

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge or modification – four covenants restricting use of land in cul-de-sac of single storey dwellings – planning consent for new double garage and replacement entrance drive on open garden land – whether part or all of three covenants obsolete – whether fourth covenant secures practical benefits of substantial value or advantage – s.84(1)(a), (aa) and (c), Law of Property Act 1925 – application refused

IN THE MATTER OF A NOTICE OF REFERENCE
UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN:

(1) BARRY CHRISTOPHER KEECH
(2) DEBORAH SHARON KEECH
Applicants
-and-

(1) GEOFFREY COLERIDGE
(2) PAULINE COLERIDGE
(3) RICHARD SWAINSON
(4) JACQUELINE SWAINSON

Objectors

Re: 3 Chapel Close,
Great Addington,
Kettering,
Northampton,
NN14 4RA

Diane Martin TD MRICS FAAV
7 October 2021
Royal Courts of Justice

Mr David Lonsdale for the applicants, instructed by Lamb & Holmes
Ms Lina Mattsson for objectors (1) and (2), instructed by Hewitsons LLP
Mr Richard Swainson for himself and Mrs Swainson

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The following cases are referred to in this decision:

City Inn (Jersey) Ltd v Ten Trinity Square [2008] EWCA Civ 156

Edgware Road (2015) Ltd v The Church Commissioners for England [2020] UKUT 104 (LC)

Morris & Anor v Brookmans Park Roads Ltd [2021] UKUT 125 (LC)

Re Love's and Love's Application (1994) 67 P & CR 101

Re Truman, Hanbury, Buxton & Co Ltd's Application [1956] 1 QB 261

Introduction

1. Mr Barry Keech and Mrs Deborah Keech (“the applicants”) are the freehold owners of 3 Chapel Close, Great Addington, Kettering, Northamptonshire NN14 4RA (“the property”). Chapel Close is a cul-de-sac of seven detached single storey dwellings built around 1986 in the centre of Great Addington, a small village of some 330 inhabitants.
2. On 3 February 2020 the applicants were granted planning consent (“the planning consent”) by East Northamptonshire District Council (“the Council”) for a new attached double garage, incorporating their existing single garage. The approved site plans relocate the access drive from in front of the property, opposite the entrance to No 4 Chapel Close (“No 4”), to an area of open grassed garden land opposite No 5 Chapel Close (“No 5”).
3. The first owners of the property acquired it by a conveyance dated 8 August 1986 (“the conveyance”), in which the Vendors were John Leonard Burt, Jennifer Kay Burt and Bryan William Sinfield, “trading together with partnership as Burfield Developments”.
4. The covenants in the Fifth Schedule of the conveyance are as follows (so far as is relevant):

“1. No buildings other than a single private dwellinghouse with the usual garages and outbuildings for use in connection therewith shall be erected on the land hereby conveyed or any part thereof and no buildings shall be erected on the land hereby conveyed or any part thereof unless and until the plans and elevations thereof shall first have been submitted to and in approved in writing by the Vendors

2. No trade or business shall be carried on upon the land hereby conveyed or any part thereof nor shall anything be done or placed upon the land hereby conveyed which may in the opinion of the Vendors be or become a nuisance or annoyance to the occupiers of adjoining property

...

4. Not to make any external additions or alterations of any kind whatsoever to the buildings erected on the said land hereby conveyed or any part thereof pursuant to Clause 1 of this present Schedule or to erect any other buildings erections fences or

other permanent means of enclosure upon any part of the said land without the consent in writing of the Vendors first had and obtained

5. The space between any dwellinghouse erected upon the land hereby conveyed and the road and/or private driveway giving access from the property into Main Street/Ringstead Road aforesaid shall be maintained as ornamental garden ground and entrance driveway and no trailer mobile home caravan or boat shall be kept or parked in such space

...”

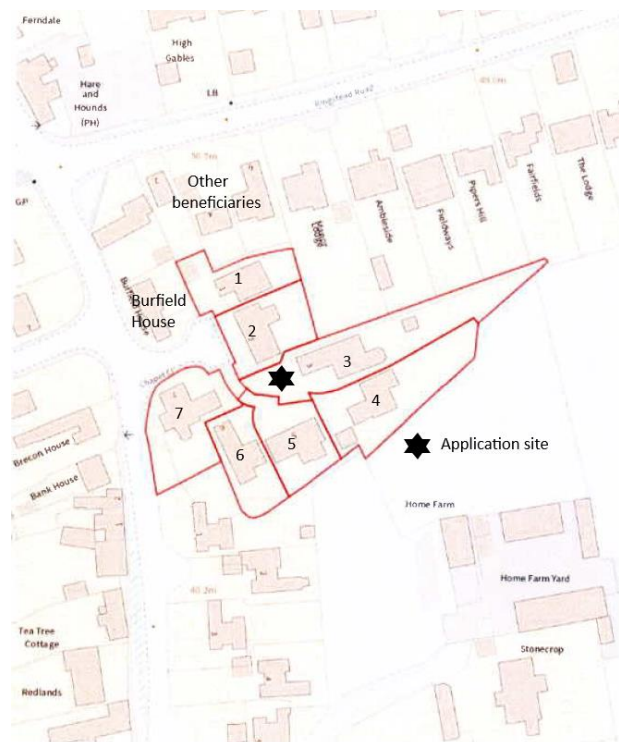
5. The applicants made an application to the Tribunal on 6 October 2020 seeking discharge of the covenants 1, 2, 4 and 5 on grounds (a), (aa) and (c) of s.84(1) of the Law of Property Act 1925. At the hearing Mr Lonsdale applied to amend the application to seek discharge of covenants 1 and 4, partial discharge of covenant 2, and modification of covenant 5 to permit implementation of the planning consent.
6. The owners of No 4, Mr and Mrs Coleridge, and the owners of No 5, Mr and Mrs Swainson, objected to the application, claiming compensation should the application be successful.
7. On 10 September 2021, less than a month before the hearing, Mr Coleridge filed a supplemental witness statement adducing evidence of a conveyance dated 15 July 1985, by which Burfield Developments acquired a small parcel of additional land adjoining the estate. The plan attached to that conveyance makes clear that the extent of the estate referred to in the 1986 conveyance included four properties adjacent to Chapel Close, the owners of which had not been notified of this application. The applicants’ solicitors sent out the additional notices on 24 September 2021.
8. On 4 October 2021 solicitors for Burfield Investments Limited, the owner of Burfield House, a property at the entrance to Chapel Close, wrote to the Tribunal asking that the hearing listed for 7 October 2021 be vacated so that their client, and others who received late notification, could consider their position and whether to submit notices of objection to the application.
9. On 6 October 2021 I confirmed that the hearing would not be vacated due to the modest nature and scale of the application and the disproportionate effect on costs which postponement would have. Moreover, my site inspection had confirmed that those who had received late notification of the application seemed unlikely to be more seriously affected by the proposals than the objectors taking part in the hearing. I allowed those who had recently received notification until 5 November 2021 to file any notice of objection with the Tribunal. I would consider any filed objections and either take them into account in the determination or, if appropriate, re-open the hearing so that further evidence could be taken.
10. During my inspection of the application site I was accompanied by Mr Tom Lathom of Lamb & Holmes for the applicants, and Ms Natalie Minott of Hewitsons LLP for Mr and Mrs Coleridge. Mr and Mrs Swainson hosted me at their property. The applicants had arranged for the boundary of the proposed double garage to be marked on the ground with

pegs and string, which I found helpful. I made internal inspections of No 4 and No 5 to see the outlook from those properties over the application site.

11. A hearing of the application took place at the Royal Courts of Justice on 7 October 2021. The applicants were represented by Mr David Lonsdale, who called Mr and Mrs Keech as witnesses of fact. Mr and Mrs Coleridge were represented by Ms Lina Mattsson, who called Mr Coleridge as a witness of fact and Mr Paul Pridmore FRICS as an expert. Mr Swainson appeared as a witness of fact for himself and Mrs Swainson.
12. On 27 October 2021 solicitors for Burfield Investments Limited submitted their notice of objection, supporting the grounds of objection made by the objectors appearing at the hearing. No further notices of objection were received and no request was made by Burfield that the hearing should reconvene to enable them to present any further evidence.

Factual background

13. The locations of the property, the application site and the objectors' properties are shown on the layout plan below. The locations of Burfield House, and the three other beneficiaries who received late notification are also shown.



14. It will be apparent from the plan that the design of the close sets Nos 3, 4, 5 and 6 in close proximity to each other around a shared central area through which their access road passes. This access road is privately maintained by the owners of the four dwellings, while the entrance to the close, including the road giving access to Nos 1, 2 and 7, is an adopted highway. The entrance road rises up into the close towards No 2 and then falls away as it passes No 7 and becomes a private road. No 2 therefore sits at a higher level than No 3, which in turn sits at a higher level than Nos 4 and 5.

15. The applicants purchased the freehold of the property on 26 February 2010 but did not move in until 2017 as they were living and working abroad. On 2 February 2012 the Council granted planning consent for a single storey extension and various internal modifications which included changing one half of the original double garage into a bedroom. In 2019 the applicants applied for consent to erect a new double garage on the application site and convert the remaining single garage to a study. This application was refused on 22 May 2019. The design of the proposed extension was considered to be out of keeping with the prevailing built form in the immediate area. The siting, scale and design were not considered to be in keeping with the character and appearance of the area. The extension would have had a dominating and oppressive impact on Nos 4, 5, 6 and 7 given the proximity, difference in levels and separation distance.
16. A revised, and now consented, application was submitted to address the reasons for refusal, reducing significantly the size of the extension by incorporating the single garage, thereby increasing the separation distance from other properties and mitigating the impact of the difference in levels. The proposed garage would sit some 2.5 metres further forward than the existing garage and be set back from the road by a minimum of 3.0 metres.
17. In the planning officer's report to the Planning Management Committee of 30 January 2020, recommending grant of permission, it was noted that "The reduction in size along with its improved set back position (relative to the refused scheme) mean the proposal would not have an overbearing and dominating appearance on the neighbouring dwellings or street scene and vicinity". It continued "The garage would not be out of scale in terms of its height, width or depth relative to the host property. The close is characterised by gaps either side of buildings and these revised proposals would reflect this given the drive and landscaping to the west and south of this proposal." The report also explained that whilst an attached garage is not permitted development, a detached single storey garage up to four metres in height, in any materials and with multiple windows, could be built on the site under permitted development.
18. It is a condition of the planning consent that the existing vehicular access (opposite No 4) shall be blocked up and use ceased within 28 days of start of use of the new vehicular access. The approved site plan shows a 175 mm high kerb along the edge of the existing access.
19. A public footpath runs between the property and No 2, on raised ground above the level of the proposed new garage, driveway and turning area. It is a condition of the planning consent that boundary screening must be approved, prior to development above slab level, in the interests of highway safety given the proximity of the footpath and difference in levels.
20. During my inspection I observed that the application site is visible from the frontage of No 4, with some screening by shrubs in the garden. From inside No 4 it is visible obliquely from a hall window and directly from a study window, again with some screening by garden shrubs. By contrast, the site is directly opposite No 5, so is visible from the frontage and also from inside looking out of the sitting room and main bedroom.

The law

1. 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-

(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 considered obsolete; or

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

...

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

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

21. The applicants seek discharge of covenant 1 under s.84(1)(a) on the basis that the restriction ought to be deemed obsolete. They do not rely on changes in character but on other circumstances which they suggest the Tribunal should deem material. They also apply under s.84(1)(aa) because the continued existence of the restriction would impede some reasonable use of the land.
22. Covenant 1 is a qualified prohibition which requires approval in writing by the vendors to any plans and elevations to be erected on the land. Mr Lonsdale submitted that Burfield Developments, a partnership of the original three vendors, had ceased to exist following the death of Mr Burt and Mr Sinfield. A witness statement of Mr Tom Latham, solicitor for the applicants, dated 6 October 2021 confirmed that he had written on 30 April 2020 to Mr and Mrs Burt and Mr Sinfield at the addresses provided in the 1986 conveyance to notify them of the application to the Tribunal. He provided a telephone note of a call received on 1 May 2020 from Mrs Burt confirming that both Mr Burt and Mr Sinfield had passed away and that she would not be opposing the application.
23. Mr Lonsdale submitted that it is unusual to have reference to vendors in a covenant unless they have retained property to benefit from it, for which there is no evidence in this case. The only surviving vendor is elderly, and not interested in opposing the application. The provision would stultify development for ever, particularly after her death and it cannot have been the intention of the parties that the covenants would become absolute. Mr Lonsdale referred me to the discussion in Preston and Newson (at 6-031 and 6-032) of cases concerning the death or dissolution of a vendor. Discharge of the covenant would leave any development proposals to be controlled by the requirement for planning permission.
24. For covenant 2 it was submitted that the first limb prohibiting trade or business remains relevant but that the second part should be discharged as obsolete under ground (a) because there will be no vendors to have an opinion on nuisance or annoyance once the remaining vendor has died. Moreover, nuisance is prevented by the law of tort.
25. Discharge of covenant 4 was also sought under grounds (a) and (aa). Once no vendor remains to give consent an absolute covenant would prevent arials, solar panels, satellite dishes or new windows being provided to the house, as well as the erection of a modest greenhouse or shed in the garden. In reality such things have already been done at No 3 and at other houses in the close without any consent having been obtained so this covenant is obsolete.
26. Covenant 5 does not refer to consent, and modification is sought to permit implementation of the planning consent.
27. Mr Lonsdale referred me to an artist’s impression of the proposed new double garage and garden layout, which had been provided by the applicants’ architect with his expert report.

I shall return to the status of that report later. I pointed out, and Mr Lonsdale had to agree, that the artist's impression of the garden layout differed from the details shown on the proposed site plan H/428/P/1 submitted with the planning application. The artist's impression showed the current drive and parking area, together with the area in front of the new garage, all down to grass with a few climbing plants growing up the blank wall of the new garage. The plans submitted for approval showed a smaller grassed area along with a substantial planted area in front of the garage. Neither showed provision for a footpath across the new garden to give access, for people not entering the garage, between the new parking area and the entrance to the house. Mr Lonsdale confirmed with his clients that the proposal shown on the plan was the intended layout and suggested that the new garden would be more attractive if planted as shown on the plan.

28. It was submitted on behalf of the applicants under s.84 (1)(c) that the proposed discharge and modification of covenants, to allow implementation of the planning consent, would not injure those benefiting from the covenants and that no loss or disadvantage would be suffered for which compensation should be paid. Mr Lonsdale cited the case of *Re Love's and Love's Application* (1994) 67 P & CR 101 where the Tribunal had modified a covenant not to erect any buildings on an open area in order to permit erection of a garage which it considered would cause no injury. The Tribunal in that case held that modification would not create a precedent because few other houses on the estate could accommodate a garage in a similar manner and each case would turn on its merits.

Application evidence

29. Mrs Keech gave evidence that she and her husband had purchased the property without knowledge of the covenants, which first came to light in 2019 when objections were made to the earlier application to erect a double garage. Also around this time, they were required by Northamptonshire Highways to cut back their Leylandii hedge on the border with the public footpath, at the back of the application site. In February 2021 they removed the hedge altogether and replaced it with young laurel shrubs to provide a new hedge.
30. Ms Mattsson questioned Mrs Keech on the way in which delivery vehicles currently gain access to No 3 and No 4, and how this would change with the proposed new layout. In particular she suggested that once the current driveway to No 3 was bordered by a 175 mm kerb, the only place for vehicles to turn at the top of the road would be in the driveway of No 4. Mrs Keech said that between November 2020 and February 2021 she had made a note from her office window of vehicle movements in that part of the close. During that period one Royal Mail van turned into the driveway of the objectors and one Anglian Water vehicle turned a circle using the driveways of No3 and No 4. Other delivery vehicles, including a fuel tanker, all drove up and reversed out and it is known that neighbours object to these vehicles turning in their driveways. The situation would remain the same after relocation of the access to No 3, except that delivery vehicles for No 3 would be able to reverse into the new driveway (opposite No 5) and then drive straight out. If necessary she would put a sign at the front door for delivery drivers.
31. Mr Swainson questioned whether it would be possible for delivery vehicles to reverse in to the proposed new narrow entrance rather than reverse into his drive at No 5 as often happens now. Mrs Keech said that the new entrance drive was tapered on both sides to allow for this.

32. Mr Keech gave evidence that the need for a new double garage stemmed from the fact that the existing single garage (remaining after conversion of the other) is too small for all but a compact vehicle. He stated that he and Mrs Keech prefer to garage their cars, unlike most people on the close who park on their drives. Mr Keech said that the new garage has no windows from which any neighbours would be overlooked and replacement of the current drive with an ornamental garden would be an improvement for their neighbours. He explained that one of the planning criteria for the new access drive was that vehicles should not have to leave in reverse mode, so provision had been made for turning in that area and a notice would be provided authorising delivery vehicles to reverse into the new drive.
33. Ms Mattsson questioned Mr Keech on the practicalities of this, and in particular how drivers who parked in the new drive would get to the front door to make their delivery when neither the plans nor the artist's impression showed a path from the parking area to the front door. Mr Keech said this had not been discussed before but a new path of paving stones would be provided, about one metre in width. He could provide no further details. Mr Swainson asked what width of garden would be left for the planting of shrubs between the path and the access road and Mr Keech said he thought about 2.0 metres.
34. It was suggested by Ms Mattsson that unless the existing path leading directly to the front door from the access road was to be removed, delivery drivers would continue to drive up to the end as they do now and block the access to No 4. Mr Keech disagreed and said that a simple sign with an arrow would be placed by the new entrance.
35. Mr Keech acknowledged that previous buildings works at the property, during the period before he and Mrs Keech moved in, had been prolonged and difficult for the neighbours due to works being done by his brother, who had become unwell during the works. The new garage would be constructed by a local company over a period of some six weeks, with parking on the current drive and elsewhere off site. I questioned whether this period would allow for the associated landscaping and Mr Keech acknowledged that another four weeks might be required for that.
36. On my site inspection I had observed the difference in levels across the application site between the access road and the boundary to the public footpath where the new laurel shrubs had been planted. I asked Mr Keech to explain how the rear of the site, supporting the laurel hedge and the footpath, was to be retained when the new drive had been excavated, since no details were provided on any plans. Mr Keech did not have a ready answer but thought that a stone wall might be provided.

The objections

37. Mr and Mrs Coleridge object to the application for discharge and modification of the covenants because permitting implementation of the planning consent would change the whole character and ambience of the close, creating a profound visual impact and removing an ornamental garden at the centre of the close. The loss of the existing gravel area in front of No 3 would increase the risk of traffic reversing into the driveways of No 4 and other properties in the close. Discharge or modification would make it more likely that other properties would be successful in such applications. Mr and Mrs Coleridge were also concerned that in seeking to have covenant 1 discharged, the applicants were opening up

the way for more than a single dwelling to be built on each plot, increasing the density of dwellings in the close.

38. Mr Coleridge accepted that the problem of delivery vehicles turning in the drive of No 4 might get better if there was an obvious sign at the entrance to the new drive for No 3. He also accepted that the proposed new planting and grassed area might not be worse than the current situation, particularly if climbing plants were provide up the bare brick wall of the new garage.
39. Mr Swainson gave evidence that he and Mrs Swainson had purchased No 5 in 2010, using the same solicitors as Mr and Mrs Keech, and had been made fully aware of the covenants which affected properties in the close. From 2012 onwards building works took place at the rear of No 3 over a prolonged period, with a cement mixer, skips and building materials in the front garden and no site management. Changes were made to the configuration of the drive and garden, reducing the open green space with no regard for the covenants. Mr and Mrs Swainson are concerned that the present proposals will devalue their property as the new driveway will be directly opposite them and replace an open green space. They feel that delivery vehicles will be more likely to use the driveway to No 5 when turning, and this is already a problem which they do not wish to get any worse.
40. Since first becoming aware of the proposal for a garage extension Mr and Mrs Swainson have carried out planting in their front garden, including a laurel hedge on the boundary against the road, to mitigate the likely impact on the view from their windows. Mr Swainson confirmed that given their previous experience of building works at No 3 they are concerned about the construction period as well as the principle of the proposals.

Expert evidence

41. The applicants had engaged their architect, Mr Neville Wood, to provide an expert report but his report did not meet the requirements of expert evidence. Mr Wood was not independent and his report did not address the issues raised by the application to the Tribunal, so it was withdrawn by Mr Lonsdale at the start of the hearing. However, Mr Wood had been instructed by the applicants to meet with the expert for the objectors and had signed a joint statement in which, inter alia, he agreed that the proposals could have a negative impact on the values of No 4 and No 5. The joint statement could not be withdrawn by Mr Lonsdale but, Mr Wood is not a valuer and his views on valuation cannot carry weight.
42. Mr and Mrs Coleridge had instructed Mr Paul Pridmore FRICS to consider the impact which discharge of the covenants would have on No 4 and other properties in the close and his opinion as to the loss of amenity or diminution in value of No 4 if the application to the Tribunal was successful. He was subsequently instructed by Mr and Mrs Swainson to report also on the impact on No 5, which he provided as an addendum to his report. Mr Pridmore qualified in 1974 and is a partner in Berrys, based in Kettering. His professional expertise includes valuation and dispute resolution. He has been an RICS accredited arbitrator since 1994.

43. Mr Pridmore inspected Chapel Close on 21 May 2021 and his report is dated 16 June 2021. He observed that apart from the application site, "...which may have been left in a state of mismanagement in order to further the application..." the close was a well managed and maintained development with garden areas maintained to a high standard, suggesting that the restrictive covenants operated for the benefit of the entire development. The application site is in a prominent position and it was his opinion that if the covenants were discharged the visual amenity of the close would be diminished. That could lead to further applications from other householders to extend onto their gardens, which would not be in the interests of the occupants of the close as a whole.
44. Mr Pridmore assessed the market value of No 4 at £400,000 and it is his opinion that construction of the proposed garage and new gravelled area at No 3 would cause the value to be reduced to £385,000, a loss of £15,000. This would result from the effect on amenity, privacy and visual outlook of No 4 and the wider implication for the environment of the close caused by placing a garage on what is an ornamental garden visible to all properties in the close except No 1. Moreover the imposition of a new kerb at the edge of the access road outside No 3 would potentially restrict access into No 4. It is already a difficult place to get into and out of as he experienced when on site the day before the hearing.
45. In Mr Pridmore's opinion the market value of No 5 is the same as No 4, balancing off the fact that No 5 has a smaller garden with the fact that the access to it is less restricted. The overall impact of the proposals on the close would be shared by No 5, but its proximity to the proposed garage and turning area would impose an intrusive outlook and have a greater visual impact, causing a reduction in value to £380,000, a loss of £20,000.
46. In cross-examination Mr Pridmore acknowledged that a simple modification of the covenants to allow implementation of the planning consent would not of itself have any general implications, or be the "thin end of the wedge" for the rest of the close. He accepted that condition 6 of the planning consent, which requires approval of boundary planting beside the footpath, would provide some protection for the future and be better than the existing grassy bank. However, he maintained his opinion that the adverse visual impact of the garage on the view from No 5 would not be diminished by boundary planting and he did not provide a different figure for diminution in value.
47. Before Mr Pridmore was stood down, I raised a point regarding the construction of covenant 5, set out below with my emphasis:
- "5. The space between any dwellinghouse erected upon the land hereby conveyed and the road and/or private driveway giving access from the property into Main Street/Ringstead Road aforesaid shall be maintained as ornamental garden ground and entrance driveway and no trailer mobile home caravan or boat shall be kept or parked in such space"
48. If the effect of the restriction is that the space between any house and the access road must be maintained as either ornamental garden ground or entrance driveway, without necessarily retaining the original layout, then re-location of the driveway would not be impeded by the covenant; only construction of the garage would be impeded. Mr Pridmore very helpfully agreed to consider the impact which construction of the garage alone would have on the

value of No 4 and No 5 and we adjourned for 10 minutes to allow him to give this proper consideration.

49. In providing an alternative opinion Mr Pridmore made the assumption that there would be modification of the clause, not discharge, and that an approved planting scheme on the boundary would be provided. On those assumptions, it was his opinion that the impact of the garage alone would cause a diminution in value to No 4 of £7,500 and to No 5 of £15,000. The impact on No 5 being a greater proportion of his original figure because of its proximity to the garage.

Closing submissions for the objectors

s.84(1)(a)

50. Ms Mattsson submitted that insufficient searches and investigations had been made by the applicants to establish conclusively that the original vendors retained no land, and so the covenants could not be deemed obsolete under ground (a) of s.84(1). The meaning of “obsolete” in the context of ground (a) was considered in *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261 and she submitted that the original purpose of the covenants for the benefit of the estate could still be fulfilled. She also cited the case of *City Inn (Jersey) Ltd v Ten Trinity Square* [2008] EWCA Civ 156 where the power to consent was not lost merely because no land was retained.
51. Considering each covenant in turn, Ms Mattsson pointed out that covenant 1 has two parts. The first part restricts building to a single private dwelling house and is not obsolete because it concerns densification which is for the benefit of the estate as a whole. She said that her clients were neutral on the second part, which requires approval of the vendors (and which will become spent when the surviving vendor dies).
52. It was common ground that the first limb of covenant 2, preventing the carrying on of trade or business, should not be discharged and Ms Mattsson agreed with Mr Lonsdale that the second limb, concerning nuisance, was not essential as protection is available under common law.
53. Covenant 4 is a consent provision and whether it is obsolete depends on whether the vendors have any retained interest. Ms Mattsson said that it was not common ground that the vendors had no retained property and the applicants’ solicitors had not carried out a sufficiently thorough investigation to establish this as a fact.
54. Covenant 5 has two limbs and it was common ground that the second limb, preventing a trailer, mobile home, caravan or boat from being kept in the space should not be discharged. Ms Mattsson submitted that the whole covenant should not be discharged as obsolete.

s.84(1)(aa)

55. Considering first whether some reasonable user is impeded, Ms Mattsson submitted that covenants 1 and 2 do not impede reasonable user. Covenant 4 may do, but retains benefit for the vendors. Under covenant 5 it is not disputed that the planning consent is reasonable user, but how much of it is prevented by the covenant depends on construction of that covenant.
56. In Ms Mattsson's submission, the key words in the covenant are "...shall be maintained..." and they should be construed against the background of the planning consent granted in 1981 for the original development so that the original layout of ornamental garden ground and driveway should be maintained for each house. Any other construction would negate the purpose of the covenant and in her submission the covenant prevents all of the proposal in the planning consent.
57. It must then be considered whether the covenant secures practical benefits of substantial value or advantage, and Ms Mattsson said that the practical benefit had been established by the evidence of Mr Coleridge and Mr Pridmore. The application site is a centrepiece of the close and to remove that green area would change the whole character of the close. It would affect the view from rooms in No 4 and No 5 and the garage would be over-bearing. She acknowledged that the Council took a different view when they granted the planning consent, but she emphasised that they were informed by the fallback position of permitted development rights for a detached garage. They had no need to go through the s.84 process.
58. Whilst Mr Lonsdale placed great reliance on the planning condition for boundary screening as a mitigation, this would be very different from an ornamental garden and unlikely to include "beautiful flowers". Ms Mattsson accepted that traffic management in this part of the close is currently difficult, and it cannot be proved that the situation will change, but everyone fears the future and further detriment.
59. Considering whether the practical benefits are of substantial value or advantage, Ms Mattsson said that even Mr Pridmore's lower figures of £7,500 and £10,000 are substantial enough to engage ground (aa). However, she submitted that a "thin end of the wedge" argument applied and cited the Tribunal's decisions in *Morris & Anor v Brookmans Park Roads Ltd* [2021] UKUT 125 (LC) and *Edgware Road (2015) Ltd v The Church Commissioners for England* [2020] UKUT 104 (LC). If the Tribunal were to grant this modification it would make a decision against a future application more difficult, with potential for extensions to the front of other properties into their ornamental gardens. The covenants protect all properties in the close and loss of that protection could not be compensated by money.
60. Mr Lonsdale had emphasised the benefit of condition 6 to the planning consent, but that condition concerned only boundary screening at the back of the new drive, not the landscaping of any other part. During the course of the hearing the applicants' evidence had shifted in describing what would be involved in implementing the planning consent. There is no firm evidence of what will replace the existing drive or how and where a new footpath might feature to link the parking area with the front door to the house. Ms Mattsson submitted that in her construction of covenant 5, which is that the layout of ornamental garden and drive must be maintained as it was originally, the loss of value figures set out by Mr Pridmore in his report remain appropriate at £15,000 for No 4 and £20,000 for No 5.

61. Ms Mattsson asked the Tribunal not to exercise its discretion to modify covenant 5 as the likely impact on the objectors could not be measured when details of the proposals were unclear. However, should the Tribunal be minded to grant modification, under s.84(1C) it could impose conditions and these should include approval of a landscaping plan before modification is granted.

s.84(1)(c)

62. Ms Mattsson submitted that ground (c) could not apply because modification would cause injury to the owners of No 5.

Closing submissions for the applicants

63. Mr Lonsdale submitted that covenants 1 and 4, together with the second limb of covenant 2 should be discharged as they are obsolete once no vendors remain. Covenant 5 could remain, subject to modification to allow implementation of the planning consent. This would allow Mr and Mrs Keech to enjoy their home and enhance its amenity.
64. Turning to the impact on others of modification, Mr Lonsdale accepted that there would be an impact on No 5 but submitted that this would be reduced as a result of the planning condition on boundary planting and suggested that one does not look out of a bedroom window. For No 4 Mr Lonsdale suggested that the outlook would be enhanced not diminished and submitted that the previous concerns regarding vehicle access issues had fallen away during the hearing. He acknowledged that some compensation might be due to No 5 but not to No 4.
65. Mr Lonsdale did not accept that there had been a shifting of evidence during the hearing, but rather a movement in what is required to accommodate competing interests whilst preserving what is good in the covenants.

Discussion – application for modification of covenant 5

66. I shall deal first with the application for a modification of covenant 5 under s.84(1)(aa) to permit implementation of the planning consent, which is plainly the desired outcome of the application. The fact that there is also an application under s.84(1)(a) for discharge of all or part of covenants 1, 2 and 4 is, I suspect, simply the result of a “catch all” approach at the initial stage. The requirements of s.84(1)(c) set a higher bar than (aa) so I will put them to one side at this stage and consider in turn the questions posed by s.84(1)(aa).

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

67. Ms Mattsson accepted on behalf of the objectors that the proposed use is reasonable.

Does the restriction impede that reasonable use?

68. It is clear that covenant 5 impedes the erection of a new garage, but whether it also impedes the provision of a new drive depends on its construction. Ms Mattsson submitted that the intention of the clause was that the original layout of gardens and drives should be maintained.
69. I disagree. The covenant does not prescribe where in the “space” between any dwelling and the road the ornamental garden ground and entrance driveway are to be maintained. The covenant (and covenants 1 and 4) allow for the possibility that a different house may come to be on the plot, with different access arrangements. There is therefore fluidity between those two uses which means that the covenant does not impede a new entrance driveway, only the new garage.

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

70. Mr Pridmore’s report, and his willingness to consider alternative propositions put to him during the hearing, were very helpful. From my inspection I agree with him that the visual impact and intrusion of the new garage would be greatest for No 5, which sits at a lower level than the application site and has principal rooms looking over it. The bedroom window is directly opposite the location of the proposed garage wall and I do not agree with Mr Lonsdale’s suggestion that one does not look out of a bedroom window. It is probably the first window that one does look out of every day – if only to check the weather – so it sets the tone for the day. The view from that window is softened by the shrubs that have been planted by Mr and Mrs Swainson, but the new garage would bring them much closer to a built structure and block some view of the sky which they now have as they look up over the application site. The view from the sitting room is more open, as it looks over the driveway, but the garage would be visible to the right hand side and would again block some view of sky currently available.
71. In his report on No 4, Mr Pridmore took into account the concerns of Mr and Mrs Coleridge over likely problems with access and turning which would result from closing off the current driveway to No 3. However, there are already significant issues in that regard and Ms Mattsson accepted that there was no evidence they would get worse. Mr Pridmore made reference to the view from front rooms at No 4 and confirmed that he had measured the distance between No 4 and the corner of the new garage at 14.0 metres. The windows facing the application site are a study window and a hall window. During my inspection I looked out through those windows and observed that the wall of the new garage, which would be at a higher level than No 4, would be visible and a small part of the view of sky from the study window would be blocked. The view is softened by shrubs in the front garden, but the covenant does secure a practical benefit to the owners of No 4.
72. I agree with Mr Pridmore that the wider relevance of the covenant in protecting the visual amenity and environment of the close as a whole is an important practical benefit to the objectors. Not only does the covenant secure the visual amenity and environment for the benefit of all owners in the close, but it provides confidence that these are not at risk - which would be a factor in the minds of prospective purchasers.

Are the practical benefits secured of substantial value or advantage?

73. Mr Pridmore assessed the current market value of both No 4 and No 5 at £400,000. He assessed the diminution in value which would arise from modification of the covenant to allow the new garage at £7,500 for No 4 and £15,000 for No 5. These figures represent a diminution in value of 1.9% for No 4 and 3.75% for No 5, neither of which could be considered as substantial.
74. I must next consider whether the practical benefits of covenant 5 are of substantial advantage to the objectors and others entitled to those benefits. The covenant restricts what can be done with the space between the dwellings and the access road. All the space is to be maintained as either ornamental garden ground or driveway and the covenant specifically prevents the parking or keeping in that space of any trailer, mobile home, caravan or boat. The original application was for complete discharge of the covenant, but this was sensibly amended to an application for modification so that control of what can be parked and kept on the space is not lost. This is an acknowledgement of the value of control over the way the space is used, in order to preserve the benefit of visual amenity and environment of the close, giving the whole an integrity. It is, perhaps, easy to take this integrity for granted and only to realise its true value once control is relaxed and the benefit eroded.
75. Although the objectors wish to prevent the new drive as well as the new garage, and there is no doubt that use of the new drive would have an impact on No 5, the key difference is that the garage is a structure with height and visual impact which the applicants propose to erect in the currently protected open space. In the same way that parking a trailer, mobile home, caravan or boat would intrude into the visual scene of the close, so the new garage would alter, for the first time, the visual integrity of the close as it was originally designed.
76. In the recent case of *Brookmans Park* the Tribunal explained [101 to 104] how the trite expression “the thin end of the wedge” can apply in a situation where one decision to modify a covenant could lead to the character of an estate being eroded over time. In that decision the character of the estate was a practical benefit of substantial advantage and there was, therefore, no jurisdiction to modify the covenants. In *Edgware Road* the circumstances were different, but the reasoning was the same, that modification for one property would make it more likely that others would seek modification and be successful in doing so.
77. The covenant in this case ensures that, by restricting the way in which the open space can be used, a line is held which protects the visual amenity, environment and integrity of the close. It is apparent that the planning system cannot deliver the same protection, particularly where decisions must be made against a backdrop of permitted development rights. It became evident during the hearing that the plans approved by the Council, even with the condition on boundary planting, left many details of the proposals unknown or uncertain. This only serves to emphasise the special value of restrictions for the mutual benefit of properties within a small estate such as Chapel Close. One modification would create at the very least the possibility of further applications and modifications, generating uncertainty for all owners over potential future developments by their neighbours on the open space in the close. The shadow of the legal process required to challenge any applications would fall over the owners.

78. Uncertainty is detrimental to the enjoyment of property and also to its value in the market. Knowing that there is a line, and that it will be held, gives confidence to present owners and prospective purchasers and is a practical benefit of substantial advantage.

Disposal – application for modification of covenant 5

79. In my judgement, based on my observations during inspection and the evidence I heard, the practical benefits secured by covenant 5 are of substantial advantage to the objectors and the other properties in Chapel Close and I therefore have no jurisdiction under s.84(1)(aa) to modify it.
80. The conditions of s.84(1)(c) are not met either because modification would injure the persons entitled to the benefit of the covenant.

Discussion – application for discharge of covenants 1, 2 (part) and 4

81. I can deal with this application shortly in the light of my decision on modification and the fact that the primary case for the applicants would not be affected by granting a discharge of these covenants.
82. Ms Mattsson submitted that none of the covenants ought to be deemed obsolete under s.84(1)(a) since their original purpose could still be fulfilled, there was insufficient evidence that the vendors retained no property and, in any event, the power to consent was not lost merely because no land was retained.
83. Mr Lonsdale referred me to discussion in Preston & Newsom concerning the death or dissolution of a vendor.

Disposal – application for discharge of covenants 1, 2 (part) and 4

84. Covenants 1, 2 and 4 still fulfil their original purpose and are not obsolete.
85. The sole remaining vendor has indicated that she does not wish to oppose the modification and it therefore seems unlikely that she would object if asked for her approval. I am not satisfied on the evidence that the requirement to obtain consent is a practical impediment to the proposals and there is therefore no basis on which I could discharge or modify the second half of each restriction.

Costs

86. This decision is final on all matters except 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 24 of the Tribunal's Practice Directions of 19 October 2020.

Mrs D N Martin MRICS FAAV

1 December 2021