UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 119 (LC)

LC-2021-472

North Shields Tribunal Hearing Centre
NE29 6AR

26 May 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPLICATION UNDER SECTION 84, LAW OF PROPERTY ACT 1925

RESTRICTIVE COVENANTS – MODIFICATION – residential estate subject to long standing scheme of mutual covenants – development requiring estate committee's approval – whether restriction securing practical benefits of substantial value or advantage – Tribunal's discretion – application refused – s.81(1), Law of Property Act 1925

BETWEEN:

COLLEEN CAIRNS (1)
KIM MOORE (2)

Applicants

-and-

THE COMMITTEE OF THE PAINSHAWFIELD, BATT HOUSE AND BIRCHES NOOK ESTATE AND OTHERS

Objectors

Re: 21 Cade Hill Road,
The Painshawfield Estate
Stocksfield
Northumberland NE43 7PT

Martin Rodger KC, Deputy Chamber President and Peter D McCrea FRICS FCIArb

7-8 March 2023

James Hanham, instructed by Gordons LLP, for the Applicants
Simon Goldberg KC, instructed by Muckle LLP, for the Estate Committee
Other objectors attended but were not represented

The following cases are referred to in this decision:

Lakeman v Moat (unreported) (1911)

Price v Bouch (1987) P&CR 257

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

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

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

Re Chandler's Application (1958) 9 P&CR 512

Re: Snaith & Dolding's Application (1995) 71 P&CR 104

Introduction

1. On the edge of the Northumberland commuter village of Stocksfield, about 14 miles west of Newcastle upon Tyne, lies the Painshawfield, Batt House and Birches Nook Estate ('the Estate'). Encompassing some 215 acres, the Estate dates from 1895, when 53 members of the Northern Allotments Society purchased the Painshawfield, Batt House, and Birches Nook farms at auction with a view to 'allotting' the land for residential development according to a scheme of mutual covenants.

2. The quality of the houses and the preservation of the general amenity of the Estate were important to the original purchasers, who were concerned that 'each may the more surely and advantageously enjoy all the benefits of his share…'. In 'Four Valuable Farms', a chronicle of the Estate published to celebrate its centenary, the local historian Robert M Browell explained the motivation of the original purchasers in securing those objects by a Deed of Mutual Covenant entered into by each of them on 30 May 1895 ('the DMC'):

> "… a document drawn up by men who had watched the dereliction of the countryside through the unrestricted transfer of investment into industry, men who were firmly resolved to build a way of life in which family and home were removed from the business and administrative pressures of the city. In their new land they would not allow the pursuit of any business whatsoever nor would they tolerate unacceptable levels of noise or smell. They would position their dwellings and design them subject to mutual agreement and all decisions affecting their well-being would be arrived at through a fully democratic process of majority vote."

3. The control over development and the democratic processes referred to by Mr Browell, are given effect by clause 14 of the DMC, by which the original purchasers of the Estate covenanted for themselves and their successor that:

> "14.—A MAJORITY of the Mutual Covenantors may at any duly convened meeting fix the position of building lines on any part of the estate and no dwelling house coal house hen house cow byre stable piggery greenhouse or any other building whatever shall be built created or set up upon the land lying between the said building line and the road or roads abutting upon each lot and such majority may appoint a Committee of not less than nine members chosen from the Mutual Covenantors whose duty it shall be to inspect plans of dwelling-houses and other buildings proposed to be erected and no dwelling house or other building shall be erected unless the plans thereof have first been submitted to and approved by a majority of such committee…."

4. The DMC of 1895 remains the local law of the Estate to this day.

5. In November 2014, the applicants, Colleen Cairns and Kim Moore, bought a bungalow on the Estate at 21 Cade Hill Road ('the application land'). The bungalow is on a site of nearly an acre, and the applicants have obtained planning permission to demolish it and build two detached houses, one which they intend to live in and one which they propose to sell to fund

the development. As required by clause 14 of the DMC, they submitted plans to the Estate Committee ('the Committee'), but these were twice rejected. They now apply to the Tribunal under s.84(1) of the Law of Property Act 1925 ('the 1925 Act') to modify the DMC in so far as it binds the application land to enable the development to proceed. The Committee objects to the application to the Tribunal, as do 151 individual residents of the Estate who have filed notices of objections with the Tribunal.

6. This is far from being the first occasion when the protection afforded by the DMC has been tested in legal proceedings. Within less than 20 years of the Estate's formation, in the unreported case of *Lakeman v Moat* (1911) Neville J ruled that the Committee was justified in refusing to approve plans submitted to it on the grounds of the proposed building location. More recently, in *Price v Bouch* (1987) P&CR 257, Millet J held that there was no implied covenant that the Committee's approval of plans could not be unreasonably withheld (as the decision was that of a majority of a committee who might each have different reasons for refusal). He also held that while it may be appropriate and would normally be convenient for the Committee to give reasons for its decision, there was no legal duty on it to do so.

7. Having been unsuccessful in the High Court, the claimants in *Price v Bouch* made an application to the Lands Tribunal for modification of the DMC under section 84 of the 1925 Act, attracting a significant number of objections from other residents. The application was eventually withdrawn when a measured survey revealed that the applicants' plot was smaller than first thought, and their proposals would result in a higher density of development.

8. At the hearing of the application the applicants were represented by Mr James Hanham and the Committee by Mr Simon Goldberg KC. The remaining objectors were unrepresented, but many of them attended the hearing in person or by video link. Evidence of fact for the applicants was given by Kim Moore, and for the Committee by its current chair, Mrs Helen Rae, and by its former secretary, Mr Ian Brown. Expert evidence was given by Mr Alistair Woodruff FRICS for the applicants, and Mr Andrew Entwistle FRICS FAAV for the Committee. We are grateful to them all.

9. On the afternoon before the hearing, we inspected the application land from the roadside, and viewed it from the gardens and from inside some of the nearest objectors' properties. We then walked around the Estate accompanied by Ms Moore, Mr Hanham, Mr Entwistle, and one of the objectors, Mr Mike Bishop, who had been liaising helpfully between the many unrepresented objectors and the Tribunal.

The Estate

10. Over time, the Estate's original 53 lots, varying from 1 to 20 acres, have been further divided such that there are now 302 plots. Detached houses have been built on most plots, but in some areas of the Estate there are groups of semi-detached properties. The houses are of varying ages and design, but if one style predominates it is Edwardian Arts and Crafts. The building lines determined in 1895 continue to be observed and mature trees now line many of the estate roads. Many properties are screened by mature foliage. During our site inspection, we formed an impression of a desirable, quiet and secluded location, ideal for commuters to the Tyneside conurbation.

11. The Estate is bounded by New Ridley Road to the south-east, Batt House Road to the south, Ridley Mill Road to the west, and the A695 at the northern tip. Internal roads are laid in a grid, but any impression of uniformity is dispelled by the mature setting and its many well-established trees and hedges, occasional open greens, and sloping topography featuring some steep escarpments. The main internal roads, running north-west from New Ridley Road, are Apperley Road and Meadowfield Road. From the A695 and Stocksfield, the main access into the Estate is from Cade Hill Road, which runs south-west from the A695, intersecting with Apperley and Meadowfield Roads.

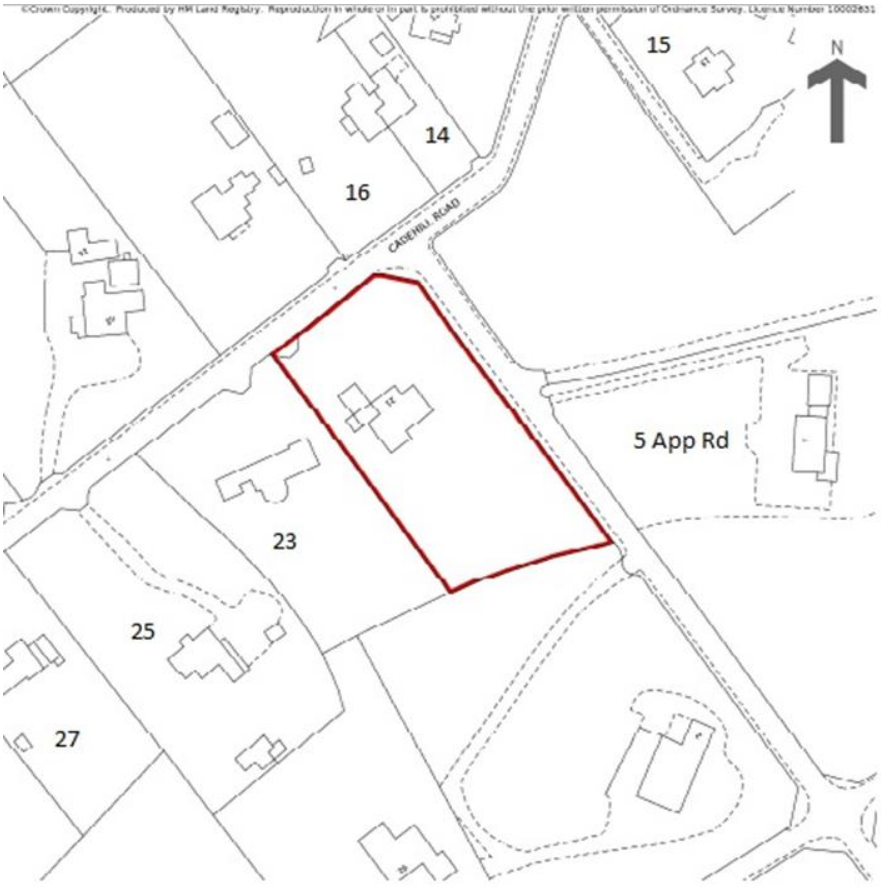
12. The Estate Committee runs a comprehensive website which, along with news, FAQ's and other topics, provides guidance on how the Committee will approach requests made to it under clause 14 of the DMC for its approval of proposed development plans. Such guidance has been published from time to time since 2015 and the current version dates from 2022, after the applicants' applied to the Committee for its approval of their proposals. The guidance indicates that plot sizes should be a minimum of 1/2 acre although 1/3 acre would be considered in exceptional circumstances; it refers to a long-established principle that 'back site' development is unlikely to be considered to be in keeping with the character and amenity of the Estate; and it offers the following invitation and advice:

> 'Prospective applicants are invited to ask the Committee to consider a basic version of their plans informally, without a fee, for guidance on the viability of their plans, before incurring the expense of professional plans, or indeed purchase of a property.
>
> It is highly recommended that applicants gain consent from the Estate Committee before going to the expense of gaining consent from Northumberland County Council. The Committee cannot be held liable for costs involved in varying or reapplying for County Council consent.'

The application land and the proposed development

13. The application land is prominently located on the south-west corner of Cade Hill Road and Apperley Road. To the east, across Apperley Road, is an open green of about 1 acre belonging to the owners of seven surrounding properties, which enhances the visibility of the application land to parties entering the Estate along Cade Hill Road from the A695.

14. The application land is edged on the plan below; also shown numbered are the houses of objectors which we visited during our inspection. The open green is to the north-east of the application land, and the main route into the Estate from the A695 is to the north.



15. The application land has a plot size of about 0.9 acres, with vehicular access from Cade Hill Road. The land slopes up to the southeast, with the side boundary to the steeply sloping Apperley Road (which in this location is aptly known as Adams Bank). The house immediately adjoining on that side sits out of sight at a much higher level. We were told that the land is prone to flooding, and from the topography this seems unsurprising. There is a modest bungalow on the land, with an unfinished extension to the side.

16. On 21 June 2011, Northumberland County Council granted planning permission (Ref. 20100113) for the demolition of the bungalow and the erection of two new detached houses. One house, proposed to be known as 'St Mary's' and facing Cade Hill Road, would be located at the front of the plot approximately on the site of the existing bungalow. It would be a two-storey house with a rendered finish, stone quoins, a front gabled section in stone, white window frames and a slate roof. It would have five bedrooms, plus a separate lounge/kitchen annexe accessed externally; a planning condition requires that this remain ancillary to the main house, and it may not be used as a separate unit of accommodation. St Mary's would sit on a plot of 0.52 acres, with a footprint of 264 sqm, and a gross internal area of 475 sqm.

17. The second house, on the remaining 0.38 acres towards the rear of the plot, would be known as 'Apperley House', and would be served by a new vehicular access from Apperley Road. It would be two-storey with a partially integrated garage, of similar external finish to St Mary's, but with a concrete tiled roof in 'Old English' colour. The house would have a footprint of 209 sqm, and a gross internal area of 311 sqm.

18. In his report to the planning committee, the planning officer noted that:

> 'The proposed houses would be constructed in materials that are appropriate to the area and included stone, slate and tiles which are of a local vernacular. There are a variety of styles of properties on the Painshawfield estate. It is considered that the proposed house designs would not appear out of place or adversely impact upon the character of the neighbourhood.'

19. By laying foundations for Apperley House, the applicants met the three-year commencement condition of the planning permission, and it is common ground that the permission is extant and remains capable of being implemented.

The applicants' requests for Committee approval

20. Evidence was given by Mr Ian Brown, who no longer resides on the Estate but who was the Estate Committee Secretary from August 2015 to September 2019. In that capacity he was the first point of contact for anyone seeking guidance or information about the process of obtaining the Committee's approval under the DMC.

21. Mr Brown explained that in a typical year there would be about 20 applications, mostly in relation to extensions, conservatories, garages or sheds. Very few were in relation to the sub-division of plots. When an application was received Mr Brown would invite the views of neighbouring property owners and then prepare a summary of their responses for the next Committee meeting. Designated committee members would conduct a site visit and consider the plans before making a recommendation to the Committee. If the Committee was minded to reject an application, Mr Brown would write to the applicant explaining its reasons, allowing them an opportunity to modify and resubmit the plans to address the Committee's concerns. The normal sequence of events was that an applicant would seek planning consent only after the Committee had approved their plans.

22. Ms Moore and Ms Cairns had not approached things in the manner recommended by the Committee but obtained their planning permission first and then implemented it by digging footings before eventually applying some years later.

23. When the Committee first became aware of the application for planning permission, its solicitors wrote to the applicants on 22 March 2010 referring to clause 14 of the DMC and expressing the Committee's concern that they intended developing without first seeking its consent. The solicitors warned that the plans accompanying the application would not be acceptable to the Committee, which considered that the construction of two houses on the application land would detract from the character and amenity of the Estate. Ms Moore suggested in her oral evidence that the letter reflected the Committee's policy at that time of opposing the sub-division of sites of less than two acres, rather than any antipathy to the design of the proposed new houses.

24. It was not until December 2016 that the applicants applied to the Committee seeking its approval to implement the planning permission in part only by building Apperley House while retaining the existing bungalow. Ms Moore explained that the proposal to retain the

bungalow and build Apperley House alone was a compromise offer, following some informal discussions. The request was rejected on 8 February 2017. The Committee's minutes summarised the main objections to the proposal, giving three reasons for its refusal. First, the density of the proposed development was out of keeping with the Estate and, if approved, would set an unwelcome precedent which could lead to the character and amenity of the Estate being 'destroyed'. Secondly, the proposed dimensions of Apperley House would be disproportionate to the plot size and would be out of keeping with other properties. Finally, by retaining the existing bungalow on the reduced front plot size, the higher density would also be out of keeping with other properties on the Estate.

25. In July 2019 the Committee became inquorate following resignations and ceased to operate for a time. A working group including both Ms Moore and Mrs Helen Rae (the current chair of the Committee) was convened with a view to its revival. All Estate residents were invited to attend an EGM to elect a new Estate Committee, and in anticipation of that meeting the working group circulated a letter from on 15 November 2019 outlining a 'new approach'.

26. The 'new approach' letter was, in effect, a manifesto on which the members of the working group sought election as a new Estate Committee. While the previous committee had adopted a policy that no building would be permitted on plots of less than one acre, the working group note that most plots were smaller than this, and one application had been approved on a plot of one third of an acre. It was proposed that the new committee should consider applications where the resulting plot size would be one third of an acre or greater. The working group went on:

> 'The character and amenity of the proposed build will be assessed by considering whether the proportionality of house size to plot size is typical of the Estate as a whole. Due to the diligence of a fellow Resident, we have accurate data describing every plot and building on the Estate. Future builds will be checked to ensure that they are in keeping with those that already exist.
>
> Any application that is out of keeping with the current character of the Estate will be referred to a full consultation with all Covenantors. If the Covenantors agree with the Committee and are willing to provide the funding to contest the matter if need be, the Committee will follow that direction. If the Covenantors wish to approve the application, or do not object so strongly to the application that they are willing to provide funding to contest it, it will be approved by the Committee. The Committee will continue to have an important role to play in:
>
> - Preventing building on plots of less than 1/3rd acre
> - Preventing building that is out of keeping with the Estate
> - Considering applications to extend existing properties
> - Acting as an automatic consultee to all plans submitted to the Local Authority
> - Acting as a body that can represent the collective views of the Covenantors to the Local Authority
> - In maintaining the Common Land
> - Granting permission to applications that conform to the new policy
> - Protecting the character and amenity of the Estate
> - Preventing the Estate coming within the sole planning jurisdiction of the Local Authority

> The effect of this change in policy is that more plots on the Estate than at present will be eligible for development. We do not think this will in fact have a significant effect in the short term or change the character of the Estate in the long term. The Covenantors of many eligible plots may not wish to build as their land is unsuitable for building because of topography or the positioning of existing buildings or through a lack of desire. The mandatory boundary restrictions to keep houses well back from the road will still apply.
>
> Most plots that can be subdivided will be 1-acre plots anyway which if sub-divided evenly would only result in two one-half acre sites.'

27. The product of the 'diligence of a fellow Resident' referred to was a document entitled 'Data Driven Density Decisions', ('4D') which described an approach to analysing the density of proposed development. In the event, the Committee has only occasionally resorted to 4D calculations, as it has recognised that they provide a poor basis for comparison (the calculation is based only on a building's footprint, without reference to the number of storeys or volume, and so fails to reflect its full impact on character and amenity).

28. Both Ms Moore and Mrs Rae became members of the new Estate Committee formed in November 2019. Ms Moore's involvement was short lived as she stepped down after a few meetings, having made it clear that the applicants intended to reapply to the Committee for approval of their development plans.

29. The working group's promise of a new approach to plot density appears to have prompted many new applications for approval of development. In an undated letter, thought to have been circulate in March 2020, the Committee Secretary informed residents that it was functioning once more and had received a significant influx of applications, with more anticipated as residents sought to 'release the potential value hidden at the bottom of the garden'. In evidence, Mrs Rae said that the use of that phrase had not been authorised by the Committee, but recipients of the letter might reasonably have assumed that it was. Mrs Rae also explained that the new Committee adopted a policy of permitting development on plots of half an acre or greater, and on plots of one third of an acre in special circumstances.

30. In May 2020, the applicants submitted revised plans for the Committee's approval. Mrs Rae was one of two members tasked with considering them, neither of whom had had dealings with the previous application.

31. The revised plans were initially rejected on the basis of a misinterpretation of the proposed building lines. When the applicants pointed this error out the Committee wrote on 15 November 2020, again refusing its approval of the plans. On 18 December 2020, in response to a request for reasons, the Committee explained that the proposals were not in keeping with the character and amenity of the Estate.

32. On 16 March 2021, solicitors for the applicants wrote to the Committee pointing out that the proposal met its published requirements. In particular: it complied with the mandatory building lines; each plot would be on at least one third of an acre; the houses were sympathetic to the existing character and amenity of the Estate; planning permission had been granted; and the Committee had been elected on a mandate that it would not refuse

plans in such circumstances. If the Committee did not reconsider its decision to refuse permission, the applicants would apply to the Tribunal under the 1925 Act for modification or discharge of the mutual covenant.

33. The Committee's minutes of 27 July 2021 record that Mrs Rae, (recently elected chair), asked the Committee to review the decision taken in November 2020, in the light of the possibility of an application to the Tribunal. Various compromise positions were discussed, including some form of alternative dispute resolution, and the Committee resolved to approach the applicants to pursue this. Despite both the applicants and the Committee being amenable to compromise, no agreement has been reached.

The application

34. The applicants now apply to the Tribunal for modification of clause 14 of the DMC to provide that the two houses for which they have planning permission are exempt from the requirement to obtain the Committee's approval.

35. The application is brought under section 84(1) of the 1925 Act, primarily relying on ground (aa). Mr Hanham accepted that if the application on ground (aa) failed, it would not succeed on ground (c) which was also formally relied on.

36. In summary, ground (aa) is satisfied where a restriction impedes some reasonable use of land for public or private purposes, provided the Tribunal is satisfied that, in so doing, the restriction secures "no practical benefits of substantial value or advantage" to the person entitled to the benefit of the restriction, or that the restriction is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for any loss or disadvantage which a beneficiary of the restriction will suffer as a result of the proposed discharge or modification.

37. In determining whether a restriction ought to be discharged or modified on ground (aa), the Tribunal is required by section 84(1B) 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.

38. The Tribunal may direct the payment of compensation to make up for any loss or disadvantage suffered by the person entitled to the benefit of the restriction, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it.

39. The numerous objections to the application are based on the following features of the proposed development:

    (a) Plot density, in the context of what is said to be a long-established policy that 'back site development' (i.e. building in the back garden of an existing plot) is discouraged on the Estate.

(b) The size and style of the two dwellings, which are said not to be in keeping with the surrounding properties.

(c) The effect on neighbouring properties, both in the sense of being overlooked by the new development and by reason of the effect of the new development on visual amenity.

(d) Traffic hazards created by the proposed new access on to Apperley Road.

The case in support of the application

40. In her evidence Ms Moore explained that when the applicants purchased the application land they had intended to live in the bungalow, and it was only when issues with damp arose that they decided to redevelop. When challenged on this evidence Ms Moore denied that they had purchased with a view to development and suggested that she and Ms Cairns had 'very minimal' experience of property development. In this respect Ms Moore seems to have been too modest as she then confirmed that the couple's last project undertaken between 2003 and 2007 involved purchasing a large property in Gateshead, dividing the house into two, converting a barn into a dwelling, and building four further properties on the site.

41. Ms Moore suggested that that the new development would be an improvement on the current dilapidated bungalow, with sufficient screening to soften any views from neighbouring properties. The applicants intended erecting a six-foot perimeter fence which, with hedges and shrubs, would provide a much greater guarantee of privacy than the many examples of low fences and hedges around the Estate. In addition, between the application land and the neighbouring 23 Cade Hill Road, an existing 6m leylandii hedge provides full screening. The application land is also largely screened from other nearby properties by foliage and trees.

42. The new buildings would comply with the mandatory building lines, with Apperley House sitting 54 feet from Adams Bank (where the building line is 27 feet) and St Mary's matching the existing line from Cade Hill Road at 60 feet. As for plot ratios, Ms Moore referred to the plot density research underlying the 4D model which showed that 75 plots of less than a third of an acre already existed on the Estate. Apperley House, the smaller of the two proposed plots, would be 0.37 acres.

43. As for design, Ms Moore pointed out that the proposed houses satisfied the Council's requirements and relied on the planning officer's assessment that they would not appear out of place or adversely impact the character of the neighbourhood. Moreover, the Estate had no design pattern. Other than pairs of semi-detached houses, no two houses were the same, and indeed even some of the semi-detached properties had been extended differently from each other. Some houses on the Estate were smooth-rendered, some pebble-rendered, some were brick; some were two-storey, some were bungalows, some were terraced, some not. From its commencement the Estate had been developed by a great variety of owner occupiers and the DMC allowed each house to be of unique design, in styles reflecting the period in which they were built.

44. In Ms Moore's experience, including during her time as a Committee member, decision-making was arbitrary and inconsistent; she suggested there were no written terms of reference governing whether permission would be granted, and that there was a lack of transparency about applications by the Committee's own members. She drew our attention to some of the designs which had received the Committee's approval, including 13 Meadowfield Road featuring a cantilevered first floor, a four-storey development proposed at 3 Apperley Road, and an 'eco' timber framed prefab at 230A New Ridley Road. The Committee had also consented to numerous extensions and two new builds on Batt House Road, and one at Nene Cottage on Meadowfield Road. Developments at 5 Crabtree Road, 15 Meadowfield Road, 33 Cade Hill Road, and 32 Apperley Road had all been approved despite inadequate measurements being submitted (sometimes none at all). Consent had been granted at 8 Apperley Road for a new property on a 'side site'; at 27 Painshawfield Road for a new property on a 'vacant site'; at 230 New Ridley Road, in the most densely developed part of the Estate; at 14 Apperley Road on 'back land' in a densely developed area; at 38 Apperley Road, for a redevelopment which more than doubled the ground floor area; at 19A Batt House Road on a plot of one third of an acre; and 32 Apperley Road, where a bungalow was replaced by a new two-storey house, more than doubling the accommodation.

The case against the application

45. Mrs Rae, the current chair of the Committee, gave evidence of the reasons for its refusal of the applicants' plans, namely that they were inconsistent with the character and amenity of the Estate, that they were considered to be too dense on the plots, and that they would detract from the openness and appearance of the immediate area.

46. She explained how the Committee's criteria for allowing subdivision of plots had evolved. In 2012 a policy of allowing plots of half an acre was amended to a minimum of 1-acre, as it was felt that too many applications were being made for smaller plots. This was the policy which had been operative in 2016, when the applicants first asked for approval of their plans. When the working group was formed in 2019, it was agreed that this policy would be relaxed, allowing subdivision to create plots of not less than half an acre, or one third in exceptional circumstances.

47. Under Mrs Rae's chairmanship the Committee had regard to three factors when considering applications. Plot size was the first, with the current Committee applying the policy Mrs Rae had explained. Density was the second, taking account of the volume as well as the footprint of the proposed development. The third was concerned with location: back land development would not be allowed, for instance where homeowners wished to build in a rear garden with a drive running past the existing house. This would not comply with the DMC requirement on frontage and would lead to over-development. A policy against back land development was first adopted in 1959 by an AGM open to all covenantors, and it had been reiterated at meetings in 1976, and again in 2021.

48. Mrs Rae noted that the applicants had not pursued the 'aggrieved applicants' route available to them under clause 3 of the DMC, which entitled an applicant who had been refused permission by the Committee to put their proposal to an Extraordinary General Meeting of the covenantors convened for that purpose. She also observed that the applicants'

incomplete extension and their installation of a shipping container in the garden had required the Committee's consent which had not been applied for.

49. Mrs Rae stressed that that if the application succeeded, in her view the Committee would cease to operate. She was aware of at least three other locations on the Estate where similar applications were likely to be made if this one was successful, and the current members of the Committee would be unwilling to devote themselves to considering applications if they knew that they 'would have to go through all of this again' to defend the Committee's judgment before the Tribunal. She felt that without the Committee the Estate would be susceptible to over-development as the only control would be statutory planning restrictions. She was sure that the Committee would disband in those circumstances, although it was possible that others would take on the responsibility.

The views of the experts

50. It was common ground between the expert witnesses that potential 'micro' or localised effects of the proposed development on properties 'within sight or sound' of the application land should be distinguished from any wider or general effect on the Estate as a whole.

51. As regards localised effects, the experts sensibly agreed a limited list of potentially affected properties comprising Nos. 14-16, 23, 25 and 27 Cade Hill Road, and No. 5 Apperley Road. The owners of 18 Cade Hill Road, immediately opposite the application land, and 2 Apperley Road, immediately adjoining it to the south, had either not objected to the application, or had withdrawn objections.

52. The experts were able to agree the current market value of each of the potentially affected properties, which appear in the table below, but their opinions on the effects of the proposed development on those properties differed markedly.

53. On behalf of the applicants, Mr Woodruff's view was that the proposed development would have no effect on the market value of the relevant properties. He referred to successful sales of Nos. 4, 10, 13, 15, 14, 30 and 33 Cade Hill Road in the period from 2018 to 2020, all of which occurred when planning permission for the proposed development was in place and publicly known, and while the existing bungalow was in its current condition. There did not appear to him to be any effect on the saleability of properties near the application land, and the prices paid appeared to be in line with market value in normal conditions. In his opinion, purchasers would perceive it to be beneficial that the current generally dilapidated appearance of the bungalow could be expected to be temporary and would welcome the implementation of the planning permission as an improvement.

54. Assuming the new properties were built as outlined in the planning drawings, to a good specification, and with adequate boundary planting, in Mr Woodruff's view the two new houses would be comparable to those in the area - good size houses on mature plots, albeit newer than the surrounding properties.

55. On behalf of the Estate Committee Mr Entwistle considered that the loss of visual amenity to the objectors' properties may not be capable of being stated in monetary terms at all; he

suggested that the properties were unique and there would not be an equivalent replacement nearby, or anywhere. However, he was mindful that section 84(1) permitted the Tribunal to award, as consideration for any modification, 'a sum to make up for any loss or disadvantage' to a person entitled to the benefit of the restriction and it was in that context, doing the best he could, that he offered his opinion of diminution in value.

56. He based that opinion on two main strands of research. First, he referred to a study which he had conducted in the past into the effect of a loss of an open outlook. He had compared the value of houses on an estate north of London which faced inward towards other houses, with the value of houses located on the edge of the same estate which faced open countryside, concluding that there was a 11% differential attributable to a rural view. Since that comparison had been between a rural and an urban outlook, he took the differential of 11% as a maximum and considered that the effect on the value of the objectors' properties by the reduction of their view by localised development must be less. Secondly, he had regard to settlement evidence of compensation paid for powerline wayleaves, ranging from 1% to 50% of market value, including one which Mr Entwistle had negotiated on the outskirts of Gateshead at 11.6%.

57. We record below the agreed market value of each of the relevant objectors' properties (before any modification of the restriction) together with Mr Entwistle's opinion of the diminution in value (and therefore the level of compensation which should be payable) caused by the effect of the applicants' proposed development on the objectors' visual amenity.

Property	Agreed Market Value	Mr Entwistle diminution
14 Cade Hill Rd	£500,000	5% (£25,000)
15 Cade Hill Rd	£750,000	5% (£37,500)
16 Cade Hill Rd	£550,000	5% (£27,500)
23 Cade Hill Rd	£675,000	4% (£27,500)
25 Cade Hill Rd	£1,300,000	2% (£26,000)
27 Cade Hill Rd	£650,000	1% (£6,500)
5 Apperley Road	£1,800,000	3% (£54,000)

58. Mr Entwistle accepted that future purchasers may not perceive any change in view or take into account any such difference when considering what to offer for any of these properties.

59. As regards any wider effect of the proposed modification, Mr Woodruff said that the Estate had evolved over time; there had been many 'back land' developments where plots had been split, without affecting the overall setting. Some houses were completely hidden by screening, but others were in plain view from the estate roads. While boundary planting was random, and not governed by the DMC, the mandatory building lines prevented

development near to plot boundaries, which contributed to what he referred to as a feeling of mystery and intrigue. The applicants' proposals appear to satisfy the Committee's planning guidelines and development criteria and he could see no reason why they would have any adverse effect on the values of any properties on the Estate.

60. In making his assessment of the wider impact of the proposed development Mr Entwistle compared average values within the Estate, which he calculated at £341 per sq ft, with those in the neighbouring village of Stocksfield at £286 per sq ft. He put the differential of £55 per sq ft down to a number of factors: the properties on the Estate are on larger plots, are generally of better specification, and the Estate generally enjoys superior amenity. He attempted to isolate the last of these factors (superior amenity) and expressed the view that this contributed at least 50% of the differential between the Estate and Stocksfield as a whole, or £27.50 per sq ft. He applied this rate to the average floor area of houses on the Estate which equated to £67,000, or 8% of the value of a property worth £822,000.

61. In Mr Entwistle's view, the differential in amenity between the Estate and Stocksfield as a whole exists because of the DMC and could be expected to continue for so long as the Committee continues to control development through the approval process. Should the Tribunal order modification, Committee members would not spend the time and resources objecting to future applications, and development control would merely be on the basis of planning permission. While, to date, the Estate has evolved gradually over time, should the DMC effectively be abandoned then further development could be expected to occur at a faster pace. Some properties, which could accommodate such development, would increase in value, but others which did not have development potential would depreciate by an average factor of around 8%. In his view, the practical benefits secured to the covenantors by the mutual restrictions had a substantial value for the whole of the Estate, far greater than any sum which could realistically be paid as compensation.

Discussion

62. Both counsel framed their submissions around the sequence of questions posed in *Re Bass's Application* (1973) 26 P&CR 156, but it is not necessary for us to deal with the application in the same formulaic way. As the Tribunal indicated in *Edgware Road (2015) Limited v The Church Commissioners for England* [2020] UKUT 104 (LC) (at [111]-[112]) what is needed is an assessment of the issues which arise by reference to the relevant parts of section 81(1) of the Act. That exercise need not involve sequential consideration of the *Re Bass* questions, answering each positively or negatively before moving to the next. Professionally represented parties should be capable of agreeing the real issues in a case, thereby avoiding the need laboriously to work through questions to which the answer is usually obvious. In this case, for example, the application land is part of a residential estate, and the proposed use is a residential one for which planning permission has been obtained. In those circumstances, having regard in particular to section 84(1B), the proposition that the intended use is not a reasonable one is usually difficult to defend, as it was in this case. We were not persuaded by Mr Goldberg KC's arguments to the contrary.

63. In this application the central issue on ground (aa) is, as is so often the case, whether the restriction which is proposed to be modified secures for the objectors any practical benefits of substantial value or advantage. Although the expression 'practical benefits of substantial

value or advantage' is a composite one, the Tribunal has frequently distinguished between benefits conferring substantial value capable of being measured in monetary terms and benefits conferring a substantial advantage on the covenantee, notwithstanding that it may not be possible to quantify in money. The central issue in this case may therefore be said to have three aspects: whether the DMC secures practical benefits at all, and, if it does, whether those are of substantial value when measured in financial terms, or if they are incapable of such measurement whether they nevertheless confer a substantial advantage on the objectors (all of whom, it is agreed, have the benefit of the restrictions).

64. That is not the only matter which may have to be determined. As Lord Burrows explained in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 (at [33]):

> 'It is well-established (see, for example, *Driscoll v Church Comrs for England* [1957] 1 QB 330) that, if satisfied that one of the prescribed grounds has been made out, the Upper Tribunal has a discretion whether or not to make an order for modification or discharge of the restrictive covenant. The important statutory words to this effect are in section 84(1): the Upper Tribunal "shall … have power". The five grounds are therefore concerned with establishing the Upper Tribunal's jurisdiction and can be helpfully labelled the "jurisdictional grounds": at least one of those jurisdictional grounds must be established by the applicant before the Upper Tribunal can go on to make what is ultimately a discretionary decision.'

65. We begin by considering whether the need to obtain the approval of the Committee secures to the residents of the Estate, acting through their elected Committee, practical benefits of substantial value or advantage; to succeed the applicants must show that neither are so secured. Mr Hanham accepted that if the issue between the parties is one in which there is no right answer, and that reasonable parties might validly hold differing views, the Committee's policing of development on behalf of the residents might be said to constitute a practical benefit. We have no doubt that it does.

66. The preservation of a long-standing scheme of mutual covenants has long been recognised as capable of being a practical benefit in its own right. In such cases weight has been given to the sincere and well-founded views of individual covenantors that a development contrary to the scheme would be prejudicial. In *Re Chandler's Application* (1958) 9 P&CR 512, for example, the Lands Tribunal considered an application to subdivide and develop the grounds of a large house in breach of a restriction and held, at page 517, that 'the practical benefit which is secured to them [the mutual covenantors] is the power left in their hands to scrutinise and if necessary veto any proposals tending to alter the character of the neighbourhood.'

67. The Lands Tribunal (HHJ Marder QC) took the same approach to a building scheme in *Re: Snaith & Dolding's Application* (1995) 71 P&CR 104, 118:

> 'Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial

practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered.'

68. In this case the need to obtain Committee approval provides an additional layer of development control which would not otherwise be available. As a result of the DMC the Committee is in a position to prioritise the interests of residents of the Estate over considerations which might carry weight in the statutory planning process but which the Committee is not obliged to take into account when it considers development proposals. Through the process of election to the Committee individual householders are in a position to influence the Committee's decisions, which are themselves then open to the possibility of further democratic scrutiny through a vote at an Extraordinary General Meeting of the whole body of mutual covenantors. We are satisfied that these are practical benefits secured by clause 14 of the DMC.

69. Given that the applicants are currently prevented by the DMC from implementing their development proposals, how valuable can those practical benefits be said to be? Having viewed the application land from each of the immediate objectors' properties, we are satisfied that in all cases the effect of the proposed residential development of the application land on their visual amenity would be negligible. Some, including 15 and 27 Cade Hill Road, are sufficiently distant from the application land that they have little visual impact on each other. At others, for example 23 and 25 Cade Hill Road, substantial screening is already present, so that any objector might only glimpse the proposed houses. It is unnecessary to descend into more detailed analysis, partly because we have some sympathy with Mr Entwistle's suggestion that small changes in outlook are difficult to measure in financial terms, and partly because the values he attributes to them are modest rather than substantial.

70. Even if we were to accept Mr Entwistle's estimated diminution figures, none amounts to greater than 5% of the agreed market values in each case. The Tribunal has been careful not to set a tariff by which effects on value may be judged; there is no threshold over which the Tribunal is bound to find a particular benefit to be of substantial value, since each case depends on its own facts and substantiality is always a matter of judgment. However, reductions of 5% or less have rarely been considered substantial.

71. Mr Entwistle very fairly accepted that there might be no effect on the market value of the objector's properties, on the basis that incoming purchasers to the Estate may not trim their bids as a result of the proposed development. As he observed, section 84 does not refer to market value, but nevertheless allows the Tribunal to award a sum to make up for any loss or disadvantage suffered by a person entitled to the benefit of a restriction in consequence of its discharge or modification. But the need to assess a sum payable as consideration for the modification of a restriction only arises if one of the statutory grounds is made out and is a separate question from whether benefits secured by that restriction are of substantial value. In any event if, as Mr Entwistle was inclined to accept, the objectors will not in fact suffer any measurable diminution in the value of their properties, and if, as we are satisfied, the proposed development will have little or no impact on visual amenity, the case for awarding compensation would be weak.

72. An assessment in financial terms of whether the DMC secures practical benefits of substantial value to the wider Estate is an even more difficult exercise. Mr Entwistle did his best to isolate and quantify the financial value of living on an estate which benefits from a regime of local development control by comparing average values on the Estate with average values in Stocksfield. That methodology did not strike us as reliable and we place no weight on it.

73. We nevertheless agree with Mr Goldberg KC's submission that the fact that it is not possible sensibly to attribute a specific financial value to the practical benefits secured by the DMC does not mean that those same benefits confer no substantial advantage on the mutual covenantors. We have already described those benefits in paragraph 68 above and recognise them as practical rather than theoretical. As in the Tribunal's *Edgware Road* case, in which a similar estate wide restriction on development without consent was considered, the extent of the practical benefits secured for the wider Estate is, in truth, immeasurable in terms of value but undoubtedly substantial in terms of the advantages which it secures.

74. In our judgment the ability of the mutual covenantors to control development, through an elected Estate Committee, is a benefit of substantial advantage to them. Without it, decisions about development on the Estate would be made applying the statutory development plan and national planning policy. We have no doubt that there are many plots on the Estate capable of subdivision and further development consistent with the development plan and that the opportunity to 'release the potential value hidden at the bottom of the garden' (as it was unguardedly put by the Committee Secretary) would prove irresistible to many. Mrs Rae's fear that if the protection afforded by the DMC ceased to be effective the Estate would be susceptible to what she and other residents see as over-development seems to us to be a realistic one. It cannot be said to be unreasonable that the Committee takes a different view from planning officers on what is appropriate for a particular site, and the respect which is afforded to the views of the mutual covenantors, formulated through the Committee, is the essence of the benefit which the DMC provides.

75. The issue of plot density is a prime example of one on which the views of planning officers and the wishes of local residents may diverge. The fact that the Committee's own policy has varied from time to time shows how this issue is one on which a variety of perfectly reasonable views is possible. The current policy of permitting development on sites of half an acre and resisting it on sites of less than a third of an acre, while being open to the possibility of development between those limits, is a relatively flexible one, more oriented towards development than previous policies. Both the properties proposed to be developed on the application land fall in the discretionary band between a third and half an acre. That causes no concern to the statutory planning authority. But it is not difficult to understand why, on a corner site as prominent as this one, highly visible across the green to anyone coming on to the Estate along Cade Hill Road from the A695, the Committee should consider that two new houses each on its own relatively modest plot would represent undesirable over-development.

76. Even if we were not persuaded of the substantiality of the practical benefits secured by the DMC in the case, we would not be persuaded to exercise our discretion in favour of the application. We agree with the observation made by Millet J in *Price v Bouch*, at page 261, concerning the same scheme of covenants, that it would be most unfortunate if the

Committee's decisions were susceptible to second guessing by a court or tribunal, a situation which the original covenantors would not have contemplated:

> 'Control would be removed from the committee and vested ultimately in the court, which would be called upon to adjudicate, presumably on the basis of expert evidence, on the very question which the parties had created their own domestic tribunal to decide. The committee, whose members are voluntary and unpaid, and with no resources of its own, would be forced to seek professional advice and incur substantial expense in seeking to uphold its own decisions.'

77. We also accept Mrs Rae's evidence that should we intervene to modify the restriction as the applicants ask, the main purpose of the Committee would be undermined and that its members would be likely to disband. It is possible, but we think unlikely, that new members would be capable of being recruited in the knowledge that the Committee's decisions are liable to be trumped by the Tribunal.

78. For these reasons we are not satisfied that a case for modification has been made out on ground (aa) (or ground (c)), and we would in any event have declined to exercise our discretion in favour of the application. The application is therefore refused.

79. This decision is final on all issues other than costs. The Tribunal's usual practice where an application under section 84 is refused is to direct that the applicants pay the reasonable costs of the objectors, subject to an assessment of the amount by the Registrar. If the parties are in agreement that an order to that effect should be made in this case they should inform the Tribunal. If that cannot be agreed, the parties are invited to make written submissions on costs, and a letter accompanies this decision providing directions.

Martin Rodger KC — Peter D McCrea FRICS FCIArb

Deputy Chamber President

26 May 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.