made to assess the impact of the extension on the front gardens of Nos 1 to 9 Elmcroft Close, using a visual representation of shadowing on 21st March between the hours of 6.00 am and 7.00 pm. The assessment concluded that shadowing conditions are not expected to change significantly, as confirmed by reference to the shadowing diagrams created for the existing property and the extension, which showed only a very small difference in the late afternoon.
43. The results were summarised in the report of the planning officer who recommended the grant of planning consent. It was concluded that the proposed development complied with BRE good practice guidance and was acceptable in terms of its impacts on surrounding neighbours in terms of sunlight and shadowing.
44. Mr Kempton relied on the results of the assessments and the planning officer’s recommendation to conclude that there would be no significant loss of light to any properties which would cause a substantial loss of value or advantage.
45. In cross-examination Mr Kempton acknowledged that for houses such as No 2, where an existing view of deciduous trees would be replaced by a view of the proposed extension, the light currently available in winter through the leafless trees would no longer be available.

Protection from overlooking from overbearing and obtrusive buildings

46. In his report Mr Kempton recognised that for Nos 2 to 5, the aspect from first floor living room windows facing the property would be affected by the development. However, it was his opinion that since the properties are located in an urban area of West London this would not result in a substantial loss of practical benefit or value. In cross-examination Mr Kempton was pressed on what he meant by aspect, as opposed to outlook, and he said that in urban areas this would usually be the same and is what can be seen from a window. It is different from a view, of open countryside. With regard to the impact on the south facing open front gardens of Nos 2 to 5, he commented that those gardens were mostly used as driveways, alongside grassed areas with trees and shrubs. The mature trees in the front gardens cast more shadow over them than the extension would.
47. For No 1, which already faces the flank wall of the property, Mr Kempton stated that there would be no change in aspect. For Nos 6 to 9, which face south across the garden of the property, the aspect would be unchanged unless they looked obliquely at the extension. For Nos 10 to 19, Mr Kempton considered that the houses were either too far away to be affected or would not have a direct view of the extension. In cross-examination, Mr Kempton accepted that he had not seen the outlook from Nos 10, 11 and 13 in winter when there would be more visibility of the rear of the property, and thus the extension, than in late April when

he had first visited. However he maintained his opinion that with the garden of the property measuring 50 metres in length, and the extension adding only 6.7 metres to the depth of the existing building, any visibility of the development from Nos 10, 11 and 13 would not have an impact as the houses were already located in a built up area.

Privacy and lack of intrusion

48. It was Mr Kempton's opinion that because the existing balcony at first floor level to the rear of the property currently has an impact on the privacy of Nos 2 to 5, when it is replaced by the extension with only two obscured bathroom windows in the facing elevation, there could be an improvement to privacy. The property currently has a plain glass window at top floor level in that elevation, which would already have more impact on the privacy of Nos 1 to 3 than the extension. Other properties in Elmcroft Close are much further away and would not face the extension, therefore he did not consider that there could be any appreciable or quantifiable loss of privacy to any of the objectors' properties from it.

Protection against overcrowding (a sense of space)

49. Mr Kempton reiterated that the property and the objectors' properties are situated in an urban area of Ealing. Only three of the seven proposed flats would have their access through Elmcroft Close, which would be a maximum of 10 people, using bicycles but not cars as the s.106 agreement allows no new parking permits. The additional movements created by these people could not, in his opinion, detract from the houses in Elmcroft Close to such an extent that they would lose any practical benefit of substantial value or advantage.
50. In cross-examination Mr Kempton agreed that the potential 12 occupiers of the other four flats would also have the right to use the access off Elmcroft Close for storage of bicycles and for access to the shared garden. He accepted that up to 22 people would have the right to pass along the pavement in front of Nos 1 to 9 and then cross over to the pavement in front of Nos 10 to 12 in order to use the new access gate whilst avoiding cars parked on that side of the road. Mr Kempton then pointed out that an increase in the number of people using Elmcroft Close can also occur by the conversion of the town houses into flats, such as has been done at Nos 1 and 20.
51. With regard to the additional refuse to be collected from five new wheelie bins, Mr Kempton referred to the planning officer's report which concluded that as these would be stored in a recessed storage compound off the road there would be no harm to the amenity of Elmcroft Close. The vehicular collection of recycling and refuse on alternate weeks would be no different from the present situation.

Preserving the peaceful character of the surroundings

52. In his report Mr Kempton described Elmcroft Close as a quiet location with no through traffic, but pointed out that there are 20 houses of which two are in multiple occupation, so the additional pedestrian movements from the proposed development would not affect the peaceful character to any substantial amount.

Protection against noise, bustle and increased traffic

53. In the light of his comments on the other concerns of the objectors it was Mr Kempton's opinion that the additional movements of three households to their apartments through Elmcroft Close, where over 20 households exist, would not add materially to these elements or affect the peaceful and quiet enjoyment of the objectors' homes. In cross-examination he accepted that where currently the garden of the property is used by just one family (since the lower ground floor flat does not have access to it) in future it could be used by seven households and up to 22 people, thus more people would be using a smaller area than at present.

Summary of opinion on potential diminution in value to objectors' properties

54. In his report Mr Kempton reviewed comparable evidence provided to him by Mr Fleming of Dexters, and the discussions they had concerning the local market. In his opinion, for purchasers of properties such as those in Elmcroft Close, the condition of the property, the internal living space, quality of fixtures, fittings and décor, and the location of transport hubs and amenities would be far more important than the aspect across gardens within an urban area.
55. Mr Kempton concluded that although Nos 2 to 5 and, to a lesser extent, No 1 and Nos 6 to 9 would have their aspect altered by the extension, this would not have any discernible or quantifiable effect upon their value. He grouped Nos 10 – 20 together, stating that they would not suffer from additional pedestrian movements nor a change of aspect nor any disruption, disturbance or effect whatsoever. He was also of the opinion that the extension would have no adverse impact on the privacy of the garden belonging to 39 Mount Park Road.

Comment on the likely rental value of the objectors' properties

56. The likely rental values of the properties had been agreed by the experts. It was Mr Kempton's opinion that during the construction phase, which he estimated might last for 12 months, Nos 1 to 9 might suffer from some disruption with an impact on rental value of 5 – 10%. I asked if this would only be noticeable if re-letting took place during that period, or whether landlords might feel obliged to offer a rebate to sitting tenants. He thought it unlikely that rebates would be offered since the access for the construction would only be from Eaton Rise and the working hours were limited by the planning consent.

Evidence of the objectors

Ms Sairah Malik of No 2 Elmcroft Close

57. Ms Malik has lived since 2013 at No 2, which faces south towards the side of the property but receives access to the sun and sky tangentially around it. She has converted the ground floor garage to a study/living room and has further living space facing south at first floor level. The rear aspect of the house is towards the side of No. 65 Eaton Rise, flanked by

mature trees, so the open views of sky and sun to the south east where the extension will be are particularly important to her. Ms Malik's health problems mean that she works from home and spends most of her time in the south facing rooms. She also sits outside her house on the south facing side to enjoy the sun and was concerned that her garden would be affected by overshadowing from the proposed extension. In cross-examination she acknowledged that the proposals met the minimum standards for daylight, sunlight and overshadowing for planning consent to be granted, but maintained that her own view of the significance of changes was valid as an affected person in the context of her property and personal circumstances.

58. Ms Malik was also concerned that the proposed development would give rise to an increase in the number of pedestrians and delivery vehicles using the close to gain access to the new entrance in the corner of the close. She described the difference made when No 20 was constructed, causing loss of a previously open area at the end of the close where cars could turn, putting pressure on the corner between Nos 9 and 10 to 12 as a turning area. Moreover, noise from the new flats and rear garden would be very evident in the close, which has an echo effect already noticeable, for example when instruments are played at properties in Eaton Rise and Mount Park Road.
59. Ms Malik was concerned further that during the construction period, which she felt could realistically last for 18 to 24 months, she would be particularly exposed to dust, fumes and noise.

Ms Neeta Amin of No 4 Elmcroft Close

60. Ms Amin has lived at No 4 since 1992 and works mostly from home in a room on the second floor which is south facing. She chose the property because of peaceful nature of the close, the expanse of gardens at the front and back, the quality of light and sunlight coming into the front of the house, the leafy outlook over trees and shrubs in the garden of the property and the location in a conservation area. Her house would be one of those most affected by the proposed development, looking directly at the side of the three storey extension and suffering a loss of sunlight and privacy. She was also concerned that the increase in bicycle traffic and exponential increase in the number of commercial delivery vehicles, bin collections and visitor movements would spoil the character and amenity of the close.
61. In cross-examination during her oral evidence Ms Amin agreed that by an exponential increase she actually meant an increase tied to the numbers in occupation of the proposed development. She spoke of the pressure on parking in the close at drop-off and pick-up times for two local schools, and her concern that visitors to the additional flats would park on a temporary basis adding to that pressure. Her concern about an increase in bicycle traffic was focused on the likelihood of e-scooters and e-bikes being used in the close.

Dr Rajni Dogra of No 6 Elmcroft Close

62. Dr Dogra bought her house in 2001, attracted to the close by its trees, the lack of through traffic, the low footfall and the fact that it was in a conservation area which would be likely to prohibit intensive development. To date the close has retained its attractive character and

most of the residents are known to each other resulting in a safe and inclusive environment. She works from home at standing desks in the first floor living room and second floor bedroom, both of which face the garden of the property. The removal of trees associated with the proposed extension would affect the leafy outlook currently enjoyed from those windows.

63. Dr Dogra was concerned that there would be an exponential increase in the number of people accessing the close and the increase in vehicular traffic and parked cars would cause an increase in disruption and pollution. As a keen gardener she was concerned that the vast size and imprint of the proposed development would block light to her front garden and hinder plant growth.
64. In cross examination Dr Dogra agreed that the direct view from her front windows is of the garden of the property and would not be bisected by the new building. She also confirmed that there is a cherry tree in her front garden immediately in front of her first floor window, and a fir tree in the front garden of No 5 next door, but commented that she would see the proposed extension when looking to the side. She also thought that she would see bins when looking to the left in winter, but then agreed that they would be behind a wall.

Mrs Unaiza Malik of No 10 Elmcroft Close

65. Mrs Malik has lived at No 10 for over 25 years. When she and her late husband bought it they were attracted by the quiet, open and leafy character of the cul-de-sac, which was rare in a busy area so close to Ealing Broadway, and in particular by the open aspect of a corner house. The living areas are on the first floor, accessed by a stair lift from the ground floor in which are a bedroom and disabled bathroom, modifications to accommodate Mrs Malik's deteriorating health and increasing disability.
66. Mrs Malik is supported in independent living by regular visits from carers and medical and health workers, who park in her drive. To allow space for them, Mrs Malik parks her own car in the CPZ as close to her house as possible. The closest parking space within the CPZ adjoins the proposed new gateway giving access to the new flats, to the store and the shared garden, so all those using the gateway would pass between her car and her drive, utilising the drop-down access to her drive. Delivery vehicles would stop there for the duration of deliveries or collections associated with the new flats, blocking access to the drive and causing pollution.
67. The proposed extension would interfere with the open aspect currently enjoyed from the first floor living room windows. There would be a sense of being overlooked by the many windows in the north elevation of the extension, and a sense of intrusion caused by use of the communal access to the flats, the bike store and the garden. Mrs Malik is already aware of music and conversations from the rear of the property and the proposed extension would increase the number of people, whilst bringing the building closer to her.
68. Mrs Malik feared that the construction phase would be particularly egregious, causing her prolonged exposure to dust and potentially exacerbating her illness so that she would need to relocate for its duration.

69. In her oral evidence Mrs Malik explained that her daughter had moved to No 2 to be on hand for her, and that a gentle walk between the two properties, along the pavement in front of Nos 1 – 9, was the limit of her exercise in the fresh air. She feared that the pavements might in future be used by e-bikes and e-scooters gaining access to the new flats. Reflecting on the construction period of at least a year, Mrs Malik said that at her age of 77, and with her poor health, that was a very significant period.
70. In cross-examination, Mrs Malik confirmed that she had asked a gardener to place tubs with bamboo trellis and climbing plants in front of her house, on the edge of her boundary by the road, as the front of the house is all down to concrete and looks stark. Because she is registered disabled, Mrs Malik is allowed by the council to leave her three bins in their position on the roadside, beside the fence to the property just in front of the CPZ, and the tubs assist with screening the unsightly bins.

Mr Terry Hodder of No 16 Elmcroft Close

71. Mr and Mrs Hodder have lived at No 16 for 30 years, and chose the property because the close was open, quiet and free of traffic. Their children were able to ride bicycles safely in the close and the children of other families do so today. Four adults work from home in the house and would be affected by an increase in noise and bustle from all the new residents in the property once extended. This increase would arise from the use of the close to gain access for bicycles, bins and the shared garden, from visitors, contractors and delivery vehicles.
72. Although No 16 is away from the corner where the access is proposed, and would have no sight of the extension, the family would be aware of a change of character to the close, including the removal of screening trees. Mr Hodder described the extension as too tall, bulky and overbearing for its setting in a conservation area.
73. In cross-examination it was put to Mr Hodder that he was over-stating the change that he would see and the amount of noise and bustle that he would hear. He responded that he is already aware of noise and music from the rear of the property and No 57 Eaton Rise. He explained that he is also aware of when anyone in the close is having a delivery. The family dog is walked four times daily so there would be eight occasions when he or a family member would pass the extension, which Mr Hodder described as immensely big and overbearing. Mr Hodder accepted that there would be no increase in the number of times that refuse and recycling lorries would enter the close, and that noise would arise from the lorries themselves not the dustbins, but he maintained that with more bins the lorries would be in the close for longer.
74. I asked Mr Hodder to comment, as a long term resident, on the number of residents living in the close at present. He confirmed that the number would be at least 50.

Expert evidence for the objectors

75. Ms Foster explained that the expert originally instructed by the objectors had been required to step down for medical reasons before reporting and that Mr Gary Sinton had kindly

stepped in at short notice to fulfil the role. I bear this context in mind when reviewing some of the admissions made by Mr Sinton under cross-examination.

76. Mr Sinton was a founding partner in 1981 of Sinton Andrews estate agents based in Ealing Broadway. Prior to that he had already spent nearly 10 years working for leading firms in the Ealing area. Mr Sinton has now retired from practice but was previously a Fellow of the National Association of Estate Agents and had previously acted as an expert witness.
77. Mr Sinton did not receive written instructions but confirmed that he had been instructed by Ms Foster to report on the impact on the residents of Elmcroft Close of a proposed development at the property which had received planning permission, in the context of the application to this Tribunal for modification of the covenant. He was instructed in particular to consider the impact of the proposed three storey extension on the amenities and market value of the residents' freehold interests and also to pay attention to the consequences arising from the development as a whole. During his career Mr Sinton had been involved with the sale and re-sale of the property three times so did not carry out an internal inspection of it. He made an internal inspection of the properties of all objectors in mid-April.
78. In cross-examination Mr Sinton admitted that when preparing his report he had not looked at the provisions of s.84 and was not familiar with the questions to be answered in considering its application to the present case. Mr Sinton admitted that, although it was not stated within his report, he had consulted a former colleague who was a building surveyor for assistance in interpreting the Daylight, Sunlight and Overshadowing Assessment, and was not personally familiar with the summary data included in his own appendix and report. Mr Sinton also admitted that he had been an objector to the applicant's planning application, as someone involved in property in Ealing for nearly 50 years who believed it was a notable case of over-development which would ruin one of the area's classic Victorian villas. He had not mentioned this within his report. He no longer belonged to a professional body and was not familiar with provisions of the Tribunal's Practice Direction concerning expert evidence.
79. I place the remainder of Mr Sinton's evidence in this context, but note the helpful comment of Mr Kempton during his oral evidence that Mr Sinton's knowledge of the local property market resulted from him having probably sold more houses in Ealing over his career than anyone else. It is to the credit of both experts that they were able to agree values within a close range for all the objectors' properties.

Impacts of the three storey extension

80. It was Mr Sinton's opinion that Elmcroft Close had been designed to create an open outlook and aspect for all the houses, which is very unusual in this part of Ealing and provides a valuable and substantial benefit over other similar closes in the neighbourhood. The first floor living areas face south or west to take advantage of the open outlook and maximum exposure to light, sky and the sun.
81. In his report Mr Sinton said that the extension would obstruct sight of the sky, sight of winter sun and the open and verdant outlook over the back gardens of properties on Eaton Rise.

The bulky brick-built extension would replace a low level, transparent balcony structure and deciduous trees which currently have minimal obscuring effect. He stated that this replacement would negatively transform the sense of openness enjoyed by all residents of the close. For the houses closest to the extension, Mr Sinton commented that it would reduce daylight and increase shadowing, even though the minimum BRE standards were met. For some homes the reduced light in the south facing gardens would affect planting and reduce the amenity of them. In cross-examination he said that the assessment report did not reflect his experience of sunlight received by the affected houses from where the proposed extension would be.

82. The increased number of windows and additional garden terraces in the development would create a significant increase in spaces from which houses in the close would be overlooked, increasing the sense of intrusion. These spaces would also be a significant source of sound and light pollution affecting all residents in the close. Mr Sinton maintained this view in cross-examination, even when it was put to him that in order to overlook any of the south facing houses in the close, residents of the new flats would have to look sideways out of their windows in the east elevation.
83. For the garden land occupied with 39 Mount Park Road, Mr Sinton identified that the most likely impact would arise from excavation for the basement, which might exacerbate issues of standing water near the boundary with the property. A result of the development as a whole would be a substantial increase in activity at the new gate, next to the path through to the garden land, which would significantly impede access to the garden land.

Valuation impacts

84. Mr Sinton described the very low turnover of houses in Elmcroft Close, the last sale being of No 2 in July 2013. He referred to the nearly identical houses in nearby Lanark Close, which lack the open outlook, aspect and sense of space enjoyed by houses in Elmcroft Close and sell for 12-15% less. It was Mr Sinton’s opinion that the extension would have a negative impact on the character of Elmcroft Close and create a general base-line loss of value of between 2.5% to 5% for every house.
85. Mr Sinton’s assessment of the impact on each objector’s house is summarised below:

House/s	% Loss
Nos 1, 16, 17, 18 and 19	2.5% - 5%
Nos 5, 6, 7, 8, 9, 11 and 13	5% – 6%
No 4	7% – 8%
Nos 2 and 3	8% – 9%
No 10 – from the extension alone	5% – 7.5%
No 10 – from the whole development	12%

86. Turning to the impact of the construction period, which Mr Sinton considered would last at least one year and most likely longer, he referred to extensive and prolonged dust and noise pollution and the negative impact on the close of construction vehicles. It was Mr Sinton's opinion that no house could be realistically and successfully marketed for sale during that period. For let houses there would be a likelihood of reduced incomes and extended void periods.
87. In cross-examination Mr Sinton was pressed to explain his opinion that the proposed development would affect the value of even those houses which could not see it. He said that the greater intensity of use and the dramatic change at the entrance to the close would affect all houses. Regarding the noise impact of increased foot traffic and number of bicycles, he said the pedestrians would be using phones and bicycle users would crash noisily through the gate to the store. Regarding increased pressure on parking, Mr Sinton said that the CPZ only operated for two hours per day and the council will sell hourly tickets so the s.106 constraint on permits would not be effective. Each house has value based on its location and there would be a knock-on effect to all houses caused by changes to the close.
88. Mr Sinton confirmed that there would be no loss of value to the garden land occupied with 39 Mount Park Close as a result of the development.
89. I asked Mr Sinton to explain the reasons for difference in value of the various houses in the schedule agreed with Mr Kempton, as summarised below in ascending order.

House/s	Low end of value range	High end of value range
No 3	£735,000	£750,000
No 4	£765,000	£785,000
Nos 7 and 17	£765,000	£775,000
Nos 13, 18, 19	£770,000	£780,000
No 16	£780,000	£790,000
Nos 1, 2, 5, 6, 8, 9 and 11	£790,000	£810,000
No 10	£825,000	£835,000

Mr Sinton said that the main reason for difference was internal condition, and the range for each property provided for the worst and best scenario in the market. From his experience, condition was the most important factor affecting value and once No 3 was put into good condition there would be a dramatic change in value. I noted that the range was typically 2.5% and Mr Sinton commented that surveyors generally accept a 5% variance.

90. Mr Sinton confirmed that if he were selling houses in Elmcroft Close his target market would be couples or singles trading down from larger houses. Although the houses were designed with four bedrooms, in many cases rooms had been combined and some were used as studies, so they were less suitable for families.

Discussion

Is the proposed development a reasonable use of the land for public or private purposes?

91. No detailed submissions were made on this question, although Ms Malik touched on it in closing. I am satisfied that the proposed use is a reasonable one which has received detailed scrutiny in the planning process, leading to modifications where recommended by the council's planning officer.

Does impeding the proposed use secure practical benefits to the objectors?

i. Preventing the three storey extension

92. Both experts acknowledged that the covenant does secure practical benefits to at least some of the objectors, in particular the owners of Nos 2 to 5 who will have sight of the extension directly from their windows and front gardens. My inspection of those properties, and the outlook that they currently enjoy over the property and its rear garden, has helped me to understand the basis of the objections. I note that from No 1 there would be an oblique outlook at the extension. Nos 6 and 7 would also have an oblique outlook at the extension, but this would be screened by the mature conifer tree in the front garden of No 5. The tree is protected by a TPO, and consent to fell was refused in 2015, so it is likely to remain for the foreseeable future.
93. More emphasis was placed by the objectors on the proposed extension than on the proposed removal of four mature trees within their view. Preservation of the trees is not a benefit secured by the covenant and I note that the spirit of the original covenant was that such trees should not have been allowed to grow at all. The trees to be removed for the extension are an ash, an oak and a holly within the garden, together with an ash on the boundary within the road. The ashes and oak are tall trees, reaching well above the eaves height of the property. Whereas the extension will block some views of sky and create shadow at certain times of day and year, the removal of the mature trees will be detrimental in reducing the leafy outlook, which residents enjoy in summer, but will open up year round views of the sky that do not currently exist. The shadowing diagrams that have been reviewed earlier are concerned only with shadows from buildings but, particularly when they are in leaf as I observed during my inspection, the trees cast their own shadow over the road and parts of the front gardens in Elmcroft Close. Their removal would provide some compensatory gain to be offset against the impact of the extension in respect of daylight, sunlight and shadowing. In my opinion the net impact on Nos 2 to 5 would be much less than the objectors fear.
94. I do not consider that the two opaque bathroom windows in the elevation facing Nos 2 to 5 will cause an increase in overlooking and intrusion, particularly as an existing open balcony with direct views of those houses is to be removed. The number of windows in the east elevation, looking out over the garden, would be increased. They would face in the general direction of No 10, but be at a distance of some 44 metres, with screening provided by the mature trees which are to remain in the garden of the property. The screening effect would be reduced in winter, but not to a degree that I consider significant at that distance.

95. There would be noise and light emanating from the new windows, but one of the amendments made during the planning application process was the removal of previously proposed balconies and roof terraces specifically to manage this factor. The planning officer described the site as an established residential area within a suburban built environment, and took care to consider the adverse effects on the residential amenities of neighbouring properties within the council's policy guidelines. The owners of Nos 10 and 11 might be most aware of the new windows at night, but they already have an outlook down Elmcroft Close across the frontages of Nos 1 to 9, which include three storeys of windows in closer proximity.

ii. Preventing the new access and store

96. Mr Kempton made little of the impact which the proposed development would have on the objector at No 10, but I agree with Mr Sinton that this property would suffer the most impact from the development because of its location in a tight corner beside the proposed new access. The situation is complicated by the previous sale of an access strip, which runs from the corner of Elmcroft Close, along the boundary fence with the property, to the garden occupied with 39 Mount Park Road. As No 10 now has no land adjoining the boundary fence, Mrs Malik leaves her three wheelie bins against the fence on the end of the pavement, just in front of the designated CPZ. This is exactly where the proposed new access would be located, as recommended by the council during the course of the planning application process. Not an insurmountable conflict of use, but an unfortunate one.

97. The outlook from inside the first floor living room of No 10 is straight down Elmcroft Close, with Nos 1 to 9 on the right hand side and parked cars beside the garden of the property on the left hand side. The outlook would be affected by the removal of a mature alder tree and a buddleia shrub in the corner of the property's garden to allow for the new access and store, both of which would be visible from the living room windows if looking down and to the left. With the windows open, some noise would be heard from use of the access and store, particularly from the ground floor bedroom, although the noise would not be out of character in a residential close. It is clear that the number of bin collections would not increase, but there would inevitably be some new delivery traffic stopping in the corner to use the new access.

98. The same factors would have some impact on the owner of No 11, but to a lesser degree because it has no ground floor accommodation and is further removed from the access with only an oblique view towards it.

99. It was submitted in closing that any construction above 1.0 metre in height, would be in contravention of the covenant, preventing construction of the 1.9 metre high metal railings across the new access, the 2.5 metre high new side gate and the 2.4 metre high store. But the existing fencing is 1.9 metres high, with arched panels reaching up to 2.77 metres, and it has not been suggested in evidence that this height has any negative impact on the residents. I am therefore not persuaded that preventing those parts of the proposed development secures practical benefits to the residents in general, but I see that it does secure some practical benefit to the owner of No 10 in protecting her from new intrusion and an altered oblique outlook.

iii. Preventing the new development in general

100. I understand the natural fears of the objectors, that their relatively secluded environment would be permanently altered by the proposed development with its new access in the corner of Elmcroft Close being used on a daily basis by up to 10 residents of the new flats. I think the fears that the residents of all the flats, a maximum of 22 people, would use their right of access to the communal garden on a regular basis are likely to be unfounded.
101. I was told that the current number of residents in Elmcroft Close is at least 50, and I am aware that some of the houses are occupied by tenants, so there will be a degree of flux in the total number over time. The three flats which would gain access from Elmcroft Close have a total of 10 bed spaces in five bedrooms. Even if they were at maximum occupancy, in the context of fluctuating numbers in the close the additional numbers would not be dramatic and the potential impact of noise and disruption would be limited.
102. Concerns about the increased footfall down the close to the new access, and the possibility of e-bikes and e-scooters using the close, feel over-blown. I understand concerns that there would be potentially more visitors' cars using the CPZ on an hourly basis but, as one witness mentioned, there is currently parking congestion in the close during local school drop-off and pick-up times. By comparison, an increase in irregular use by visitors would have limited impact.
103. The owner of the garden land associated with No 39 Mount Park Road submitted written evidence of her concerns over the impact of potential flooding in her garden, and possible restricted access. Those concerns were repeated by Mr Sinton in his report, but he put no value on the impact and I see no discernible practical benefit secured by the covenant to the owner of the garden land.

iv. Preventing the disturbance of construction

104. Mr Francis submitted that there was nothing in the covenant to protect the beneficiaries from noise and nuisance, and that practical benefits should be assessed ignoring the construction stage, which should be dealt with separately. The experts agreed that there would be some disruption to adjoining residents during the construction period of at least 12 months, and Mr Francis has submitted on behalf of the applicant that some compensation for this would be in order. I will return to this.

Are the practical benefits secured of substantial value or advantage?

105. I do not accept Mr Sinton's suggestion that the value of all houses in the close would suffer a general base-line loss of between 2.5% and 5% as a result of implementing the planning consent.
106. For the owners of Nos 2 to 5 the primary practical benefit secured by the covenant is in preventing an altered outlook over the extension. I have explained why I consider this would have much less impact than they fear. If there is a benefit to them in preventing an increase

in the number of passing pedestrians and cyclists, and in occasional visitor parking, it is a small one. I conclude that the totality of practical benefits secured is less than substantial and that money would be adequate compensation for the loss of them.

107. It was Mr Kempton's opinion that the extension would have no discernible or quantifiable effect upon the market value of Nos 2 to 5. By contrast it was Mr Sinton's opinion that the loss of value to Nos 2 and 3 would be 8% to 9%, to No 4 would be 7% to 8% and to No 5 would be 5% to 6%. All of those figures are inclusive of the base-line loss of 2.5% - 5% across all houses in the close. The agreed market values for Nos 3 and 4 are lower than for Nos 2 and 5 as a result mainly of their condition, so I do not consider that compensation based on a percentage of existing value would be appropriate. The mid-range value agreed for the houses in good condition is £800,000 and I will use this as the benchmark for compensation. It is my view that loss of value to Nos 2 to 5 would be reflected in a price reduction in the order of £24,000 per property (3% of £800,000) and that this sum would provide adequate compensation for the loss of benefits suffered.
108. For the owner of No 1, which would have oblique sight of the extension but is already located at the corner of the close beside busy main road, I consider that there are minimal practical benefits secured by the covenant, for which compensation of £8,000 (1%) would be adequate.
109. For the owners of Nos 6 to 9, I consider that practical benefits secured by the covenant in preventing modification for this application are above minimal and that a sum of £16,000 (2%) per property would be adequate compensation.
110. For the owners of Nos 13 and 16 to 19, which would have no sight of the extension and would experience no increase in passing pedestrians or cyclists, there are no discernible practical benefits secured by the covenant in preventing modification for this application.
111. For the owner of No 11, which would have sight of the new access and be aware of more delivery vehicles in the corner of the close, I consider that there are some practical benefits secured by preventing the new access and store, but these are much less than substantial. I determine that a sum of £16,000 (2%) would be adequate compensation for the loss of those benefits.
112. Turning to No 10, I consider this to be the only property which may have practical benefits of substantial value or advantage secured by the covenant. The owner would barely have sight of the extension, but would be aware of the emanation of noise and light from it. More seriously, No 10 adjoins the location of the proposed new access and the owner would be aware of pedestrians and cyclists using it, particularly from the ground floor bedroom. There would be an altered oblique outlook from the rooms at first and second floor down over the new access and store. Protection from these effects is secured by preventing the extension and implementation of the consent for it. I will consider substantial value and substantial advantage separately.

Substantial value

113. It was agreed between the experts that No 10 is the most valuable terraced house in Elmcroft Close, as a result of its corner position, with a range of market value between £825,000 and £835,000. I will use the mid-point of £830,000.
114. Mr Sinton was of the opinion that implementation of the consent would lead to a loss in value of 12% or £99,600, of which 5% - 7.5% (say 6.25% or £53,950) would be caused by visibility of the extension and (say) 5.75% or £45,650 would be caused by the access, store and development as a whole. Such a large loss in value would put the value of No 10 below the current value of No 3, the lowest value in the close because of its internal condition. This opinion must be viewed in the light of Mr Sinton's general dislike of the proposed development and opposition to the planning application. He was not truly objective and I consider this figure to be extreme.
115. By contrast, Mr Kempton considered the impact of the development on No 10 in a group with Nos 11 to 20 and did not address any potential impacts specific to its location. This was an over-sight on his part, and Mr Francis in closing recognised that No 10 was a special case which required careful consideration.
116. I accept the agreed evidence of the experts on the value of No 10 as the highest in the close, but it is my opinion that the house and its value have been compromised by sale of the adjoining garden land and access path to the front. At present the owners of No 10 and No 39 remain those who entered into the transaction 38 years ago, so the status quo is established and benign. A future owner of No 39 may choose to use the Elmcroft Close access to their garden more frequently, and that is outside the control of the owner of No 10. If it were to be offered for sale, potential purchasers of No 10 might take a cautious view of the lack of complete ownership of land in front of the house and the location of an access to the garden land adjacent to the front door. This is the context in which the potential impact on value of the proposed new pedestrian and cycle access at the foot of the drive must be considered. The new access would be in regular use, but it would be away from the house over the council owned pavement and nothing unusual in a suburban context to cause a purchaser concern.
117. The extent to which the outlook would be affected depends firstly on the time of year and secondly whether a conscious look down towards the location of the access and store is taken when standing at the window. I must consider whether a potential purchaser would be deterred, or reduce their offer, as a result of the altered outlook and I bear in mind that the current view is down over the dustbins belonging to No 10 and cars parked in the CPZ.
118. Taking into account the impact of the proposed new access and store, alongside the altered outlook, I am of the opinion that the effect on market value of No 10 of the practical benefits is nowhere near the sum suggested by Mr Sinton. Looking at the range of agreed values for houses in the close, and bearing in mind Mr Sinton's comment that internal condition has the most effect on value, I am of the opinion that at most a reduction of £40,000 to £790,000 would be attributable to loss of the practical benefits. At 4.8% of current market value this is not sufficient to be called a substantial loss of value.

Substantial advantage

119. I now turn to the separate consideration of whether the covenant secures to the owner of No 10 practical benefits of substantial advantage. Mrs Malik's personal circumstances are described in her oral evidence and I have the difficult task of judging whether the practical benefits that she derives from the covenant are as significant as she sincerely believes, amounting overall to a substantial level of benefits. I reiterate my previous comments about the underlying impact of having sold away the side garden and an access to it, which already exposes the owner to third parties using a gate next to the front door.
120. Mrs Malik's primary concern is that the construction phase will be unbearable for her due to dust and noise, some of it immediately adjacent to her house, and that her fragile health will deteriorate further. I will consider this separately at the end of this section.
121. Beyond the construction phase Mrs Malik is concerned at the prospect of additional vehicles, including large delivery vehicles and bin collectors, massing at the end of her drive. She fears an increase in pollution, including from noise, and that such vehicles will block access to her drive for emergency vehicles. Mrs Malik explained in her written evidence that the space in front of her house (by which I believe she means the road space, not her drive) is already used by vehicles for three-point turns and she believes that this would occur more frequently as a result of the proposed development. In oral evidence witnesses have accepted that the frequency of bin collections will be unchanged from the current situation, and that the additional time taken to deal with five more bins will not amount to many minutes. Therefore, the most likely noticeable increase would be in the number of vehicles delivering to the three flats accessed from that corner, over and above deliveries which would continue to take place to 20 houses in the close. This is a level of increase which Mrs Malik may notice, but which is unlikely to be significant.
122. Mrs Malik is sensitive to the fact that pedestrians and cyclists using the new access gate would pass close to her bedroom window. The new access would certainly create a change from the current situation in the corner, but the pedestrians and cyclists would be no closer to her house than the pavement. The store is intended to provide secure storage for 12 bicycles, a standard allocation at one per bedroom for a total of 12 bedrooms in the development of seven flats. 12 is therefore the limit on the number of bicycles which might go in and out daily, although it is perfectly possible that some bicycles would not be used every day. Perhaps five (one per bedroom) would belong to residents of the rear three flats, which accommodate a maximum of 10 residents, so there might be an additional five pedestrians over and above the 12 cyclists. This potential total of five daily pedestrians and 12 daily cyclists seems to me unlikely to create a level of noise and disturbance to Mrs Malik which could be described as significant. Use of the access by visitors, and by other residents to gain access to the communal garden, is likely to be irregular and more spasmodic. Even when added to the potential number of daily users, I still find it hard to envisage the impact as significant.
123. A further concern which Mrs Malik has is that she would be overlooked and feel intruded upon by the many windows facing in her direction from the extension, from which would emanate noise and light causing a nuisance. She explained in oral evidence that she can hear music and conversations and party noise from the rear of the property as it currently stands and fears that this would only get worse. I sympathise with the sentiment but as there is already potential for noisy situations at and in the garden of the property, the practical benefit

of the covenant arises only in preventing a potential increase in the number and extent of noisy situations. There is no evidence that such an increase would be significant.

124. My final consideration must be whether cumulatively the benefits - of preventing an oblique outlook over the new access and store, preventing a modest increase in the number of delivery vehicles, preventing a limited amount of pedestrian and cyclist access in the corner of Elmcroft Close and preventing a potential increase in the number and extent of noisy situations at the property – amount to a substantial advantage. I bear in mind the definition of substantial from *Shephard*, as “considerable, solid, big”.
125. With the greatest of respect to Mrs Malik’s sensitive personal situation, I cannot see the totality of benefits conferring a substantial advantage. I consider that money would be an adequate compensation for the loss of those benefits, and I have assessed that compensation at a sum of £40,000.

The construction period

126. In *Shephard*, Carnwath LJ said [at 58]:

“In my view, account must be taken of the policy behind paragraph (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. “Reasonable user” in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor.”

127. In this case the covenant simply restricts height above a boundary wall, and makes no reference to nuisance or annoyance to secure protection from the disturbance of construction work. Such short term disturbance will inevitably occur from time to time on neighbouring properties in any urban or suburban area and there are no facts in this particular case which justify giving special weight to it. Disturbance could arise at any time from works at the property, for example to extend the basement accommodation or to landscape the garden, which would be unimpeded by the covenant.
128. The experts agreed that the construction period would last at least 12 months, and that some properties might be affected during that period. However, the access for construction would be from Eaton Rise, on the far side of the property away from Elmcroft Close, and the planning consent places a limitation on working hours. I agree with Mr Kempton that a landlord in Elmcroft Close would be unlikely to offer a rebate to their sitting tenant during the construction period, which is the best indicator that there would not be an exceptional level of disturbance in this case. I therefore award no compensation for disturbance.

129. I remain conscious that No 10 is located close to the area where a new access and store would be constructed, and that the owner suffers from ill health which could be exacerbated by unmanaged effects of those works. I deal with this in my determination.

The Tribunal's discretion

130. S.84(1)(B) requires the Tribunal to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area. Evidence on this was provided by the applicant within the report of the planning officer who recommended the grant of planning consent. In that report the officer states "...other large extensions have been granted planning permission within the vicinity of the site such as at 45, 47 and 60 Eaton Rise." I am therefore satisfied that the pattern for granting consent is established and apparent.
131. The Tribunal is also required to take into account the period at which and context in which restriction was created or imposed and any other material circumstances. The covenant was entered into 56 years ago when the planning policy framework for the area would have been very different. Councils are now required to deliver a sufficient supply of homes and the planning officer's report explains how the application for this planning consent was tested and modified to ensure compliance with the relevant planning policies in respect of the conservation area and the residential amenity of neighbouring properties.

Determination

132. I am satisfied that the applicant has established ground (aa), but not ground (c), and I therefore allow the application for modification of the covenant. Under s.84(1C) the Tribunal may add such further provisions restricting the user of the building on the land as appear to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; it may accordingly refuse to modify the restriction without some such addition.
133. I am concerned that the works in the immediate vicinity of No 10 may be prolonged, causing unnecessary disturbance to the owner. I therefore require the applicant to draft for the Tribunal's approval a scheme of management for the works to construct the new access and store which would mitigate their duration and the impact on the owner of No 10. The draft should be submitted to Mrs Malik for comment within 21 days of this decision and a final version should be filed for consideration by the Tribunal within 35 days of this decision.
134. The following order shall be made:

The restrictions in the Charges Register for the property 59 Eaton Rise shall be modified under section 84 (1)(aa) of the Law of Property Act 1925 by the insertion of the following words:

"PROVIDED that the development permitted under the grant of planning permission on 4 February 2020 by The London Borough of Ealing under reference 184748FUL and subject

to the conditions attached thereto may be implemented in accordance with the terms, details and approved drawings referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached thereto.”

135. An order modifying the restriction shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have:

(a) signified his acceptance of the proposed modification of the restriction in the Charges Register of the property; and

(b) received approval of the Tribunal to a scheme of management for the works to construct the new access and store; and

(c) paid the following sums to affected objectors:

£8,000 to Mr Adeolu Adeola, owner of No 1 Elmcroft Close

£24,000 to Ms Maleiha Malik and Ms Saira Malik, owners of No 2 Elmcroft Close

£24,000 to Mr John Beastall, owner of No 3 Elmcroft Close

£24,000 to Ms Neeta Amin, owner of No 4 Elmcroft Close

£24,000 to Ms Maria Zografou, owner of No 5 Elmcroft Close

£16,000 to Dr Rajni Dogra, owner of No 6 Elmcroft Close

£16,000 to Ms Susanta Panda, owner of No 7 Elmcroft Close

£16,000 to Ms Anita Foster, owner of No 8 Elmcroft Close

£16,000 to Mr Ng Yok Cheong and Ms Janet Yee Cheng Lee, owners of No 9 Elmcroft Close

£40,000 to Mrs Unaiza Malik, objector and owner of No 10 Elmcroft Close

£16,000 to Mr Simon Rabett, owner of No 11 Elmcroft Close

136. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 15.10 of the Tribunal’s Practice Directions dated 19 October 2020.

Mrs Diane Martin MRICS FAAV
Member, Upper Tribunal (Lands Chamber)

21 September 2021