UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 248 (LC) **UTLC Case Numbers: LC-2022-495**
LC-2022-496
Royal Courts of Justice
23 October 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

TWO APPLICATIONS UNDER SECTION 84
OF THE LAW OF PROPERTY ACT 1925

RESTRICTIVE COVENANTS – MODIFICATION – building scheme – covenant preventing development – previous Tribunal decision modifying covenant linked to planning permission – different scheme built out – jurisdictional stage satisfied – whether Tribunal should exercise discretion - applications granted – s.84, Law of Property Act 1925

BETWEEN:

PAUL AND DEBBY HOWARD

Applicants

JOHN AND ELIZABETH BAINES

-and-

SUNITA SURANA **Objector**

Re: 17 and 19 Icklingham Road,
Cobham,
KT11 2NQ

Peter D McCrea FRICS FCIArb
24 August 2023

Jacqueline Lean, instructed by Higgs LLP, for Mr and Mrs Howard
Mr Baines appeared for himself and Mrs Baines
Ms Surana appeared in person

The following cases are referred to in this decision:

Re Surana's Application [2016] UKUT 0368 (LC)

Re Voss's Application LP/11/1973 (unreported)

Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] UKSC 45

Housing Solutions v Smith [2023] UKUT 25 (LC)

Millgate Developments Limited and Housing Solutions Limited v Bartholomew Smith and the Alexander Devine Children's Cancer Trust [2016] UKUT 515 (LC)

Alexander Devine Children's Cancer Trust v Millgate Developments Limited [2018] EWCA Civ 2679

Introduction

1. Ms Sunita Surana lives at 21 Icklingham Road, on the exclusive Fairmile Estate in Cobham, Surrey. She previously also owned two plots of land next door, those of Nos. 17 and 19 Icklingham Road (together 'the application land') which are affected by restrictive covenants. In 2016 Ms Surana applied to the Tribunal under s.84(1) of the Law of Property Act 1925 to have those covenants modified to permit residential development. That application resulted in the Tribunal's decision in *Re Surana's Application* [2016] UKUT 0368 (LC), in which the Tribunal (Martin Rodger QC, Deputy Chamber President, and Mr Andrew Trott FRICS) permitted modification, limited to a specific planning permission or any renewal thereof, but prohibiting access to the houses through an established front hedge.

2. Having unlocked the potential of development, Ms Surana subsequently sold the application land to Indigo (Icklingham) Limited ('Indigo'). Indigo made several further planning applications, before selling No. 17 Icklingham Road ('plot 1') to Mr Paul and Mrs Debby Howard, and No. 19 Icklingham Road ('plot 2') to Mr John and Mrs Elizabeth Baines.

3. The Howards and the Baineses are now building substantial houses on the plots. They wish to access the houses through the front hedge and to that end each applied to the Tribunal for a further modification of the restrictions. For the reasons I will explain below, in fact they each require a wider modification to regularise their respective positions.

4. Despite the applications being publicised and the many beneficiaries on the estate being notified, there is no objector to the Howards' application (LC-22-495) on plot 1, and Ms Surana is the sole objector to Mr and Mrs Baines' application (LC-22-496) on plot 2, which is adjacent to her house.

5. On 29 June 2023 I carried out an accompanied site visit of plots 1 and 2, observing the substantial houses currently under construction to roof level. I also viewed plot 2 from Ms Surana's garden.

6. I heard the applications together on 24 August 2023. Mr and Mrs Howard were represented by Jacqueline Lean of counsel, Mr Baines spoke for himself and Mrs Baines, and Ms Surana represented herself, assisted by her brother. I am grateful to all of them, particularly for Ms Lean's helpful skeleton argument and submissions.

The estate and its scheme of covenants

7. In the following paragraphs I outline the lie of the land, in the most part taken with gratitude from the Tribunal's decision in *Surana.*

8. Icklingham Road runs in a south-easterly direction between the A307 Portsmouth Road and Leigh Hill Road in Cobham. It is a straight private road, about half a mile long, gated at each end, and is referred to in the relevant conveyances as Fairmile Section One but is known locally simply as the Fairmile Estate ('the Estate'). The Estate now includes many residential plots on each of which has been built a single substantial detached house. It is one of a number of sub-estates within the larger Burhill Estate, which was laid out and made subject to schemes of mutual covenants by its original owner, the Burhill Estate Company Limited ('the Company'), between 1934 and 1952.

9. Between 1934 and 1939 the Company made up Icklingham Road and then sold off vacant building plots on either side of the road. The original conveyances of the building plots annexed an identical schedule containing detailed provisions identifying the use to which land on the Estate would be put, and conferring rights and imposing restrictions on different areas to facilitate and protect the intended uses. The restrictive covenants imposed by the schedule were expressly referred to in the conveyances as a building scheme.

10. The schedule to the conveyances defined three categories of land: 'development areas', 'greenways', and 'closes' which, together with the roads, were represented on the coloured estate plan annexed to each conveyance.

Development areas

11. The development areas were sold off in individual plots to purchasers who were required to build a single house in accordance with plans approved by the Company. Alterations required the Company's consent, and the houses could be occupied only for private residential or professional purposes. Each owner was under a positive obligation to plant and thereafter to maintain hedges along specified boundaries of their plot.

12. The houses on the Estate are set back from their road frontages behind the now mature boundary hedges. They are of varying styles, materials and sizes, with those of more recent construction generally being much larger than the older properties. In *Surana*, the Tribunal heard that at least 14 of the houses then on the Estate had been constructed in the previous 10 years. Some of the more recent additions were not at that point as well screened from the road as the older properties which typically stood behind beech or laurel hedges of three metres or more in height.

13. The individual plots themselves are large, with a minimum road frontage of 85 feet, but they are not of uniform size, nor are the houses consistently distanced. With its mixture of building styles and variety of vegetation the overall impression given by the Estate is of spaciousness and absence of uniformity. These characteristics are infringed to an extent by some of the more recent properties, which maximise the use of available space and employ less conservative architectural styles. Paradoxically these modern additions, though not to any standard pattern, have a consistency of design and scale not apparent amongst their more traditional neighbours.

Greenways

14. The development areas were separated from the Estate roads by wide grass verges, referred to as greenways. They were retained by the Company, but in practice each section of the greenways is maintained by the owner of the adjoining property. Each owner had the right to create a driveway to the Estate road, and a separate pedestrian right of way over the greenways. Building on the greenways is prohibited. Trees have been planted at intervals along the greenways on both sides of the road, with usually two or three of a variety of species in front of each plot; many of these trees are now substantial mature specimens and are likely to have been planted when the Estate was first created.

Closes

15. On either side of Icklingham Road, at what is now the T-junction with Burstead Close, are two parcels of land, originally designated in the building scheme as 'closes'. The greater

part of the close on the west side of the road comprises the application land. The closes were intended to be retained and maintained by the Company as land over which residents of the Estate were to have access for recreation.

16. The covenants in section II of Part III of the schedule to each conveyance restricted the use of the closes. These are the subject of the present applications for modification. To the extent that they are relevant they provide as follows ('the Vendors' referred to being the Company):

> '1. Except as hereinafter provided no building or erection of any description will be erected on any close but notwithstanding this stipulation or any other provision in this Section contained the Vendors shall be at liberty to place erect construct lay down and maintain in on or under any close:-
>
> (a) [fences];
>
> (b) [seats benches and shelters];
>
> (c) Such buildings (other than for residential purposes) as the Vendors shall think fit for the accommodation of any employee or employees of the Vendors concerned with the care or maintenance of the close and his or their tools and apparatus;
>
> (d) [utilities apparatus] and
>
> (e) [A carriageway along the southern boundary of each of the closes].
>
> 2. The Vendors may if they think fit so to do set apart and appropriate the whole or any part of any close for use (whether exclusively or otherwise) as and for a sports ground for the purposes of all or any one or more of such sports games and pastimes as the Vendors may prescribe and in such case the Vendors shall be at liberty to erect and maintain on the land so set apart and appropriated as aforesaid such pavilions changing rooms staff accommodation and other ancillary erections and apparatus as the Vendors shall consider necessary or desirable.
>
> 3. Subject to the provisions of the last preceding clause as to sports grounds the closes will be laid out as greens gardens open spaces or pleasure grounds in such manner as the Vendors shall think fit and (subject to such contributions or subscriptions if any as may from time to time be prescribed under Section IV of Part IV of this Schedule in the case of sports grounds) will be maintained by and at the expense of the Vendors.
>
> 4. Save as hereinbefore provided no close shall be used for any purpose other than as a green garden open space or pleasure ground for the benefit (subject to and in accordance with the provisions hereinafter contained) of the Purchasers and other residents on the Vendors' Burhill Estate and their families guests servants and invitees. Provided that this stipulation is to have effect subject to the existing right of way shown on the plan and provided further that nothing herein contained shall be construed as imposing any liability on the Vendors to see to the exclusion of unauthorised persons from any close.'

17. The closes were therefore subject to two restrictions, with a variety of permissive exceptions. The first restriction was that no building or erection of any description would be erected on any close; qualified by exceptions in favour of the Vendor. The second was that 'no close shall be used for any purpose other than as a green garden open space or pleasure ground for the benefit … of the Purchasers and other residents on the Vendors' Burhill Estate'; again, this was qualified by the Vendor's right to appropriate any close for use as a sports ground.

18. The conveyance of each plot also granted the Purchaser certain rights of way and access, including rights over roads, closes and greenways. So far as they concern the closes, those rights are at Section IV of Part IV of the schedule and comprise the following:

> '1. Subject to the special provisions hereinafter contained with respect to sports grounds each Purchaser shall have for himself and his family guests servants and invitees full and free rights and liberty of access to and enjoyment of the closes in common with the Vendors and all persons authorised by them and any other persons having the like right.
>
> 2. [Rights to be exercisable in accordance with bye-laws and regulations made by the Vendors].
>
> 3. The Vendors may from time to time fix hours for the opening and closing of any close and in such case the rights aforesaid shall not be exercisable during the hours of closing; and may surround any close with fences having an entrance or entrances therein to give access to such close; and may fit any such entrance or entrances with gates to be opened or closed in accordance with such hours of opening and closing as may from time to time be fixed as aforesaid.
>
> 4. …
>
> 5. In the event of any close or any part of any close being appropriated for use as a sports ground the Vendors may if they think fit –
>
> (a) [Restrict access and use to the members of any club approved by the Vendors].
>
> (b) [Require payment of periodical contributions to the maintenance of such sports ground]; and
>
> (c) [Make rules and regulations].'

19. As the Tribunal observed, the purchaser's rights of access were therefore not indefeasible. In the (probably unlikely) event that the close was appropriated for use as a sports ground the purchaser could be prevented from having access to the close unless he or she became a member of an approved sports club and contributed to the maintenance of the close for that purpose.

20. In 2015 the Estate roads, the greenways, and the closes (to the extent that they had not previously been sold off) were sold for £1 by the Company to Fairmile Estate Ltd, a newly established company owned by the residents of the Estate.

The application land

21. The application land has a trapezoidal area of about just over an acre, divided equally with plots 1 and 2 each extending to about 0.52 acres. Each plot has a continuous hedge frontage to Icklingham Road, and a rear boundary adjoining a school. Plot 1, at 17 Icklingham Road, to the south east (or, to the left when viewed from the road) adjoins number 15 - 'Fair House' formerly known as Druids Lodge. Plot 2 adjoins the private drive to Ms Surana's property at 21, which sits behind 'Breezes' - a very large house of relatively recent construction. The application land is currently accessed from this drive.

22. So standing on Icklingham Road and looking from left to right (south to north), we have 'Fair House' (15), plot 1 (17), plot 2 (19) (both behind a hedge), then the drive servicing both Ms Surana's house (21) and, for the moment at least, the application land, and finally 'Breezes', with Ms Surana's house behind it.

23. Despite the original intention, the application land has not been used for recreation by residents of the Estate for more than 70 years. In 1952 it was sold by the Company to the owner 'Druid's Lodge'. The land was enclosed and used exclusively for the enjoyment of the owners of Druids Lodge, and who built a greenhouse on the land. In 1962 it was sold on to the owner of No.21, a Mr John Purefoy and from 1976 the Surana family.

24. While the other residents of the Estate were therefore unable in practice to exercise the rights of access to the application land for recreation given to them by the building scheme, nevertheless the conveyance repeated the same scheme of covenants as already bound the Estate, prohibiting development of the application land and restricting its use to communal recreation.

25. As outlined in *Surana*, there have been a number of historic departures from the scheme of covenants. In *Re Voss's Application* LP/11/1973 (unreported), the Lands Tribunal granted a proposed modification on land further to the north on Icklingham Road, which was originally intended to form a link road into land to the west of the Estate. The land was sold by the Company to an adjoining owner subject to the full estate covenants, until the successful application to the Lands Tribunal to enable residential development.

26. Among the half-dozen further sales made by the Company, of most relevance is the sale of the 'close' opposite the application land. When sold, for the purposes of the schedule of restrictions that close was deemed a development plot. In the case of the application land, it was sold expressly on the basis that it was deemed to be a close. The schedule to the conveyance continues to permit access onto the application land by other residents of the Burhill Estate. In *Surana* (at [59]), the Tribunal considered this to be peripheral to the issue to be determined, and I take a similar view. I heard no submissions or evidence on the point, and express no view about it, save noting that in any event whether it is a negative covenant over which the 1925 Act gives the Tribunal jurisdiction is questionable.

The Tribunal's decision in *Surana*

27. The application land has been the subject of a series of planning decisions by Elmbridge Borough Council. In her application to the Tribunal, Ms Surana relied on two planning consents, both of which were for one house on each of the two plots. The difference between them was that in consent 2014/2373, the plots would be accessed from Icklingham Road, 'punching through' the hedge, whereas in 2014/4564 the plots would be accessed from the

side, over Ms Surana's drive, with plot 1 having vehicular access over plot 2.

28. The Tribunal considered the application in *Surana* by identifying two aspects for consideration. First, whether by preventing the proposed development of the application land the covenants secured, as a substantial practical benefit, the integrity of the building scheme and the protection of the closes as undeveloped land; and secondly, whether by preventing development the covenants secured, as a substantial practical benefit, the visual and other amenity of the persons entitled to the benefit of them.

29. The Tribunal recognised that to some residents a modification of the restrictions may appear to weaken the covenants across the Estate as a whole, but it was satisfied that the overall integrity of the scheme of covenants would not be further jeopardised by permitting Ms Surana's application; as observed in *Re Voss's Application*, the scheme of covenants was already destabilised by the sale of individual plots of land originally designated as road, greenways or closes.

30. As regards the second aspect, the key determinant of the character and amenity of the Estate was the system of greenways on either side of the road, rather than the undeveloped closes which had long since been appropriated into private use, and which were shielded from view by tall hedges. The Tribunal was satisfied that the development proposed at that point was in keeping with other houses on the Estate, and would not have a substantial effect on the amenity of the Estate in general or on neighbouring properties in particular. The dominant feature of the frontage of the application land was the greenway and the tall hedge behind it. The Tribunal considered that provided the hedge was maintained, and kept to a minimum height of 2.5m, the visual amenity of the Estate would be preserved and the development would not adversely affect the character of the Estate. While the view of the application land from neighbouring properties and that of residents would change, that did not inevitably mean that a substantial practical benefit would be lost.

31. The Tribunal found that money would in principle be capable of providing adequate compensation for loss of amenity or other disadvantage, but on the evidence it was satisfied that the objectors would suffer no loss or disadvantage which would require such compensation.

32. The Tribunal considered it appropriate (at [95]):

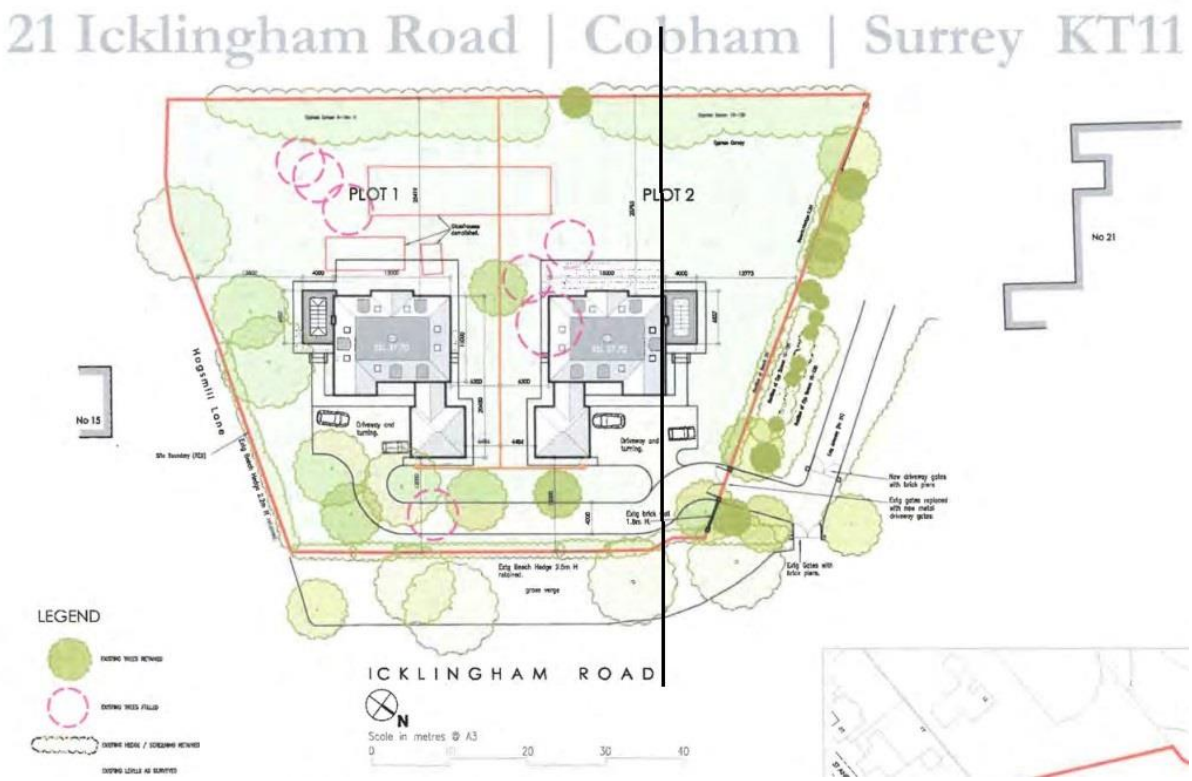
> '….to distinguish between the two schemes of development for which planning permission has been obtained. The first planning permission, reference 2014/2373, dated 2 September 2014 shows each of the two proposed detached houses having its own driveway and crossover onto Icklingham Road. This would involve the creation of two new gaps in the existing beech hedge. The second planning permission, reference 2014/4564, dated 12 January 2015 shows both the proposed houses sharing a driveway running parallel to, but inside, the existing beech hedge and joining the existing driveway connecting Icklingham Road to the applicant's house at No. 21. The second permission would therefore maintain the integrity of the existing hedge. Our assessment of the impact of the development on the visual amenity of the Estate has assumed that the application land will continue to be fully screened as it presently is. The retention of the existing hedge at a height of no less than 2.5m is therefore an important factor in ensuring that the amenity of those with the benefit of the covenants is not adversely affected by the proposals.

96. The following order will accordingly be made:

> "The restrictions of the Estate building scheme relating to closes shall be modified insofar as they affect the application land so as to permit the development for which detailed planning permission was granted by Elmbridge Borough Council on 12 January 2015 under reference 2014/4564 and in accordance with the terms, details and approved plans referred to therein, provided always that the existing beech hedge on the application land fronting the greenway to Icklingham Road shall not be reduced below a minimum height of 2.5m. 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 to such permission."

97. An order modifying the restrictions to this extent will be made by the Tribunal providing the applicant shall have notified the Tribunal in writing within three months of the date hereof of her acceptance of the terms of the proposed modifications.'

33. The Tribunal's modification therefore authorised development for two houses, each having a gross internal area of approximately 446 sqm, plus 39 sqm of garage. The houses were located as shown below (with Ms Surana's property, number 21, visible on the right). On this plan I have marked a line showing the position of the main three storey elevation closest to Ms Surana's property, to which I shall return later.



Events post-*Surana*

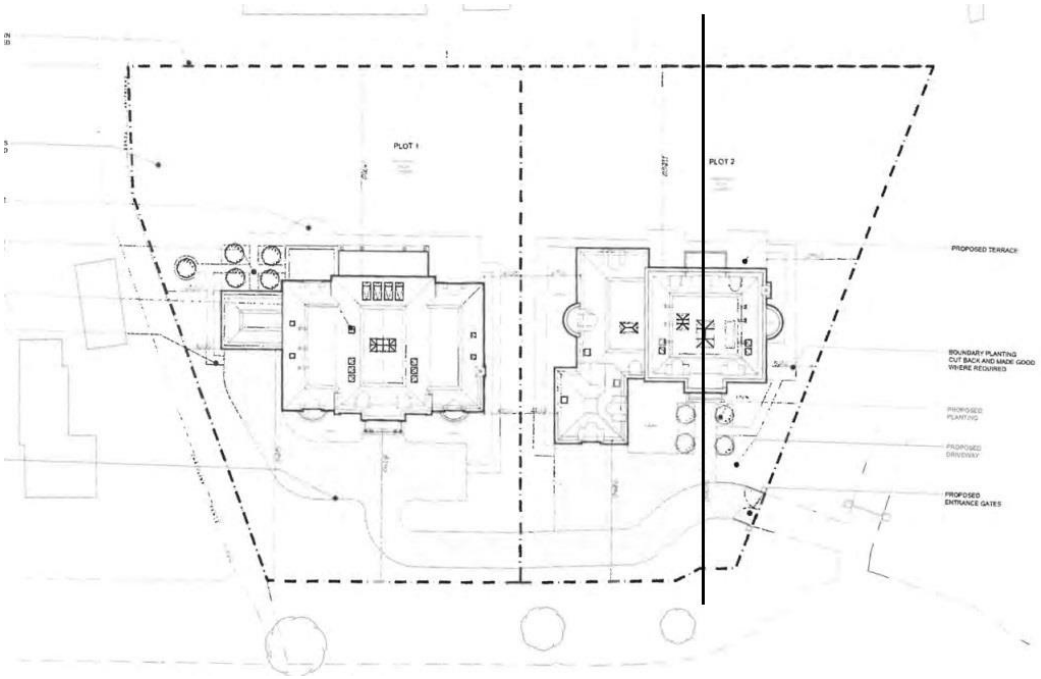
34. Ms Surana notified the Tribunal of her acceptance of the terms of the proposed modification, and the Registrar drew up an Order dated 7 December 2016, amended on 6 February 2017. There matters lay, as it seems that no application was made to the Land Registry to alter the title of the application land until the current applicants did so on 4 July 2023, following my site visit. At the date of the hearing, this was awaiting the Registry's attention. Ms Lean accepted that references to 'further' modification were therefore limited to the position pre-*Surana*, as the restrictions had not been modified at the Land Registry.

35. In May 2020 Ms Surana sold the application land to Indigo for £3.5 million. Indigo made several subsequent applications, termed as 'variations' to the previous consents, but as Ms Lean very fairly accepted these were in effect new permissions under s.73 of the Town and Country Planning Act 1990.

36. I assume that Indigo had taken some form of option agreement, because its first application predated its acquisition of the land. In 2019, it applied to vary two of the conditions attached to the implementable permission, relating to approved plans and materials. That application (2019/3475, which I shall call 'the 2019 permission') was approved by Elmbridge BC on 25 March 2020, authorising two considerably larger houses - the previous floor areas of 485 sqm each having been increased to 790 sqm. Access remained through the side entrance over Ms Surana's land.

37. In July 2020, having purchased the land, Indigo made another application, this time to vary the 2019 permission, reducing the size of the houses to around 714 sqm, to alter the siting of them, alter layouts, rooflines etc. That application was granted (2020/1742) by Elmbridge BC on 29 October 2020. This was the scheme which has been built out and at the time of my site visit was nearing completion, and I shall call it the 'constructed permission'.

38. The approved site plan of the constructed permission is reproduced below, with my added black line broadly in the same position as before.



39. Indigo then decided to change the access to the plots by making two new entrances from Icklingham Road, 'punching through' the hedge (at odds with the Tribunal's order). A further application to vary was refused by Elmbridge on the basis that it wasn't really a variation, before a second substantive application (2021/0058, which I shall call 'the access permission') was granted on 13 April 2021, subject to conditions.

40. At this point the Howards and the Baineses enter the picture. Mr and Mrs Howard bought plot 1 from Indigo on 25 January 2022 for £2,550,000, Mr and Mrs Baines bought plot 2 on 14 January 2022 for £2,525,000. Unfortunately, rights of access across plot 2 were not reserved for plot 1, rendering it at that point landlocked.

41. Both Mr Howard and Mr Baines said, and I accept, that they were aware of the Tribunal's decision in *Surana*, but had been advised and understood that as far as the design and layout of the houses was concerned, the 'variation' planning consents were in accordance with the Tribunal authorising any subsequent planning permission that was a renewal of the implementable permission. However, they understood that they would need to apply to the Tribunal to be able to access the plots through the hedges and so made their applications under s.84 of the 1925 Act in September 2022.

42. It was only at the site visit on 29 June, when I raised the possibility of the constructed houses being in breach of the covenants as authorised to be modified by *Surana*, that they became aware of that being a potential problem.

43. I should add at this point that it became evident at the site visit that there is a significant boundary dispute between Mr and Mrs Baines and Ms Surana. A substantial hedge has been cut down by Mr and Mrs Baines (believing the hedge was on their land – Ms Surana disagrees), and there are accusations of bad faith. However, that dispute is not within the Tribunal's jurisdiction, and the parties must look elsewhere for resolution.

44. At the hearing, both Mr Baines and Ms Lean for the Howards accepted that that the houses currently under construction were indeed in breach of the restriction as authorised by *Surana*. Consequently, Mr and Mrs Howard have two problems: the first is that their plot has no vehicular access; the second is that the house they are building is in breach of the restrictions as authorised to be modified in *Surana*. Mr and Mrs Baines also have two problems; the first is that their house is also in breach, and secondly that there is a live objection from Ms Surana to their current application to the Tribunal. In each case, there is the added issue that the title to the plots was not modified at the Land Registry.

45. The applicants are therefore in the unhappy position of each paying over £2.5 million for their plots and are currently building substantial houses at no doubt considerable cost, but with these issues outstanding.

The applications

46. There are two applications before the Tribunal, which were heard together and are the subject of this combined decision. While Mr and Mrs Howard were represented by Ms Lean, and Mr Baines represented himself, to all intents the applications are the same. At the hearing, Mr Baines understandably did not demur from Ms Lean's submissions, nor her sensible concessions.

47. The applicants' largely identical statements of case seek two alternative modifications. The first involves the discharge of the 'close' restrictions affecting the application land, and instead substituting in their place most of the 'development area' restrictions referred to at paragraph 11, with some alterations. In the alternative, the applicants seek modification to authorise the constructed permission and the access permission.

48. The applications are brought under ground (aa) of s.84(1) of the 1925 Act which gives the Tribunal the power to discharge or modify a restriction where it is satisfied 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;
>
> …
>
> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—
>
> > (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
> >
> > (b) is contrary to the public interest;
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.'

49. It will become relevant later to note that section (1A) provides two alternative routes – first that of substantiality of value or advantage to the covenant holders, or secondly that impeding the user is contrary to the public interest.

50. In determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal is required to take into account the statutory development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area. It must also have regard to the period at which and context in which the restriction was imposed and any other material circumstances.

51. In *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45, the Supreme Court emphasised that the Tribunal 'shall have power' but is not obliged to exercise that power. The applicant must first satisfy at least one of the grounds under s.84(1), as part of what the Supreme Court called the jurisdictional stage, before the Tribunal should then decide whether to exercise its discretion to discharge or modify.

Discussion

52. In assessing whether the applicants can satisfy ground (aa), there are two issues for determination. First, the applicants' wish to access the plots on new drives through the hedge, which the Tribunal has previously rejected. Secondly, whether the size and location of the two houses currently under construction will have a greater impact on the amenity of

Ms Surana's property and the Estate generally to such an extent that the prevention of that impact is of substantial value or advantage. The public interest point within the second limb of section (1A) is not pursued.

53. Dealing first with the access issue, Ms Lean pointed first to the access permission, 2021/0058. This was omitted from the bundle, and in the absence of any expert evidence in this application I told the parties at the hearing that I would look at the planning webpages of Elmbridge BC. As regards the access permission, the planning officer's report, in recommending the grant of planning permission, said:

> "The design of the entrance gates and piers are considered to be of a scale and design commensurate with the character of the area. Whilst part of the boundary hedge is required to be removed, the remainder would be retained and would be reflective of other properties in the area which have accesses 'punched through' boundary hedging'.

54. The applicants had drawn up a schedule of houses on the Estate where access drives had been installed through hedges. These included two accesses at Fairways (formerly Druid's Lodge) immediately to the south of the application land, one drive at 'Breezes', immediately to the north, two drives at 25 Icklingham Road, immediately to the north of 'Breezes' and a new replacement drive at 16 Icklingham Road, opposite 'Breezes', in a planning permission granted in 2020.

55. I am satisfied that in the seven years since the Tribunal's decision in *Surana*, events have moved on and the proposal to install two drives in the hedge is acceptable, noting in passing that in respect of plot 1 there are no objections, and in respect of plot 2 Ms Surana does not object to the new drive being installed. However, in all other respects the hedge must remain as an important part of the street scene.

56. Turning now to the size and location of the houses, from the plans and elevations supplied and my inspection, they seem not dissimilar to many of the houses that have been constructed within the last ten years. As Ms Lean submitted, the planning officer was content that as regards Ms Surana's house, the house on plot 2 would be sufficiently distant that Ms Surana would not suffer an overbearing impact. The only window higher than first floor level directly facing her property will be frosted glass, secured by a planning condition.

57. However, much of the flavour of the officer's report compares the implemented permission (714 sqm) with the much larger (790 sqm) houses which were permitted by 2019/3475, rather than the 485 sqm houses permitted by the earlier permission that formed the basis of the Tribunal's decision. Whilst I am satisfied that the houses being constructed represent a 'reasonable user' for the purposes of the Act, the extent of the impact on Ms Surana's property is a different question. There is no question that the restrictions prevent that user.

58. In the plans I have included above, owing to the ongoing boundary dispute I have avoided any reference to whether the house on plot 2 is closer to the disputed boundary line. But they demonstrate that in comparison with that permitted by *Surana*, the house on plot 2 is considerably larger and, as regards the bulk of the three-storey element of the building, it is noticeably closer to Ms Surana's house. Aside from the boundary dispute, that is the nub of Ms Surana's objection.

59. In assessing whether by preventing the construction of the new houses (putting aside for the

moment the fact that they are almost complete) the restrictions secure to Ms Surana a practical benefit of substantial value or advantage, I must have regard to several factors.

60. The first is the Tribunal's decision in *Surana* (it matters not that Ms Surana herself was the applicant and is now the objector, because I am dealing with the effect on properties). Whilst the restrictions have not yet been modified at the Land Registry, that must be the starting point. I am satisfied that preventing the proposed development does secure to Ms Surana a practical benefit, and I did not understand Ms Lean (or Mr Baines) to argue otherwise.

61. There is a circularity in the related points of whether an objector should be awarded any sum to make up for any loss or disadvantage suffered should modification be ordered. Once the sum required to compensate her for the loss of restriction reaches a certain level, it may become difficult to say that the benefit of the restriction is not of substantial value. At that point and the question of compensation falls away as the application is refused.

62. The problem here is that there is no expert evidence at all, and whilst as an expert Tribunal I would be able to form an approximate judgment of the diminution in value of Ms Surana's property, based on the sale values of the plots, I do not think I am able to do so in this case. In *Surana* the Tribunal accepted that there would be no diminution in value to the properties to the objectors to that application, but since Ms Surana was the applicant, any effect on her property of development on the application land was not considered.

63. I am mindful that, to an extent, Ms Surana has already been partially compensated for the effect of the adjoining development – by selling the application land to Indigo for £3.5 million. There is no evidence to suggest that the sale price was in any way linked to development restricted to that permitted by the Tribunal; indeed, Indigo were making alternative planning applications before acquiring the land, and there is nothing before me to allow my to confidently assess the difference, if any, between the effect on value of the new houses as against those permitted by *Surana*.

64. On the evidence I am satisfied that both the new accesses and the houses currently under construction represent a reasonable user of the application land, and there are no practical benefits of substantial value or advantage in preventing their construction. There is no greater overlooking, no particular loss of sense of space than from the permitted development, and no greater impact on the integrity of the building scheme. So, the applicants have succeeded on the jurisdictional stage under ground (aa).

65. I must then turn to whether I should exercise my discretion to modify the restrictions to regularise the difficulties the applicants face.

66. In these applications, there are *some* similarities with the circumstances in *Alexander Devine*, in that the Tribunal is being asked to modify a restriction in order to regularise the situation where construction work has already taken place in breach of that restriction. But as I will explain, the circumstances are not identical.

67. The matter of the covenants affecting the land referred to in *Alexander Devine* has been the subject of four different decisions. In the latest, *Housing Solutions v Smith* [2023] UKUT 25 (LC), the Tribunal (Judge Elizabeth Cooke and Mr Mark Higgin FRICS) outlined how the Tribunal's decision to modify restrictions (*Millgate Developments Limited and Housing Solutions Limited v Bartholomew Smith and the Alexander Devine Children's Cancer Trust*

[2016] UKUT 515 (LC)) was overturned by the Court of Appeal ([2018] EWCA Civ 2679), with whom the Supreme Court agreed (but for different reasons) in *Alexander Devine*. The covenants remained unmodified until the applicant finally succeeded at the Tribunal in *Housing Solutions.*

68. I shall not repeat what was said in those decisions, save these points. Before the Tribunal in *Millgate Developments Limited*, the Tribunal decided that because the value of the restriction preventing development to the neighbouring children's hospice was substantial, the first limb of section (1A) had not been met. However, the Tribunal decided that under the second limb, there was a public interest in the residential units which had been built in breach of the restriction not lying empty, and it ordered modification.

69. In *Alexander Devine* the Supreme Court considered that at the discretionary stage, the Tribunal failed to take account of two omitted factors. The first was that the developer, Millgate, could have built the offending units on the part of the site which was unencumbered by the restrictions, but chose not to do so. There would have been no need to apply to the Tribunal for modification and the hospice would have been left unaffected. By this cynical breach Millgate put paid to what would have been a satisfactory outcome. It was important to deter such a cynical breach, especially when that conduct has produced what the Supreme Court called a land-use conflict (the public interest of the housing not remaining empty weighed against the continuation of the covenant protecting the hospice providing a sanctuary for children dying of cancer).

70. The second factor was that had this cynical breach not been committed, it would have been unlikely that the applicant would have succeeded under the public interest limb. They would have been met with the objection that planning permission would have been granted for the affordable housing to have been erected on the unencumbered land. By going ahead with development without first applying to the Tribunal, Millgate put itself in the position of being able to present the Tribunal with a *fait accompli* where it could succeed under the public interest limb. It was, the Supreme Court found, important at the discretionary stage to deter such a cynical breach where, because the Tribunal will look at the public interest position at the date of the hearing, that cynical conduct would directly reward the wrongdoer by transforming its prospect of success under the public interest ground.

71. By the time the matter came back to the Tribunal in *Housing Solutions*, several things had changed. The first was that Millgate had paid a 'substantial sum' to the Alexander Devine hospice, such that it no longer objected to modification. Its cynical breach had evidently proved costly. The second was that the public interest ground was no longer relied upon, and the third was that the Tribunal was satisfied that the proposed modification did not cause harm to the remaining objector, Mr Barty Smith. So, the 'omitted factors' could not play the same role as they did previously. The Tribunal ordered modification on the basis that:

> 'It is not for the Tribunal to pursue a mission of punishment where the modification of the covenants will not injure [the objector], where [the developer] has already paid a heavy price for its misconduct, and where the cynical breach of covenant has made no difference to the fact of the Tribunal's jurisdiction.'

72. In this case (unlike in *Housing Solutions)* the applicants or their predecessor in title have not yet paid any price to the beneficiaries of the covenants, including Mrs Surana, for their breach of the restrictions. For her part Ms Surana has not sought to prevent them from

building in breach by applying to the court for an injunction. If the covenants are modified the applicants' property rights will be clear and they will be able to enjoy their new houses, or sell them, without fear of future enforcement of the restrictions.

73. But the Tribunal's jurisdiction under s.84 is about the future, and not the past. Modification will not rewrite history and it will not absolve the applicants from responsibility for their previous breaches of the covenants. Nor will it deprive beneficiaries of the covenants of their rights to seek damages for the breaches. In that sense the applicants are in a similar position to Housing Solutions (although Millgate had already settled a claim for damages before applying to the tribunal for discharge of the breached restrictions). Ms Surana has not sought to have the new houses demolished. The Tribunal would not be approving or rewarding cynical conduct by modifying the restrictions to regularise the position for the future because the right to seek a financial remedy for the past breach would remain. In those circumstances the appropriate exercise of the tribunal's discretion is to allow modification.

74. There is one final point which is relevant to any future applications to the Tribunal where modification has been ordered pegged to a particular planning permission. As the applicants now accept, variations of planning permissions (especially where they involve significant changes to, for instance, floor areas, locations or external appearance) are not what the Tribunal envisaged and permitted by '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 to such permission.'

75. In this case, the issue doesn't arise because the houses have been built. I can therefore limit modification to permitting development for which detailed planning permission was granted by Elmbridge Borough Council under the constructed permission and the access permission. The hedge must be maintained and/or renewed, save for the driveways. The applications are granted, and the parties are directed to now submit a draft order putting this into effect.

Peter D McCrea FRICS FCIArb

23 October 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.