



Neutral Citation Number: [2024] UKUT 112 (LC)

Case No: LC-2023-115

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

8 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – consent covenant in favour of dissolved company – obsolescence – benefit of other covenants annexed to the company’s land - one house, one plot covenant - practical benefits of substantial advantage – scale, density, open aspect – application refused

BETWEEN:

COLIN BERNARD MEDLEY

Applicant

-and-

ROSS MACKENZIE (1)
YASHWANT AND SUSHMA KOAK (2)
GUNTER AND GLYNNE STOHR (3)
ASIM AND UZMA CHAUDHARY (4)
STELLA DIGGINS (5)
GLEN & CLAIRE FELDMAN (6)
LESLEY BELLAMY (7)
TAI WAI WONG (8)
RAJESH KHAKHAR AND CHRSTINE FUCHS-KHAKHAR (9)
PAUL VELLA AND CATHY O’ROUKE (10)
CATHERINE EILEEN BOAK (11)
MICHAEL ALPHONSO CHRISTIAN AND BRENDA PATRICIA
MARGARET REGAN (12)
MRS P M MORLEY (13)
ROBERT L AND KELLY R WALKER (14)

Objectors

12 High Elms,
Chigwell,
Essex, IG7 6NF

Upper Tribunal Judge Elizabeth Cooke and Mr Mark Higgin FRICS FIRRV

9-10 April 2024

Ms Robyn Cunningham for the applicant, instructed by Fahri LLP
Mr James Fuller for objectors 1 to 10, instructed on a direct access basis

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The following cases are referred to in this decision:

Crest Nicholson Residential (South) Ltd v McAllister [2002] EWHC 2443

Federated Homes Limited v Mill Lodge Properties Limited (1980) 39 P & CR 576

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

Ridley v Taylor [1965] 1 WLR 611

1.

Introduction

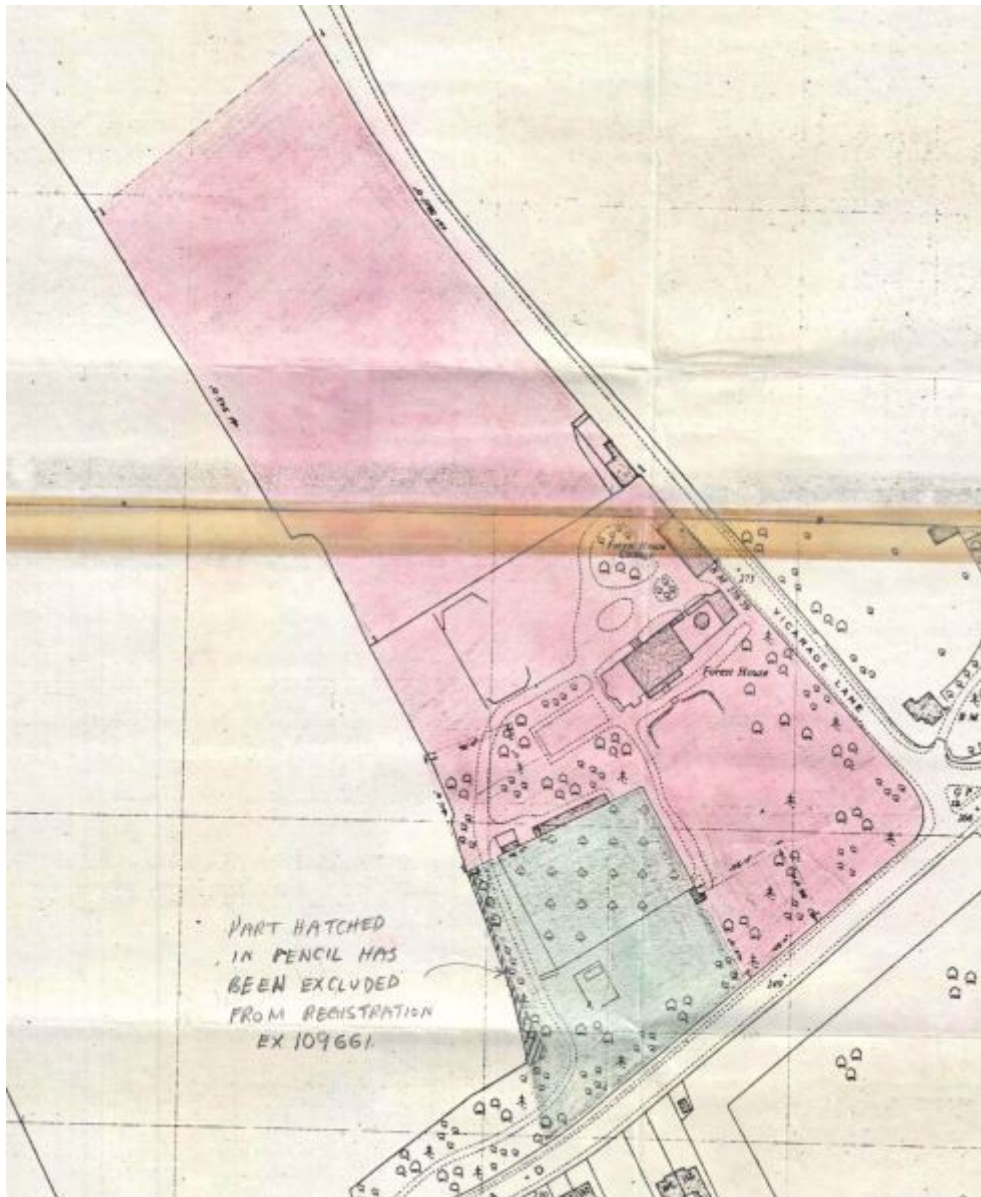
1. In June 1828 The Times carried an advertisement for Forest House, Chigwell which was available for letting, either furnished or unfurnished. The house was described as ‘beautifully situate’ (12 miles from the City) and in its own grounds, on the verge of Hainault Forest and commanding unrivalled views over the counties of Essex and Kent. It was said to possess all the requisite accommodation for a family of respectability. In 1966, some 138 years later, Chigwell had surrendered some of its bucolic charm to the advance of Greater London and part of the 15 acres of grounds at Forest House was sold for residential development. Restrictions included in the disposal of the land and in a subsequent conveyance in 1967 are at the heart of the dispute before the Tribunal. It concerns High Elms, an attractive cul-de-sac built on the disposed land and now enjoying panoramic views of London to the south west. The entrance to the road is flanked by two bungalows (numbers 1 and 12) with similar pillared porticoes; after a left turn in front of number 12 there is a detached house (number 2), a row of three storey town houses (numbers 3 to 11 High Elms), and then there are 5 further, larger properties beyond a gate on a private section of the road.
2. The applicant Mr Colin Medley is the owner of number 12; he wants to demolish his bungalow and replace it with two houses but is prevented from doing so by restrictive covenants binding his property. This is his application under section 84 of the Law of Property Act 1925 to have one of the covenants discharged and the rest modified. The objectors are the current owner of Forest House and the owners of 13 of the other 20 properties on High Elms and the private roads connected to it.
3. Mr Medley was represented by Ms Robyn Cunningham of counsel, Mr James Fuller of counsel represented objectors 1 to 10, and Ms Boak represented herself; we are grateful to them all. The other three objectors were not present at the hearing and were not represented. The objectors represented by Mr Fuller have been represented during the proceedings before the hearing by one of their number, Mr Rajesh Khakhar.

Background: the High Elms estate

4. In the early 1960s the Savill family owned Forest House; on 13 September 1966 the Savill family trustees sold the house and land in two conveyances, each using the same plan (shown below). The first conveyance was of the land shaded green to Deanley Properties Limited. We refer to this as “the 1966 conveyance”. It imposed covenants for the benefit of “the Pink Land and every part thereof”, of which the following are the subject of this application:

“(b) That no building will be erected upon the Green Land save with the consent in writing of the owner or owners for the time being of the Pink Land and that neither the external plan nor the elevation of any building so erected shall at any time be altered save with the like consent.

(c) That nothing shall be done upon the Green Land which may be or become a nuisance annoyance or danger to the owners or occupiers for the time being of the Pink Land or which may tend to depreciate the value of the Pink Land or any part thereof as residential property”



5. Later that day, whether immediately or after a congenial pause, the Savill trustees sold the Pink Land to Charles and Elizabeth Morley, who then lived in Forest House for many years. We know that that was the later conveyance because the Pink Land was expressed to be conveyed with the benefit of the rights reserved to it in the conveyance of the Green Land.
6. On the Green Land were built numbers 1 to 12 High Elms in the years that followed. On 12 December 1967 Deanley Properties Limited, which had by then changed its name to High Elms Properties Limited, conveyed number 12 to John Wooton; the plan depicts a simple rectangular house with a detached garage, connected by a wall. This is the only one of the houses on the Green Land that physically adjoins the Pink Land; its north and east boundaries are separated from it by a tall and quite conspicuous brick wall, part of a larger

structure that formerly contained an orchard. According to Mr Mackenzie the wall is Grade II listed along with Forest House; Mr Mackenzie says he owns it, and Mr Medley says he owns it.

7. Leaving that aside for now, in the 1967 conveyance the purchaser entered into restrictive covenants with the company “For the benefit and protection of the remainder of the Company’s High Elms Estate ...or any part or parts thereof the owner of the adjoining property known as Forest House Vicarage Lane Chigwell aforesaid or any part or parts thereof”. It is curious that as well as being for the benefit of the vendor and its estate, which of course was the Green Land, the covenants were said to be for the benefit also of Forest House, which the company did not own; whether that provision was effective we do not have to decide, but the explanation for it is said to be that the company was owned and controlled by the Morley family.
8. The following covenants in the 1967 conveyance are the subject of the present application:
 - “3(b) not to erect any wall hedge fence or structure (whether in the form of a boundary wall hedge fence or structure or not) around or within any part of the land hereby transferred lying between the line of the said dwelling and any road or footpath on to which the said land abuts PROVIDED ALWAYS that this covenant shall not relate to any wall or fence erected by the Company and marked “T” on the said plan
 - 3(c) not to erect any building or other structure whether of a permanent or temporary nature on the land hereby transferred without the prior written approval of the Company to a sufficiently detailed drawing thereof
 - 3(d) not to use the said dwelling for any purpose other than as a private dwelling or to carry on any trade business or manufacture whatsoever on the land hereby transferred.”
9. At the hearing Mrs Fuchs-Khakhhar confirmed that her own property was subject to the same covenants and it is likely that that is true of all the houses on the Green Land.
10. In the 1970s more houses were built on the Pink Land; numbers 13 to 15 in the north-west along with numbers 1 and 2 Forest House Fields, and numbers 16 to 18 in the south east. Number 18 is known as ‘High Elms’ and is accessed from Vicarage Lane.
11. Here is a plan of the High Elms area today:



12. On the plan can be seen the Green Land, entered from Manor Road on the small estate road flanked by the two bungalows, with the detached house at number 2 and the nine town houses in a row. Their front gardens are open and unfenced. A number of them have been extended to the rear to create more ground floor living space but they have pleasant gardens and a splendid view over London. There is a pair of ornate wrought iron gates across the road where the Green Land ends, and the road is adopted up to a point a few metres south of the gates.

13. The application site is broadly rectangular in shape and is adjacent to the listed brick wall which is some 3 metres in height, and forms its northern and eastern boundaries. The site contains three buildings, an 'L' shaped bungalow constructed in the 1960s, a brick built, flat roofed double garage and a structure described by the applicant as an 'arbour'. The bungalow is conventionally constructed with rendered block elevations under a shallow pitched roof covered in grey, concrete interlocking tiles. It has a wide, flat roofed portico supported on four pairs of Doric columns. The garage is next to the north facing part of the listed wall and orientated east/west. The 'arbour' is a three-sided, single storey structure of rendered brick or block with a canopied fabric roof. It forms the western boundary of the garden. The roof has a metal frame and, when in repair (which it is not), could be folded back not unlike a folding roof on a car. The positioning of these buildings is such that a grassed margin about 2.5 metres deep has been left all around the site. The western elevation of the bungalow is concealed behind a mature hedge. The site itself has a distinct slope, so that the ground level at the northern boundary is about 1.5 metres higher than at its southern equivalent.

14. The second bungalow (number 1 High Elms, not the subject of this application) is broadly similar in construction, style and scale. It occupies a larger ‘L’ shaped site next to the entrance to High Elms. Its entrance faces east, and consequently the rear garden has a westerly aspect. It too has a wide portico feature but unlike number 12 the columns are Corinthian in style. It also has a double garage and a sloping site such that the garage is built into the slope with its floor level being well below the ground level immediately to the north. The garden contains a single storey annex next to the Manor Road frontage.
15. The row of town houses are conventionally built with pale brick elevations and clay tiled mansard roofs at second floor level. The upper-most surface of the roof is flat and the mansards are equipped with a pairs of sash framed dormer windows in each elevation. The entire row is oriented north/south with the rear elevations and gardens facing to the west. The front elevations look towards the two bungalows. The slope of the site means that from number 3 onwards, each consecutive house is about 0.5 metres higher than its neighbour.
16. The last house on the Green Land is number 2 which is a two storey, detached house. It is brick built under a hipped, clay tiled roof and occupies a site between the town houses and Manor Road. It appears to have been built after the initial development of High Elms.
17. Forest House is an imposing three-storey house dating from the turn of the 19th century. A two-storey extension was added to the eastern elevation in the same century. The entrance faces north-west and the gardens slope away to the south east. Its design, thought to be by the popular Regency architect John Papworth, is typical of the period with stock brick elevations, double hung sash windows and a shallow pitched roof concealed behind a parapet with a stucco string course. The grounds contain a range of brick out buildings including an octagonal dairy. The rear garden is laid to lawn and the house enjoys long reaching views over London and as far as Kent. The orientation is such that number 12 is to an extent concealed behind the listed wall and some mature trees. The townhouses are only visible from the second floor windows. Forest House has a Grade II listing which was applied in 1954. It is of a different scale to every other dwelling built on the Green or Pink Land, most of which could be described as modest in comparison.

The legal background

18. Section 84 of the Law of Property Act 1925 gives the Tribunal jurisdiction to discharge or modify restrictive covenants affecting freehold and some leasehold land. So far as relevant to the present application it says this:

“(1) The Upper Tribunal shall ... have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or

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

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

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

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

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

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

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

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

(3A) On an application to the Upper Tribunal under this section the Upper Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; ...

19. Importantly, section 84 confers a discretion on the Tribunal; if any of the various alternative conditions in sub-section (1) is satisfied, the Tribunal may discharge or modify the covenant but does not have to do so.

The application

Number 12 High Elms and the proposed development

20. In paragraph 13 we described the bungalow at number 12. The internal arrangement of the rooms is not material to this application. Mr Medley's proposal is for two houses arranged over three floors. They are Neo Georgian in style, with brick elevations, double hung sash windows, and shallow pitched roofs behind stone faced parapet walls. At basement level

the houses are joined, effectively semi-detached, while above ground they are detached. The basements will contain a car parking space, a swimming pool, hot tub, changing rooms and a plant room. It is proposed that the ground floors will accommodate a hallway, dining room, study, WC, and a kitchen/living area which spans the full width of the rear part, overlooking the garden. The first floor will have 3 bedrooms each equipped with an ensuite bathroom. The master bedroom has a dressing room as well. A lift will serve all three floors.

21. The plans show rear gardens that are essentially trapezoidal in shape but with a smaller rectangular area at the side of each house. The average depth of the garden of the northern house is 7.62 metres and its southern counterpart has an average depth of 9.15 metres. The principal, western elevations appear to be set back about 0.8 metres further from the road than the existing bungalow although the southern elevation of the southern house is about a metre closer to the road than the equivalent elevation on the bungalow it will replace. However, the planning application depicts a 900 mm brick wall topped with railings at the boundary and a 1,890mm brick wall enclosing the rear garden of the southern house.
22. The planning permission that Mr Medley wishes to implement (EPF/0931/19) was granted on 28 May 2021 and permits the demolition of the existing bungalow and the construction of two three bedroom houses on basement, ground and first floors. This was a revision to an earlier application (EPF/2758/17) and was subject to a section 106 agreement signed on 9 April 2019. An application for a variation of the permission was refused on 17 February 2022 and an additional application for a variation was granted on 2 November 2022.
23. Both the Tribunal and the objectors encountered some difficulty in working out what exactly Mr Medley has planning permission to build and therefore what modification he wants. At the invitation of the Tribunal Mr Medley submitted an additional witness statement and gave evidence on the second day of the hearing about the relevant plans and the heights of the new houses. He confirmed that his application is for the modification of the restrictive covenants so as to permit the development depicted in the more recent versions of plans TFU 210 and TFU 211. We were not assisted by the use of the same plan references on different iterations of the plans. Fresh plans attached to the new witness statement showed the houses with an additional, second floor; they were said by Mr Medley to relate to a proposed further modification which had not yet been through the planning process.
24. We were provided with information about the relative heights of number 12, the proposed houses and the townhouses. The following measurements refer to height above sea level. The ridge of the roof of number 12 is 84.41 metres and the roofs of the proposed houses are 87.28 metres and 86.80 metres, so the new houses will be 2.4 and 2.87 metres respectively taller than the bungalow at number 12. The highest point of the northernmost town house (number 11) measures 89.24 metres. The new houses are to be built in to the slope of High Elms so that the small front gardens will be below street level. This lessens their impact on their surroundings and explains why a boundary wall is required.

The grounds for the application

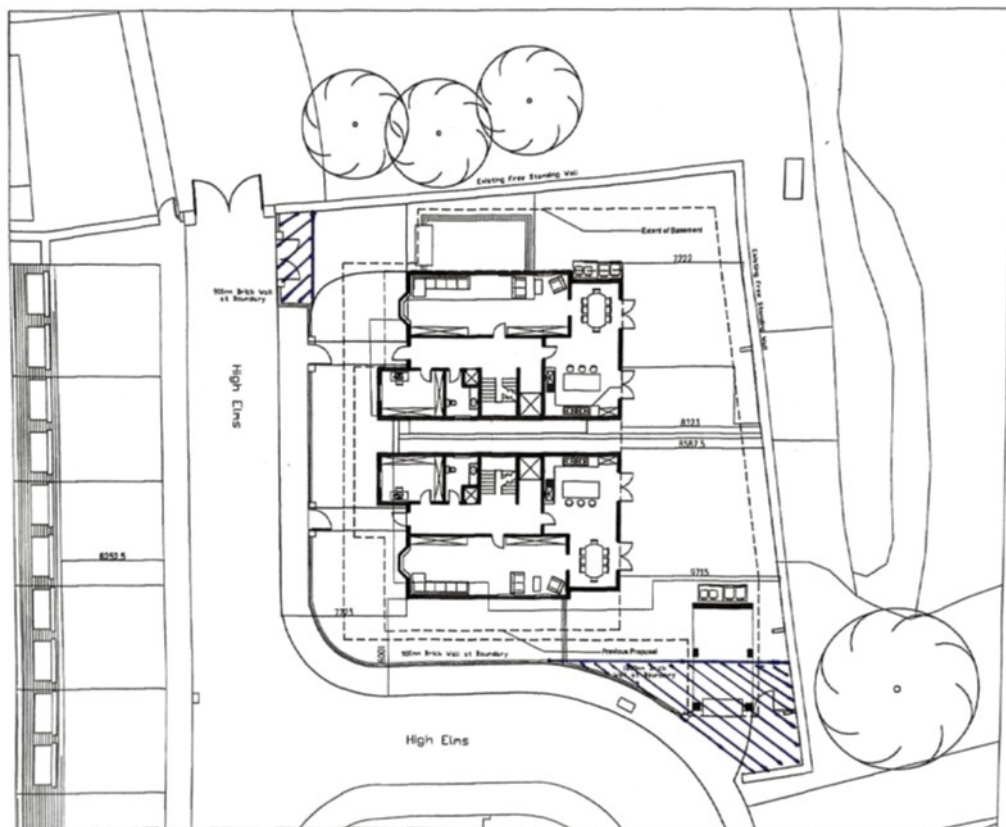
25. It will be recalled (paragraphs 4 and 8 above) that the application relates to two covenants imposed in 1966 on all of the Green Land, and to three covenants imposed in the transfer of number 12 itself in 1967. They all stand in the way of the applicant's proposed development. Both sets of covenants impose a consent requirement; the 1966 covenants in favour of the owner or owners of the Pink Land and the 1967 covenants in favour of High Elms Properties Limited. The 1967 covenants include a "one house per plot" requirement

and would also prevent the addition of walls and railings around the plot as proposed by the applicant.

26. The applicant asks the Tribunal to discharge covenant 3(c) in the 1967 conveyance, being the consent requirement in favour of High Elms Properties Limited, relying on section 84(1)(a), often referred to as the obsolescence ground. As to the rest, the applicant seeks modification on under grounds (aa) and (c).

Title to the land proposed to be developed

27. Finally, a point about title. The 1967 conveyance plan depicts a straight line boundary to the west and south of the property, ending at right-angles to the boundary of the Pink Land. Mr Medley's registered title reflects that. His proposed development does not follow that line, but requires a projection from it at the north-west corner, where the gates will be (at right angles to the big gates across the road), and another curved area at the south-east corner. The south-east area is currently part of Mr Medley's garden, laid to lawn and obviously mown with the rest of it; it sits in front of the listed wall dividing the Pink Land from the Green Land. These two areas falling outside Mr Medley's registered title are shown hatched on the following plan which also shows the intended position of the new houses:



28. Mr Mackenzie, the first objector, owns Forest House and also the roads on High Elms; this is his registered title plan:



29. So Mr Mackenzie has the registered title to those two small areas forming part of the proposed developed that do not fall within the applicant's registered title. Ms Cunningham suggested that the discrepancy could be accounted for by the fact that the boundaries on title plans are general boundaries unless there has been a determined boundary under section 60 of the Land Registration Act 2002; but in our judgement that argument could not succeed since the registered title boundary matches the conveyance plan.

30. At the start of the hearing Mr Fuller made an application to strike out the application on the basis that it could not succeed since the applicant's proposed development encompasses land that he does not own. We refused that application on the basis that it was made without notice at the last minute.
31. That said, the applicant has had ample warning of the problem. It must have been obvious to those advising him from the title plans. It was raised in the amended statement of case filed by the 10 objectors represented by Mr Khakhar and Mr Fuller on 7 March 2024. Ms Cunningham explained that the applicant believes he owns the two disputed areas of land by adverse possession over many years and that he will have no difficulty in making an application for alteration of the register; if that fails, he believes he will have no difficulty in applying for a variation of the planning permission so as to move the gates in the north-east and the garage in the south-west back inside the registered title. Ms Cunningham applied to amend the applicant's application so as to encompass, in the alternative, a development that did not involve use of land outside the applicant's title. We refused that application on the basis that it was made without notice and at the last minute; in any event we have no evidence, other than the applicant's opinion, that the variation proposed would be acceptable to the local planning authority.
32. Accordingly, the application proceeds on the basis that the proposed development encompasses the two disputed areas, and we consider it on the basis that the applicant owns the necessary land to put into effect the modification that he seeks. Had the applicant succeeded in establishing that the Tribunal has jurisdiction to modify the covenants under section 84 of the Law of Property Act 1925, we would not have exercised the discretion conferred by the statute to modify the covenant (see paragraph 19 above) in a way that would be pointless if the applicant did not own the necessary land. We would have adjourned the application in order for him to establish ownership, if he was able, of the disputed areas. As it is the applicant has succeeded as regards only one of the covenants; for the reasons explained below we do not have jurisdiction to modify the rest, and so the issue of the applicant's title to the land needed for the development does not arise.

The objectors

33. The objectors are the owners of 14 properties and they fall into three groups.
34. The first group comprises just one objector, Mr Ross Mackenzie. He owns Forest House, which Mr and Mrs Morley bought in 1966. The applicant accepts that he has the benefit of the covenants in the 1966 and 1967 conveyances. As we noted above, Mr Mackenzie's registered title also includes the road on the Green Land. He explained that he bought Forest House and the road as a single property, so at some point before his purchase the company must have conveyed or transferred the road to the then proprietor of Forest House.
35. Next are Mr and Mrs Koak of 13 High Elms, Mr and Mrs Stohr of 14 High Elms, Mr and Mrs Regan of 15 High Elms, Mrs Morley of 1 Forest House Fields, and Mr and Mrs Chaudhary of 17 High Elms. They all have properties on the Pink Land, sold by the Morley family in the 1970s – we refer to them as “the 1970s houses”. Of those, Mrs Morley is in a special position; if we have understood correctly she is the daughter of the 1966 purchasers of the Pink Land, and grew up in Forest House. The applicant accepts that she has the benefit of the 1966 and 1967 covenants. The rest of the objectors in this category own properties on the Pink Land and we see no reason why they do not have the benefit of the 1966 covenants, taken for the benefit of “the Pink Land and every part thereof”.

36. The remaining objectors each own houses on the Green Land: seven of the town houses, and the bungalow at number 1 owned by Mrs Diggins. None of these properties has the benefit of the 1966 covenants, which were taken for the benefit of the Pink Land only. Ms Cunningham argued that they do not have the benefit of the 1967 covenants either. She took the view that those covenants were taken only for the benefit of the vendor company, High Elms Properties Limited, in order for it to control the development as it was laid out. We see no substance in that argument. The covenant is expressed to be “For the benefit and protection of the remainder of the Company’s High Elms Estate ...or any part or parts thereof”, and the company’s estate was the Green Land. It is annexed to the land by section 78 of the Law of Property Act 1925 (*Federated Homes Limited v Mill Lodge Properties Limited* (1980) 39 P & CR 576). With the exception of the covenant requiring the consent of the company itself, the 1967 covenants clearly benefit the Green Land and this group of objectors has the benefit of them.

Covenant 3(c) in the 1967 conveyance

37. This is the covenant that requires the landowner to obtain the consent of High Elms Properties Limited, the then vendor, for any building or structure on the land. This covenant is sought to be discharged on ground (a) in section 84 namely that it is obsolete. Reliance was placed on *Crest Nicholson Residential (South) Ltd v McAllister* [2002] EWHC 2443 where the Court of Appeal upheld the decision of Neuberger J (as he then was) in the High Court that when a company whose consent was required by a similar covenant had been dissolved the covenant was discharged.
38. High Elms Properties Limited was dissolved long ago. Mr Fuller did not pursue an argument that covenant 3(c) survived for the benefit of the other owners of properties on the Green Land. We take the view that the covenant was discharged when the company was dissolved, but insofar as it is necessary to do so we discharge it on ground (a) in section 84(1).

The remaining covenants: grounds (aa) and (c)

39. That leaves the two 1966 covenants, and the other two 1967 covenants, which the applicant wants the Tribunal to modify, not discharge, on grounds (aa) and (c). Ground (c) requires the applicant to prove that no-one will be injured at all by the modification; if the applicant fails on ground (aa) then he fails on ground (c). We address ground (aa) first.
40. Ground (aa) is a complicated provision because it has to be read with sub-sections (1A) and (1B) of section 84; it was helpfully unpacked by the decision in *Re Bass Ltd’s Application* (1973) 26 P & CR 156 and expressed in a number of questions of which the following are relevant to this application:
- i. Is the applicant’s proposed use reasonable?
 - ii. Do the covenants impede the proposed use?
 - iii. Does impeding the proposed use secure practical benefits to the objector?
 - iv. If the answer to question 3 is affirmative, are those benefits of substantial value or advantage?
 - vi. If the answer to question 4 is negative, would money be adequate compensation?

41. Unusually question 1 is in dispute, even though the applicant has planning permission for what he wants to do. Mr Fuller argued that a use of the application land that involved trespass could not possibly be a reasonable use. As we have explained, if we had a discretion to modify all the covenants that are the subject of this application, we would not have exercised that discretion in a way that would be pointless if the applicant did not own the necessary land; but we would have adjourned the application in order to enable him to make good what he says about the disputed areas. We think that the uncertainty about the title goes to discretion and not to the first of the *Re Bass* questions; the applicant says he has title to the necessary land and, if he has, then its use for the building and occupation of two houses would be a reasonable use.
42. The second question is not in dispute; the covenants impede the proposed use of the land.
43. We proceed now to look at questions (iii) and (iv) together: do the covenants secure practical benefits to the objectors, or any of them, and if so are they of substantial value or advantage.
44. None of the parties has produced any valuation evidence and so the argument has focused on whether the covenants secure practical benefits to the objectors and, if so, are those benefits of substantial advantage, rather than monetary value, to them. In other words: if the covenants confer practical benefits on the objectors, are those benefits substantial?
45. The three groups of objectors are in different positions, physically. Not all of them will be able to see the proposed development from their homes. Not all of them have to drive past it to get to their homes: Mr Mackenzie's vehicular access is from Vicarage Lane, although he walks through High Elms to get to Grange Hill station. We could organise our discussion by groups of objectors, or by the benefits that they claim the covenants give them, and we think the simplest approach (to avoid repetition) is to do the latter.

Open aspect and the prevention of over-development

46. We regard these practical benefits as distinct but related. The prevention of fences, walls and planting at the front of the properties on the Green Land helps to preserve a sense of openness and space which is an important amenity so close to central London. There is a pleasing lack of clutter and the estate remains true to the design ethos envisaged and enabled by the inclusion of the covenant. The introduction of walls, railings and hard landscaping around the proposed development will in our view lead to a perception that the new houses are much closer to the road even if that is not actually the case. This will primarily affect the properties on the Green Land and will make the estate feel enclosed and over-developed.
47. In her witness statement Mrs Fuchs-Khakhar described High Elms as a separate entity from the built-up areas of Chigwell. On our inspection we were struck by a sense that High Elms is a part of rural Essex, there being undeveloped land to the north, west and south. Whilst in terms of their architectural form the proposed houses might be appropriate neighbours to Forest House, their scale and positioning are, in our judgement, inappropriate for this location. Mrs Morley said in her objection that the High Elms estate was very carefully planned. At the time of the disposal of the Green Land the planning authority refused an application on the basis that the proposal was not part of an acceptable scheme for the whole of the Forest House estate. The terrace of townhouses with its Georgian design cues was undoubtedly a product of that requirement. In our view if the current development proposals were permitted the careful positioning of the original development would be lost.

48. One colourful detail that emerged during the hearing was the extent to which Mr and Mrs Morley involved themselves in the Green Land. Mrs Fuchs-Khakhar, who with her husband Mr Khakhar bought her house in 1994, remembers Mrs Morely walking down the road looking at the town houses “very much the lady of the manor”; Ms Boak remembers that “Mr Morley came regularly in wellies to look up and down the street to see if anything changed”. Certain things have changed, of course; a number of the town houses have extended to the rear, and there are bushes outside number 12. Number 12 has been considerably extended; Mr Medley in cross-examination said that it had “doubled in size” and a comparison of the plan to the 1967 conveyance and the current layout indicates that that may be true, although it is not apparent from the road because the extra rooms added at the back are hidden behind the wall that connects the house to the arbour and the garage. Whether express consent was sought or given to those changes is not known; importantly there have been no changes to the Green Land that are visible from the road except the bushes outside number 12. There are no walls or fences, nothing visible on the roofs, and no visible extensions, whether because the Morleys refused consent or because no-one tried to change anything.
49. We have already mentioned the small area of land at the north-west of Mr Medley’s title, adjacent to gates across the road, the ownership of which is disputed. This land is currently used as a turning point for vehicles that do not have access to the area beyond the gates. Mr Medley proposes to enclose it behind gates. This will remove what the townhouse residents view as a useful facility. It was also submitted that the residents of the new houses will find their basement parking, accessed by a car lift, bothersome and will inevitably take to parking on the paths and verges, causing congestion and contributing to the sense of over development. Whilst the prevention of these two changes might not, on their own, constitute much of a practical benefit, when taken into account with the other effects of the development they reinforce the perception that the proposals are ill-suited to the High Elms estate.
50. The development itself represents a striking intensification of the use of the application site. The proposal is for two substantial family homes where only one relatively modest bungalow currently exists. The houses will have basements with pools and underground parking. The garden space will be very limited with little open outlook, being hemmed in by a tall wall and mature evergreen trees. Mr Medley has in our view simply tried to squeeze too much on to the site. Understandably he has sought to maximise the development value of his land but in our view he has gone too far. The solutions he has employed to shoehorn as much floor space as possible into the scheme have forced him into compromises such as the boundary walls which have resulted in a development that would damage the special locality of High Elms.
51. In our judgement the preservation of the open, uncluttered nature of the estate and the prevention of over development are practical benefits of substantial advantage. That is not to say that the benefit applies uniformly across the Green and Pink Land. We view the houses now on the former as being most affected by the proposals and it is solely on the Green Land (the houses numbered 1 to 11) that the covenant confers a substantial advantage.

Potential effect on other development proposals in High Elms

52. Mr Fuller submitted that were the proposed development to be permitted it would create a precedent for future schemes, making it more likely that they would succeed in

circumventing the covenants. This argument is normally referred to as the ‘thin end of the wedge’.

53. We recognise that the two bungalows in High Elms are on borrowed time. They are starting to show signs of their age, their architecture is dated and they make far from optimal use of the sites they occupy. If the proposals at number 12 are permitted it will not be long before a scheme of similar density, scale and mass is advanced for number 1. In our view that degree of development would fundamentally change the character of the estate and the ability to prevent it is a practical benefit of substantial advantage for the occupiers of numbers 1 to 11 High Elms but not for Forest House, nor for 16 to 18, nor for the properties situated north of the listed wall. We make this distinction because Forest House is sufficiently removed from High Elms to be largely unaffected by any intensification of use, whilst the owners of the houses north of the wall only pass through the estate and numbers 16 and 17 only drive a short way past the entrance to High Elms. Any effect on the amenity of the houses north of the wall will be negligible because of their position behind the listed wall and gates; there will be no effect on numbers 16 to 18 because of their position on the estate.

Overlooking

54. The new houses would to some extent overlook some of the townhouses. The new houses will be opposite numbers 8, 9, 10 and 11 and at a distance of some 20 metres apart. We anticipate that the first floor windows will be at broadly similar heights and there will inevitably be some intrusion at that level. We noted from our inspection that the full height windows on the first floors of the townhouses are in the third and fourth bedrooms. The lounge space at first floor level faces west. From the first floors the occupiers of the new houses would be able to look down into the ground floors of the town houses but at that level there is only one, relatively small, street facing window which serves the kitchen. However, we consider that there is reasonable separation between the two groups of dwellings and the ability to restrict any overlooking in this context is not a practical benefit of substantial advantage.
55. The rear windows of the proposed houses face the garden of Forest House, and it is impossible to tell from the plans we have whether the lower part of the garden of Forest House will be overlooked from the first floor windows of either of the new houses. If it is, it will not be to a great extent; it is clear that the bottom of those first floor windows will not be above the wall. Accordingly, any overlooking will be minimal and we do not regard the prevention of that overlooking as a practical benefit of substantial advantage.

Damage to structures including the listed wall

56. We take the view that the listed wall is an intrinsic part of the High Elms street scape forming the backdrop to much of the estate. Any change to it would alter the character of the estate. The proposed houses will have large basements and their construction will involve excavation to a significant depth. Plans included in the hearing bundle show the distance between the car lift shaft serving the basement of the northern house and the listed wall as being 0.6 metres. At the southern end of the site works will take place within 2 metres of the wall. We have no evidence about the construction techniques to be employed to construct the basements, or to ensure the integrity of the wall, but even if best practice is used it can be reasonably surmised that the foundations of the wall are shallow and deep groundworks in close proximity will pose a significant risk of serious damage or even collapse. On our site visit we noted that the existing garage at number 12 is attached to the wall and may be providing a degree of support and stability for it. We question

whether the floor slab of the garage in particular can be broken up and removed without damage to the wall. We have similar concerns about the parts of number 12 which appear to be attached to the section of wall running north/south. That particular part of the wall has a pronounced lean in the direction of the bungalow. It follows that the preservation of the wall is a practical benefit of substantial advantage to the owners of number 1 to 11 High Elms.

57. Equally the preservation of the wall (leaving aside any dispute about ownership) is important to the owner of Forest House; it marks their boundary and ensures privacy, and forms the back wall of a greenhouse and another garden building. With its old brickwork the wall is also part of the character of the Forest House garden. Accordingly its protection and integrity is a practical benefit of substantial advantage to Mr Mackenzie.
58. We do not think that the protection of the listed wall is a practical benefit to the owners of any of the other properties on the Pink Land (13 – 15 and 16 – 18 High Elms, and numbers 1 and 2 Forest House Fields).

Strain on services including drains

59. Mrs Fuchs-Khakar thought that the occupation of two new houses in an estate that already comprises 21 dwellings would put an undesirable strain on services. The new houses represent a net increase of only one house and in the circumstances it is unlikely that services will be overwhelmed. Moreover, we have no evidence, either anecdotally or from an expert to judge whether there is any merit in the submission.

Loss of access, and loss of view, for Forest House

60. Mr Fuller speculated that the disputed land at the south-west corner of the application land was probably excluded from the applicant's title to permit access from Forest House to High Elms and to facilitate development of the Forest House site if necessary. In fact, a previous doorway which is now bricked up is clearly visible and on the plan of the Green Land a pathway from Forest House to the doorway can be discerned. We do not regard the possibility of the reinstatement of the doorway as a practical benefit of substantial advantage. No planning or development evidence was adduced with regard to the prospects of building on the garden of Forest House but bearing in mind that both the house and the wall are listed the likelihood of gaining planning permission is remote. It follows that the retention of the possibility of access is also not a practical benefit of substantial advantage.
61. Mr Mackenzie said that a major attraction for him and his family when they acquired Forest House was the far-reaching views over East London to the Thames and beyond to Kent. He considered that the two bungalows at numbers 1 and 12 were built below the top of the garden wall to preserve the views. We accept that, and we think that it is likely that the positioning of the town houses along the eastern boundary of the Green Land was the result of the same objective.
62. Mr Mackenzie thought that the new houses would protrude far enough above the wall to obstruct his view. We find that they will not do so, despite the difficulty we have in determining the exact relationship between the height of the new houses and the listed wall. What we can say with certainty is that the ridge line of the roof on the existing bungalow is above both the northern and eastern sections of the wall. When we inspected, we took in the view from the first and second floors of Forest House. We think that the roofs and rear elevations of the new houses will be visible from both of the upper floors.

The nearer house will be partially obscured by trees. The far views from both levels will be unaffected, because the roofs when viewed from the upper floors of Forest House will be well below the horizon, and no higher than the row of tall conifers that line the southern boundary of the High Elms estate. We conclude therefore that there will be no loss of the view beyond High Elms.

Conclusion on ground (aa)

63. We conclude that the covenants (other than the company consent covenant, see paragraphs 37 and 38 above) bestow practical benefits of substantial advantage upon the objectors whose property is on the Green Land (numbers 1 to 11 High Elms), by protecting the open aspect of High Elms and preventing over-development, and by preventing further inappropriate future development. And by protecting the listed wall they confer a practical benefit of substantial advantage on those objectors and also on Mr Mackenzie in Forest House. We therefore do not have jurisdiction to modify them.

Ground (c)

64. Having failed to establish that the conditions in ground (aa) are met, the applicant necessarily fails to establish ground (c).
65. Ms Cunningham relied on *Ridley v Taylor* [1965] 1 WLR 611 where the Court of Appeal held that ground (c) will be appropriate in the case of “frivolous” or “vexatious” objections from persons who have suffered no injury. None of the objectors would suffer no injury as a result of the proposed development so the point does not arise. But we wish to make clear that whilst not all the reasons for opposing the development succeeded, none of the objectors could be regarded as having been frivolous or vexatious.

Conclusion

66. The covenant numbered 3 (c) in the 1967 conveyance is discharged; otherwise the application is refused.

Upper Tribunal Judge Elizabeth Cooke

Mr Mark Higgin FRICS FIRRV

8 May 2024

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.