Neutral Citation Number: [2024] UKUT 62 (LC)

Case No: LC-2022-597

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

Royal Courts of Justice

15 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – proposed extensions to terrace of houses - covenant preventing alteration of external appearance of houses – whether covenant secured practical benefits of substantial value or advantage – s.84(1) (aa) and (c), Law of Property Act 1925 – application refused

BETWEEN:

RAKESH PATEL AND OTHERS

Applicants

-and-

LIAM PHILIP SPENDER AND 103 OTHERS (1)
FIT NOMINEE LIMITED AND FIT NOMINEE 2 LTD (2)

Objectors

4, 6, 8, 10, 12, 14, 16, 18, 20, 22 and 24 Ferry Street,
London, E14 3DT

Upper Tribunal Judge Elizabeth Cooke and Mr Mark Higgin FRICS FIRRV
30 January – 2 February 2024

Decision date:

Mr Stephen Jourdan KC and *Mr Michael Ranson* for the applicants, instructed by Brethertons LLP
Mr Liam Spender for the objectors

The following cases are referred to in this decision:

C & G Homes Ltd v Secretary of State for Health [1991] Ch 365
Duval v 11 – 13 Randolph Crescent Limited [2020] AC 845
Martin v Lipton [2020] UKUT 8 (LC)
Morris v Brookmans Park Roads Ltd [2021] UKUT 125 (LC)
Re Bass (1973) 26 P & CR 156
Ridley v Taylor [1965] 1 WLR 611
Shephard v Turner [*2006*] EWCA Civ 8

Introduction

1. Ferry Street is a pleasant street in Docklands, lined with town houses and rich in history; the pub on the corner dates from 1737. The street takes its name from the Ferry that plied between the southern tip of the Isle of Dogs and Greenwich; the first documented mention of a ferry across the Thames in this location was in 1450 but it is thought to be older. Some two hundred years later the ferry was mentioned by Samuel Pepys in his diary, and it eventually closed for business in 1892. That, however, is not the end of the story, as during World War Two the Greenwich Foot Tunnel was damaged by a German bomb and the ferry was temporarily reinstated, a pier being created from some redundant barges.

2. This application is for the modification, pursuant to section 84 of the Law of Property Act 1925, of a covenant that burdens eleven freehold houses on Ferry Street but forming part of the St David's Square development, which is a mix of freehold houses and leasehold flats. The owners of the application properties wish to extend the living accommodation into the roof space and create full width dormer extensions which will face west, looking into the development, and to extend their ground floors. Each house is burdened by a covenant:

> 'Not to….
> Add or alter any building on the Property in any way so as to affect substantially the external appearance thereof and in the event of any rebuilding it shall so far as reasonably possible in conformity with the building which it renews or replaces'

3. We refer to that as the "alterations covenant". It is not in dispute that there is a building scheme across St David's Square so that the alterations covenant benefits and is enforceable by the owners of the other houses and flats in the development, 104 of whom are the first group of objectors as well as by the freeholders of the estate other than the houses, who are the second objectors.

4. We inspected the application properties in the afternoon of 11 January 2024. We viewed them both from Ferry Street and from within the development, and we saw inside three of the properties. We also walked around the wider development and some of the surrounding streets. We were granted access to a number of flats in the development and we inspected the communal facilities in Consort House.

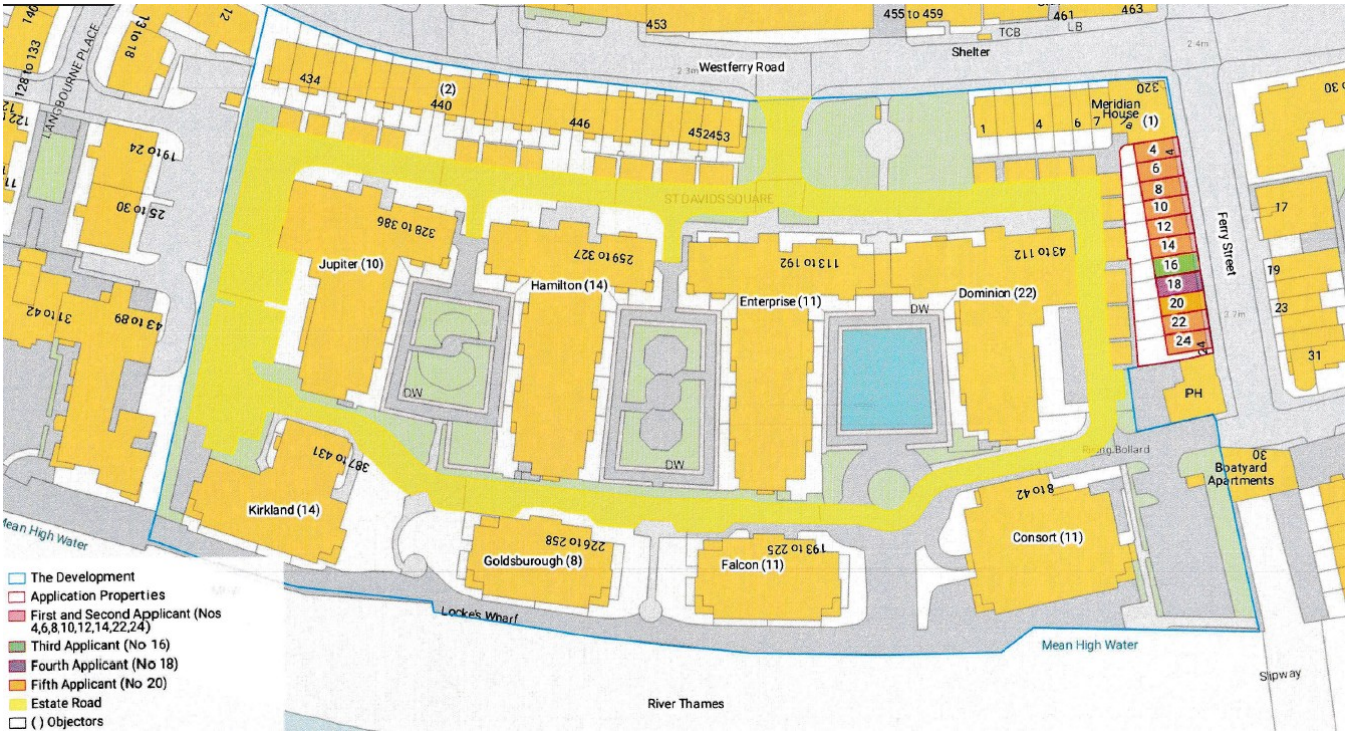
5. The applicants were represented by Mr Stephen Jourdan KC and Mr Michael Ranson, and Mr Liam Spender represented the first group of objectors; we are grateful to them all. The second objectors were not represented at the hearing.

The facts

6. St David's Square was developed in the late 1990s by St George North London Limited, a subsidiary of Berkeley Homes. It occupies a site of approximately 7.5 acres which was formerly used for heavy industrial purposes including the manufacture of ship propellers. The development comprises four terraces of houses on its northern boundary adjacent to West Ferry Road and the application houses on the eastern boundary with their entrances on Ferry Street. The remainder of the site contains several blocks of flats; four large 'T' shaped blocks in the centre, four smaller blocks on the river frontage and a further small block nestled between the Westferry Road and Ferry Road on the north east corner of the

site. In total there are 476 individual units in the development, split between 436 flats and 40 houses.

7. The plan below shows the extent of the site and the arrangement of the various blocks within it. The application properties are clearly visible on the right hand side of the plan and are marked 4 to 24. Vehicular access to the development is from Westferry Road and car parking is provided beneath each block of flats. The houses have covered parking accessed from within the development. The plan also shows the formal landscaping between the largest blocks and a large ornamental water feature between Enterprise House and Dominion House. Consort House in the south eastern corner of the site contains a range of facilities including a gym and swimming pool that are available for residents' use. It is also the location of the on-site management offices and security team.



8. St David's Square is at the southern tip of the Isle of Dogs, about 5 miles east of Central London. Canary Wharf is approximately 1.25 miles to the North. The area is well served by public transport, and the Island Gardens Docklands Light Railway station is some 250 metres north east of the development. The Thames Clipper boat serves Masthead Pier which is about 500 metres to the west and can be reached by the Thames Path.

9. The application properties are a terrace of eleven, three storey houses on the western side of Ferry Street. Numbers 4 to 22 are arranged in pairs with the entrance doors on the left and right hand sides respectively and each pair is separated from the next by a brick wall which extends to the full depth of the front garden area and is approximately 2.75 metres tall. The elevations are of yellow stock cavity brickwork and the roofs, which have a steep pitch, are covered with reproduction slate. The windows are double glazed timber casements with stone cills. At the rear of the properties each house is provided with a small first floor balcony, access to which is through a pair of French doors. The houses have small courtyard gardens at the back although the layout of the site is such that the gardens become progressively smaller from the south to the north of the terrace. Each

house also has a car port with a curved metal roof which is situated adjacent to the rear garden.

10. St David's Square has a noticeable architectural signature going beyond the uniformity of the yellow brickwork. Stripes of dark brickwork on the ground floor of the houses are echoed on the blocks of flats and create an interesting theme. So do the curved 'waveform' roofs on the tall blocks, a motif which is referenced in the curved roofs of the carports. Pale coloured laminate panels are utilised as cladding at upper levels throughout the estate and, together with the use of slate on the roofs of the houses in Ferry Street and Westferry Road, create a pleasing consistency.

11. The original configuration of the houses comprised, at ground floor level, a kitchen/dining space at the rear of the floor with access to the garden, a single bedroom, a cloakroom with WC and a hallway. The first floor contained a living room with access to the balcony, a double bedroom and a shower room. The top floor had two double bedrooms and a bathroom. The properties owned by Mr Patel are operated as Houses in Multiple Occupation ('HMO') and the first floor living rooms are used as a bedroom.

The statutory background

12. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The applicants in this case relied on grounds (aa) and (c); unless one of these grounds is made out the Tribunal has no jurisdiction to modify or discharge the covenant.

13. Ground (aa) is fulfilled where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures "no practical benefits of substantial value or advantage" to the person with the benefit of the restriction, or that it is contrary to the public interest, and that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.

14. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area, as well as "the period at which and context in which the restriction was created or imposed and any other material circumstances."

15. The condition in ground (c) is met where it can be shown that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. The applicants focused in argument on ground (aa), accepting that if ground (aa) is not made out then neither can be ground (c).

16. If the applicants are able to establish that the Tribunal has jurisdiction to modify the covenant they will have only cleared the first hurdle; the Tribunal then has to make a discretionary decision whether or not to do so.

17. If it does so, the Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction. If the applicant agrees, the Tribunal may also impose an additional restriction on the land at the same time as modifying the original restriction.

The applicants, the application and the open offer

The applicants

18. There are five applicants. Mr Rakesh Patel owns numbers 4, 6, 8, 10, 12, 14 and 24. Through First Docklands Property Management Limited, which is wholly owned and controlled by Mr Patel, he also owns Number 22. We refer to those eight properties together as "the Patel properties". They are all let as HMOs, and each has five occupants at present although Mr Patel's evidence was that they have been occupied by four, five or six people at various times. Each has an HMO licence for six occupants. Number 16 is owned by Mr Mikky Ho and is let on an assured shorthold tenancy to two tenants, but his evidence was that he intends to move back there once the projects are completed. Number 18 is owned by Mr Anthony Onabanjo. At the time of the application Number 20 was owned by Mr Ali Tekin Atalar but in July 2023 the property was sold to Ms Carolyn Chuah. Only Mr Onabanjo and Ms Chuah currently use their properties as their home.

The application

19. The application was made on 25 November 2022 and sought modification of the covenant to enable two separate construction projects to be undertaken.

20. The first is a ground floor addition at the rear of the properties which will extend the kitchen/dining area. The external dimensions of the extensions are modest, being some 3.0 metres in depth (albeit a little more in the case of numbers 22 and 24; it will be recalled that the courtyards are bigger at the south end of the terrace, see paragraph 9 above and the plan at paragraph 7) and extending the full width of the house, which from the plans supplied in evidence appears to be about 4.4 metres. Planning permission is not required for the ground floor extensions numbers 4 to 20 because the works constitute permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015. At numbers 22 and 24 where the extensions exceed 3 metres in depth planning permission was required and obtained but has now lapsed.

21. Mr Patel has obtained, for each of his properties other than numbers 22 and 24, certificates of lawfulness of proposed development under section 192 of the Town and Country Planning Act 1990. This means that the planning authority has certified that the carrying out of the extension works would be lawful.

22. The second set of works is to convert the loft space in each of the houses to a habitable room, with a shower room and WC; the applicants' Statement of Case states that the intention is to convert these three-bedroomed houses into four-bedroomed houses, although obviously in the case of the HMOs more than three rooms are presently being used as bedrooms. Planning permission is not needed for this work, being permitted development, and there is a certificate of lawfulness for each of the Patel properties.

23. The loft extensions are said by the applicants to be consistent with the St David's Square houses on Westferry Road but that is not exactly the case. Those houses were built with accommodation at roof level and the fenestration has been set back to create a small roof terrace which is accessed by French doors. The proposals in Ferry Street envisage a dormer extension on the western slope of the roof. The flat roof of the dormer would align with the ridge of the existing roof and Velux roof lights would be installed on the existing roof facing on to Ferry Street. The west facing wall of the dormer, looking into St David's Square, would be largely glazed with French doors in the middle and a Juliet balcony.

24. The applicants' case is that the alterations they want to carry out are straightforward domestic alterations and extensions that are carried out by thousands of homeowners every year, and will have a minimal impact upon the adjoining properties.

The open offer

25. On 18 January 2024 the applicants' solicitors wrote to the representatives of both groups of objectors offering, on an open basis, a number of conditions to be attached by the Tribunal to the modification of the covenant.

26. First, to address concerns expressed by the first group of objectors about the potential for nuisance to be caused by additional occupants of the application properties:

> "the Applicants are prepared to agree to a covenant under s.84(1C) not to create any additional bedrooms in the property (with the intention being to use the additional loft space as a reception / living room), and not to let any individual property to more than 5 individuals and not to permit more than 6 individuals to occupy the property. That reflects the current tenancy arrangements and will mean that there is no increase in the number of individuals living in the Application Properties.

27. It was explained to us at the hearing that that offer should have been stated to relate only to HMOs; so where there is a single family in occupation the top room can still be used as a bedroom for a family member.

28. Next, to address concerns about disturbance from construction, about the appearance of the loft extensions, and about overlooking, the applicants offered to enter into what they describe as a licence to make alterations. A draft licence was attached to the letter, from which it appears that what is proposed is better described as a deed of covenant, whereby the applicants enter into obligations both to the freeholders (objectors 105 and 106) and to, as follows (we quote from the letter, not from the draft):

- "… to comply with the reasonable obligations, conditions and stipulations recommended by a surveyor to be appointed by the 105th – 106th Objectors (on behalf of all Objectors);
- to pay the reasonable legal and surveyor's costs of the other parties in connection with the licence and the works (excluding the costs of the Tribunal proceedings)…;
- not to commence work until a suitable Build Over Agreement [from Thames Water in relation to proximity to the mains sewer] has been obtained;

- …to seek the prior written approval of the 105th – 106th Objectors as to the form and content of the Build Over Agreement (such consent not to be unreasonably withheld or delayed).
- …to undertake all of the loft conversion work to the Application Properties at the same time;
- …to carry out all any works… at the same time rather than sequentially;
- …to use all reasonable endeavours to complete the work within 4 months of the work commencing."

29. We take those last two points to refer to the whole project, ground floors and lofts.

30. The letter contained an offer of compensation for disturbance, due to the construction works, to those 26 of the objectors whose properties are closest to the application properties.

31. The letter also made an offer to modify the plan for the loft extensions:

> "The Applicants do not consider overlooking to be a reasonable concern, given the distance between the Application Properties and Dominion House, and the number of windows already overlooking Dominion House. Consequently, their preference is dormer windows (as specified in the Application). However, if (contrary to the Applicants' primary contention) the Tribunal considers that the ability to prevent further overlooking does afford to the Objectors a practical benefit of substantial value or advantage, the Applicants would be prepared to install Velux rather than dormer windows.
>
> … The Applicants are prepared to agree to a covenant under s.84(1C) not to carry out construction work to further extend or increase the size of their properties or alter their appearance (aside from the loft conversion and single storey rear extension).

32. Finally the letter made offers of covenants to the freeholders, objectors 105 and 106, essentially to confirm what the applicants say is the case in any event, that the modification of the alteration covenant will not cause them to incur any additional liability or to be unable to provide the services they have covenanted to provide on the estate (we explain those points below).

33. It is fair to say that that suite of open offers was made late in the day, just a fortnight before the hearing. It was not entirely easy to ascertain which of those offers was intended as a modification of the original application and which were intended as fall-back positions in case the original application did not find favour with the Tribunal.

34. As we understand the position by the close of the hearing, the one point on which the original application is now modified is that the applicants offer to carry out all the loft conversion works at the same time; they suggest that that is a condition that the Tribunal should attach to the order modifying the covenant, and additionally offer the deed of covenant so that their commitment is enforceable as a matter of contract by all the objectors.

35. Otherwise the application remains unamended, but the offers set out in the letter of 18 January are made as fall-back alternatives. To summarise, they comprise
    1) an offer to restrict the number of occupants of the properties and the use of the loft room,
    2) conditions relating to the conduct of the works, and
    3) the substitution of Velux windows for French windows with balconies.

36. The applicants' primary case remains that none of these safeguards is necessary and that their application should be granted in its original form subject to the one change in paragraph 34 above.

The objectors' cases

37. The application is vehemently opposed by the first group of objectors on a number of grounds which we can summarise as follows:

    1) Increased future nuisance from the occupants of HMOs;
    2) Increased strain on the estate services and the service charge;
    3) Damage to the trees at the back of the application houses;
    4) Overlooking from the new balconies;
    5) The change to the architecture of the development;
    6) The breach in the building scheme and the risk of further development in the future.
    7) Disturbance from the work done to carry out the proposed projects.

38. We need to look in detail at each of those points and at the evidence put forward in respect of each.

39. Objectors 105 and 106, the two freeholders of the estate apart from the houses, have played a limited role in the proceedings and chose not to attend the hearing. Their statement of case set out a number of reasons why they opposed the modification of the covenant.

40. Their principal concern was that they are under an obligation to all the residents on the estate to enforce the covenants that burden each of the properties, if called upon to do so. The modification of the alterations covenant will make it impossible to enforce the original covenant, and so they will incur a liability to the other residents for failing to enforce it. They referred to the Supreme Court's decision in *Duval v 11 – 13 Randolph Crescent Limited* [2020] AC 845. In that case a landlord had released covenants by some of its leaseholders and thereby put it out of its power to enforce those covenants, as it was obliged via-a-vis the other leaseholders to do.

41. The freeholders' concern is an understandable concern but misplaced. If the Tribunal orders the modification of the alterations covenant, the freeholders will not themselves have put it out of their power to enforce the original covenant, and *Duval* has no relevance. Rather, the Tribunal's order operates against the property and the freeholders' obligations to enforce covenants applies to the covenant as modified.

42. The freeholders' other points can be swiftly dealt with. They say:

1) That once the application properties are extended they will no longer be able to enter them to provide services under the lease. Again, this is misplaced; any covenant by the freeholders of the application properties to give access to the freeholders will operate, unchanged, in respect of the extended buildings.
2) That they will not be able to exercise their rights to lay cables and conduits under the courtyards of the properties once built on; it seems unlikely that they would need to excavate the rear courtyards of these houses, but the applicants offer a covenant to allow them access (see paragraph 32 above).
3) That the applicants will be in breach of their covenant not to re-decorate the exterior of their properties; but, again, that covenant will apply to the buildings as modified.
4) That the projected works will increase the estate insurance premiums. It is difficult to see how that would be the case and no evidence is produced in support of that assertion, and we give it no weight.
5) That if the application properties are used as HMOs that will be a breach of the covenant in the lease to use each property only as a private dwellinghouse. As Mr Jourdan KC pointed out, that does not appear to be correct; an HMO is nevertheless a private dwellinghouse (*C & G Homes Ltd v Secretary of State for Health* [1991] Ch 365). In any event the alterations covenant does not prevent the use of any property on the estate as an HMO and the eight Patel properties are already so used.
6) That the increased number of residents will put a strain on the estate services. This concern matches that of the first group of objectors and we deal with the point below.

43. With the exception of that last point that disposes of all the freeholders' objections. For the rest of this decision, where we say "the Objectors" we mean the first group who are all residents on the estate. So far as the rest of their objections are concerned we have to look at the arguments and evidence, and to consider both the application in its original form (as modified by the proffered covenant to do all the loft conversions together) and at the covenants further offered to allay concerns.

44. All the four individual applicants gave evidence, and they also relied on the expert valuation evidence of Mr Ian Asbury, BSc (Hons), MRICS. Two of the Objectors gave evidence, namely Mr Spender and Ms Ekaterina Venidiktova; the objectors also called Councillor Peter Gold CBE, Mr Khaled Ahmed-Ali, Mr Abhay Kini, and Ms Katerina MacLachlan. Mr Ruaraidh Adams-Cairns BSc FRICS provided expert valuation evidence for the Objectors. Mr John Byers FRICS ACIArb was appointed as single joint expert in respect of construction issues arising from the application, and he was not called to give evidence at the hearing.

45. We examine the issues raised by the Objectors within the framework provided by the decision in *Re Bass* (1973) 26 P & CR 156, which is helpful in taking us through the requirements of section 84(1)(aa).

Does the covenant impede a reasonable use of the applicants' land?

46. The objectors have conceded that the application in its original form described works that would have been a reasonable use of the applicants' properties. They have not made that concession in respect of the applicants' proposal, for the objectors' benefit, that in the loft

of the properties there should no longer be balconies but Velux windows on the sloping roof. But they have not said why the installation of such windows would not be a reasonable use and we see no reason why it should not be.

Does the covenant, in impeding that reasonable use, secure practical benefits to the objectors? If so, are those benefits of substantial value or advantage?

47. We take the next two *Re Bass* questions together, for the avoidance of duplication. As we said above the objectors argue that the covenant gives them a number of important practical benefits, and we look at them in turn.

(1) The prevention of increased nuisance from the occupants of HMOs

48. The objectors clearly feel very strongly about HMOs, which they perceive as a source of nuisance and of anti-social behaviour. They argued that Mr Patel's HMOs are a particular source of nuisance, that his management of his HMOs encourages nuisance, and that he fails to prevent nuisance by his tenants. Of all the issues in the case this was perhaps the one about which they felt most strongly; it was certainly the one on which they adduced the most evidence.

49. Obviously, the alteration covenant does not prevent the use of any property on the estate as an HMO. All the application properties owned by Mr Patel or his company are already HMOs, as is at least one of the objectors' properties, and that is not a breach of covenant. Accordingly, the substance of this objection is not that the covenant prevents HMOs, but that it protects the objectors from an intensification of the HMO population in the application properties. If the properties cannot be altered then they cannot be adapted for more occupants. Essentially the objectors sought to demonstrate that Mr Patel is a bad landlord whose tenants are particularly troublesome and that the covenant in preventing him from adding to the number of occupiers of the application properties is securing a practical advantage to the objectors.

50. Most of the objectors' evidence was from people who do not live at St David's Square, namely Councillor Gold and Ms. MacLachlan, who live nearby, Mr Ahmed-Ali who lives on the other side of Ferry Street, and Mr Kini who no longer lives in Docklands but still owns 23 Ferry Street. None of them was relied upon by Mr Spender in closing. We were unimpressed with the evidence of these four witnesses, none of which went anywhere near to prove that Mr Patel's HMOs cause more disturbance than might be expected from students living in a densely populated area.

51. The only one of the objectors themselves who gave evidence that she had suffered nuisance from the occupants of the application properties was Ms Venediktova – even though 25 other objectors have properties facing the back of the application properties. Ms Venediktova produced some video evidence of the noise from parties in the application properties; she also took exception to parties held, perhaps once a year, in the carport at the rear of number 18 by Mr Onabanjo; Mr Spender submitted that that made him a "bad neighbour". We reject that suggestion; it is a disproportionate reaction to the sort of occasional disturbance that is inevitable in a densely populated estate. As to the parties at the HMOs, the quality of the recording did not enable us to get a sense of the noise levels. But all the properties on the estate are subject to covenants "not to create a nuisance", and not to permit anything to be done on the property or the estate that "may be or grow to be

a damage, nuisance of annoyance" to anyone there. It is to those covenants that the residents should look in response to anti-social behaviour by any of the residents on the estate.

52. None of this evidence, from Ms Venediktova nor from the four other witnesses went anywhere near to showing that the covenant sought to be modified confers a practical benefit on the objectors. That is because the modification of the covenant will make no difference to the numbers of people who can live in the Patel properties.

53. Each of the Patel properties has an HMO licence for 6 occupants. Mr Patel's evidence was that these houses have been occupied by four, five or six people in recent years. It may well be that all of them have had six occupants at some time. It is not suggested that that is a breach of the alterations covenant or of any other covenant.

54. The applicants' application was for a modification of the covenants to enable the creation of an extra bedroom in the loft space. In his witness statement Mr Patel said that he would be happy to enter into a covenant limiting the number of occupants to six. The open offer letter suggested a covenant limiting the number of tenants to five and occupants to six.

55. But the modification of the covenant, whether or not subject to that condition, will make no change in the number of occupants presently permissible in the Patel properties, each of which has an HMO licence for six occupants.

56. The objectors established in evidence that the present kitchens do not meet the local authority's size standards for a house with six occupants; the effect of the extensions would be to make the kitchens compliant with those requirements. We are invited to draw the inference that that is the motivation for the extensions. So it may be, perhaps in the hope that there will be no difficulties when the HMO licences come up for renewal. But that does not alter the fact that the Patel properties at present can be, and have been, each occupied by six people without breach of covenant and without contravention of the terms of the current HMO licences.

57. As to the rest of the application properties, there are no plans at present to turn them into HMOs. The present or future owners may decide to use them as HMOs, and they are entitled to do so under the covenants in their lease.

58. We conclude therefore that the covenant does not secure for the objectors the practical benefit of preventing the intensification of the use of the application properties as HMOs; specifically it does not prevent any of them being used for six rather than five occupants.

(2) The preventions of additional strain on the estate services and the service charges

59. Mr Spender argued that if the covenants were modified, 11 additional residents on the estate would put greater pressure on the gym and the swimming pool. The pool, in particular, is limited to 25 occupants and so with 11 more people on the estate it would be full, and closed to people who want to use it, more often.

60. The covenant does not, as we said above, prevent an increase of 11 persons in the population on the estate. There is no occupancy limit in any of the properties that could prevent its occupation by say, a couple with five adult children. Nor does the covenant

prevent any of the properties currently being occupied by, say, two people, being occupied by three, or becoming HMOs. The population of so large an estate must fluctuate frequently. It is unrealistic to focus on the 11 application properties as if they were the only source of that fluctuation.

61. We saw the gym and the swimming pool. Both are very nice. They are far too small to cater for more than a tiny fraction of the population of the estate. As we said above, the covenant does not prevent the introduction of 11 more residents on the estate, but even if it did we do not see that 11 additional residents, whether in the application properties or elsewhere, would make any discernible difference to the availability of the gym or swimming pool to any individual resident on the estate. So we see no substance in this point; the covenant does not secure any benefit in terms of the availability of estate facilities.

62. As to the service charge, this is apportioned on a per property basis. Mr Spender explained that this is regarded as unfair, because the HMOs with 5 or 6 residents pay the same as he or any other single leaseholder does, and so with the introduction of 11 more people that unfairness would be intensified. We fail to see how that is a practical benefit.

(3) Damage to the trees at the back of the application houses

63. The proposed works will involve the removal of some, but not all, of the trees behind the application properties.

64. The alteration covenant does not protect those trees. They can be cut down tomorrow without breaching it. The properties are, however, all subject to a covenant not to "remove or destroy any tree or shrub planted on the Property as part of any landscaping scheme (and forthwith to replace any tree or shrub on the Property which dies or is removed or destroyed and which in the opinion of the Company needs to be replaced)". That covenant will remain unmodified and can be enforced if it is breached.

(4) Overlooking from the new balconies

65. There are inevitably some compromises involved in choosing to live in a city environment. The density of development can result in lack of privacy and this is the case whether you live in a modern development in Docklands or an Edwardian mansion block in Westminster. The placement of the various blocks in St David's Square is not designed to eliminate overlooking. Some of the occupants of the lower floors of Dominion, Jupiter, Hamiliton and Enterprise Houses are overlooked by the residents of the West Ferry Street and eastward facing flats in Dominion House are opposite the rear windows of the Ferry Street houses.

66. On our inspection we perceived the Ferry Street houses to be closer to the eastern flank of Dominion House than the West Ferry Street houses to any of the other blocks. However, the distance between the Dominion House and Ferry Street, even at the closest point, appeared to be greater than the spacing of the two sides of Ferry Street itself. The proposed loft extensions will be at third floor level and the parts of Dominion House most exposed to loss of privacy will be the lower four floors (noting that the ground floor is used for car parking). It can be seen from the plan at paragraph 7 that Dominion House is 'T' shaped and that it is the flats at the eastern end of the horizontal element of the 'T' that will be most affected by the proposed development.

67. Ms Venediktova expressed concern that her master bedroom, living room and balcony would be overlooked by the loft extensions. She considered that homogeneous appearance of the Ferry Street roofs would be lost and that the harmony of the existing design might be disrupted if the extensions were not to be completed simultaneously. She was also concerned that the resultant 'eye sore' would affect her ability to sell or rent her flat, should the need arise.

68. Mr Asbury had inspected five flats on the eastern side Dominion House, they were on the 2nd, 3rd, 4th and 6th floors. He concluded that only the flats on the 3rd and 4th floors closest to Ferry Street have windows directly facing the loft extensions but they would be 18 metres apart and the privacy of the occupants would not be compromised. He thought that there was already a significant degree of overlooking in any case. In his view there would be no effect on value.

69. Mr Adam-Cairns considered that flats on the 3rd and 4th floors of Dominion House would suffer the greatest loss of privacy whilst those on the second floor would become aware of being 'looked down upon'. However, he concluded that these issues were 'comparatively minor'. He thought twelve flats would be affected by this issue and depending on their size the impact in terms of value would amount to between £3,000 and £5,000 each with a total effect of £50,000. Should the works not be completed simultaneously the 'gap toothed' effect might result in larger discounts, but Mr Adams-Cairns did not specify how much larger.

70. This is a crowded and densely-populated development. The loft extensions as originally proposed, with the Juliet balconies, will give rise to some additional overlooking, as discussed above. So would the Velux windows proposed as an alternative, albeit directed at the upper floors of Dominion House. Mr Asbury pointed out that the rear windows of the extended kitchens will be very close to the boundaries and carports of the application houses and so will have a more restricted upwards view than do the current kitchen windows. Mr Asbury thought that any increased overlooking would be thereby "neutralised".

71. The alterations covenant does prevent this additional overlooking. But in the context of this development where no-one's space is entirely invisible to anyone else (except perhaps the penthouses) we fail to see that the practical benefit conferred by that prevention is anything more than minimal. It certainly is not of substantial value or advantage. Those flats in the part of Dominion House that is orientated North-South (the vertical element of the 'T', or south wing), are in our view simply too far from Ferry Street to be impacted. The flats at the east-facing end of the north wing of Dominion House (the cross-bar of the T), are already overlooked to an extent by the West Ferry Street houses and in our judgement the proposed extensions will have no material effect on their value.

72. In light of our conclusion about the overlooking from the Juliet balconies in the original application, we do not need (under this head) to consider any further the offer to instal Velux windows in the sloping roof instead.

(5) The change to the architecture of the development

73. Having disposed of a number of things that the alteration covenant does not do, we come to what it actually does. It is a covenant not to :

> "Add to or alter any building on the Property in any way so as to affect substantially the external appearance thereof."

74. As we identified in paragraph 10 above, this is a well-designed development with a noticeable architectural theme and unity. The proposed alterations will substantially change the external appearance of the application properties, by adding the kitchen extensions and by the creation of a row either of dormer windows with Juliet balconies or of Velux windows in the sloping roofs of the properties.

75. Obviously what the residents of Dominion House will see when they look out of their windows will be a different view once the work is complete from what they see now. We do not regard the prevention of that change in itself as a benefit to the objectors. The original developer might have built the application properties with bigger kitchens and smaller gardens, and might have built them all with dormers or Velux windows in the roof, and no-one would have minded that at all.

76. The issue is whether the proposed change would be out of character with, or out of keeping with, the rest of the estate. Mr Jourdan KC referred us to *Martin v Lipton* [2020] UKUT 8 (LC) where the Tribunal modified a one house per plot covenant so as to allow an additional house to be built and said that the development would be:

> "… entirely in keeping with the original pattern of development on the estate. If the new house is completed it will be difficult for someone unfamiliar with the conveyancing history of the estate to identify which two adjoining properties on Oakfield Lane stand on what was originally a single plot."

77. So it will be here, say the applicants, because the kitchen extensions will not be noticeable and the loft conversions will be a visual unity and will look very much in keeping with the row of balconies on the back of the houses at right angles to the application properties, at number 1 – 7 Westferry Street.

78. Mr Asbury expressed the view that the kitchen extensions would have no impact on the street scene, and will not compromise the appearance of the eastern boundary of the estate; as to the loft conversions he takes the view that they are compatible with the character of the estate and do no harm to the appearance of the eastern arm of the development.

79. Mr Adams-Cairns in his report made the cogent point that a modification of the covenant for all eleven properties is likely, without more, to lead to a haphazard pattern whereby work is done on some properties and not on others, or on all the properties but at different times, so that for some while and perhaps permanently the roof line of the properties will look like a comb with missing teeth. In response to that the applicants have offered a covenant to do all the work at once.

80. We are not persuaded that such a covenant will be effective to prevent the piecemeal alteration of the application properties, nor even to ensure that they will all even eventually be altered in a consistent way or at all, for three reasons.

81. First, we accept that the applicants have all instructed their solicitor to offer that covenant. But we have not heard evidence of an agreed plan to carry out all the work in a single project by the same builder, which such a covenant must (at minimum) require. We do not doubt the appellants' sincerity in offering to get all the work done at once but clearly they have not yet put their heads together to decide how to do so. It is not known who would do the work. Mr Ho said he had had a quote of £50,000 in 2022 for the loft and kitchen extensions together; he gave no evidence about up-to-date costings. Mr Onabanjo said he had budgeted £50,000 to £80,000 for the work. Ms Chuah said she has budgeted £50,000 for the loft conversion having noticed this figure in one of the documents associated with the case. She had not sought any architectural advice and said that she had no idea how much planning, architectural and party wall costs might amount to. Both Ms Chuah and Mr Onabanjo said they would prioritise the loft and might do the kitchen later. So there is at present no plan on the part of the applicants to get the work done as a single project. Making such a plan is a considerable undertaking, and requires everyone to have the funds and everyone to agree the plans and the timing and to engage the same contractor. This would not be easy to achieve.

82. Second, even if the applicants make a plan to get all the work done together (which would include a change from the current intentions of Ms Chuah and Mr Onabanjo), it may prove impracticable for them to put it into effect. Unexpected life events are notorious for scuppering the best laid plans of mice and men, and here we have four individuals all in very different family and (probably) financial circumstances. Any plan they make cannot be immediately put into effect because planning permission for numbers 22 and 24 still has to be obtained, quite apart from the matter of build over agreements for the drains and so on. The chances of one or more of those individuals not being able to make the necessary financial commitment, not to mention a commitment to the inconvenience of the work, at precisely the right time is significant.

83. Third, and following on from those two points, a covenant to do all the work together would be difficult if not impossible to enforce by injunction (rather than by damages). It is perfectly possible that one of the four individuals involved becomes ill, or has an unexpected change in priorities, or cannot agree on the same builder as the others (the reader can no doubt supply any number of possibilities). Equally, Mr Patel himself might for example start work, but encounter difficulties in getting all his properties finished. The builder, or other contractors, might not be able to finish. And so on. In any of those cases the likelihood of any of the five applicants being compelled by mandatory injunction to do the work, at a cost of what looks like at least £50,000 per property, is vanishingly small. So is the probability of the objectors' getting an injunction to have works reversed (kitchen extensions demolished and lofts un-converted) in the event that the work is done on some but not all the application properties. They would certainly have to spend a lot of money and undergo a lot of stress and incur significant risk in any attempt to enforce the covenant.

84. So even if a covenant is given, we have no confidence in its effectiveness. And that means that to modify the alterations covenant inevitably exposes the objectors to the likelihood of piecemeal changes in the appearance of the application properties, whether by some kitchen extensions being done and not others or – more dramatically in terms of visual impact – by some loft conversions being done and not others (whether the original Juliet balcony design, more in keeping with Westferry Road, or the Velux proposal). The Velux windows would have a less dramatic effect than the balconies, but there are currently no

Velux windows on the estate and the change would striking by contrast with the existing consistent appearance of the slate roofs. And that would be out of keeping with the rest of the estate and the surrounding street scene. What is currently a well thought-out development with a very unified appearance would become incoherent and gappy.

85. We regard the prevention of that scenario as a practical benefit of substantial advantage. That being the case we have no jurisdiction to modify the covenant.

(6) The breach in the building scheme and the risk of further development in the future.

86. As things stand St David's Square is unaltered, so far as is known, since its construction. As the objectors put it, the building scheme has worked well. They are concerned that if the present application is successful future applications will have more chance of success.

87. This is not an argument based on fear of future applications; such an argument is, as Mr Jourdan KC helpfully set out, not a legitimate answer to the application. All the property owners in the development have the benefit of section 84 of the Law of Property Act 1925 and if they can meet the conditions set out therein they can have a covenant modified or discharged; it is not open to the objectors to argue that because this is a building scheme they should not have the opportunity of doing so. The prevention of the expense and stress of responding to future applications is not a practical benefit secured by a covenant of this nature, as the Tribunal has made clear (for example in *Martin v Lipton* [2020] UKUT 8 (LC) at [83]).

88. Instead, this is the argument known as the "ratchet" or "thin end of the wedge" principle. The Tribunal explained it in *Morris v Brookmans Park Roads Ltd* [2021] UKUT 125 (LC), where the application was for the modification of a one house per plot covenant to permit conversion of a house into flats:

> "101. Whether developers are more likely, if this application succeeds, to develop first and seek modification later is a matter for speculation. There are obvious risks involved in doing so and we think it is impossible to predict whether that will happen. The important issue is not so much the behaviour of developers but the likely response to future applications by this Tribunal [and] whether the granting of the present application will have the effect that more applications will be granted in future.
>
> 102. We take the view that it will. True, the Tribunal is not bound by its previous decisions and it looks at each case on its own merits. But the merits of each case depend upon the context for the application. Each modification of the covenants to allow a flatted development to proceed has an effect, however small, upon the estate as a whole and the levels of population, traffic, congestion and noise overall. Each modification changes those levels and therefore changes the context in which the next application is considered and ensures that the effect of the next flatted development is, likewise, only marginal.
>
> 103. We can see this in Brookmans Park. There are flats there already at 9A. The flats at number 11 therefore do not stand in isolation and, by themselves, they make little difference to the road, let alone to the estate. But if the covenants

> on number 11 are modified so that the flats can remain, then the next application for modification … will be made in the context of a road that already has two flatted developments. The construction of, say, four flats in place of one of the houses will not double the number of flats on the road; it will increase their number only by 50%. And so on. Each time it looks a little easier and a little more marginal. But at some point the cumulation of the marginal effects of each development will make a substantial change in the road and in the estate."

89. In St David's Square the starting point for future development would be different. The *Brookman's Park* application was for modification to a single dwelling, which would not in itself be a big change; here, as we have already said, the modification of the covenant for all eleven application properties will enable a substantial change to the estate and a significant departure from its architectural unity. The risk in the present case is that after that big change, more would follow.

90. The application properties are not the only ones that might be able to be extended. The houses in Westferry Road have courtyards; true, the internal layout of those houses is different and less easy to extend, but an applicant for modification of the alterations covenant so as to enable a rear courtyard extension would be in a strong position if the alteration covenant had already been modified so as to permit a kitchen extension.

91. There have been other planning applications. In 2020 Mr Patel applied, unsuccessfully, for planning permission for a two storey extension at 24 Ferry Street. In 2008, the local planning authority refused a certificate of lawfulness for 440 St. David's Square (one of the houses on Westferry Road), where the owner was seeking to add a two-storey extension above the garage. There are two pairs of double garages between houses on Westferry Road with space for that sort of development, and Mr Spender drew our attention to the vacant land to the west of the last house in the Westferry Road terrace.

92. So the possibility of future applications is not fanciful. In any future case the applicant will be able to say that the building scheme has already been breached and to argue that a small further change will make no difference. And indeed a change to just one more structure, following the large-scale changes to the Ferry Street terrace, may not make a lot of difference, but there would then be a cumulative effect which would further erode the visual and architectural unity of the estate, as well as making it more crowded with buildings and structures.

93. We regard the avoidance of the thin-end-of-the-wedge effect, preventing even further erosion of the design and character of the estate, as a practical benefit of substantial advantage (and perhaps of some value, albeit difficult to quantify). That being the case we have no jurisdiction to modify the covenant.

(7) Disturbance from the work done to carry the proposed projects

94. Obviously the work proposed for each of the eleven application properties will generate significant disturbance at least for the nearby occupiers of St David's Square. The extent of that disturbance is difficult to predict, as is its duration. For the reasons we have given above we think it vanishingly unlikely that work on all eleven properties will be started and finished in a four month period.

95. Some of the objectors' evidence was designed to show that Mr Patel has a record of inconsiderate construction practices. Mr Spender in closing wisely confirmed that he did not rely upon that evidence.

96. It is now well-established that where a covenant is not specifically designed to prevent building works, the prevention of disturbance from construction is not a practical benefit of significant value or advantage: *Shephard v Turner* [*2006*] EWCA Civ 8, and for a recent example see *Martin v Lipton* [2020] UKUT 8. The alteration covenant in the present case does not appear to be designed to prevent disturbance from construction works, since it does not prevent alterations that do not affect the external appearance of the estate. The disturbance from the works proposed by the applicants is – on any account of the possibilities in this case – going to be a short-term rather than a long-term problem and therefore the prevention of that disturbance is not a practical benefit of significant value or advantage to the objectors. Compensation could be awarded for the disturbance; since we do not have jurisdiction to modify the covenant we need not speculate as to what that compensation might have been.

Discretion

97. In light of what we have said above we do not have jurisdiction to modify the covenant and so we do not need to consider the evidence adduced in an endeavour to paint Mr Patel in a bad light and thereby persuade us not to exercise our discretion in favour of the applicants. Had we had a discretion, that evidence would not have attained its objective. In *Ridley v Taylor* [1965] 1 WLR 611 at [623] Russell LJ said:

> "I do not think the personality of the applicant or his past behaviour is relevant to the exercise of the discretion. I refer again to the fact that tomorrow an assign may make the same application."

98. Nothing in the evidence that was adduced would have dissuaded us from exercising our discretion in the applicants' favour had we been in a position to do so. But we are not.

Conclusion

99. The application fails and the covenant remains unmodified.

Upper Tribunal Judge Elizabeth Cooke Mr Mark Higgin FRICS FIRRV

.. ……..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.