UPPER TRIBUNAL (LANDS CHAMBER)

[2024] UKUT 00001 (LC) **UTLC Case Number: LC-2023-174**
Bristol Magistrates' Court and Tribunal Hearing Centre

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

RESTRICTIVE COVENANTS – discharge – covenant preventing extension of bungalow without prior approval – bungalow extended in breach of the covenant – whether covenant was obsolete or secured practical benefits of substantial value or advantage – s.84(1)(a), (aa) and (c), Law of Property Act 1925 – modification granted

BETWEEN:

ANTHONY AND PATRICIA ROGERS

Applicants

-and-

MICHAEL DINSHAW (1)
IAN DINSHAW (2)
ANTHONY DINSHAW (3)

Objectors

Re: The Birches,
7 Redwood Grove,
Bude,
Cornwall, EX23 8EB

Upper Tribunal Member, Mr Mark Higgin FRICS
Bristol Magistrates' Court and Tribunal Hearing Centre
2 November 2023
Decision Date: 8 January 2024

Mr James Jarvis, instructed by Paul Finn Solicitors for the applicants
Mr Michael Dinshaw in person and for the third objector
Mr Ian Dinshaw in person

The following cases are referred to in this decision:

Mahon v Sims [2005] 3 E.G.L.R. 67
P&A Swift Investments v Combined English Stores Group Plc [1988] UKHL 3
Stockport Metropolitan Borough Council v Alwiyah Developments [1986] 52 P&CR 278

1.

Introduction

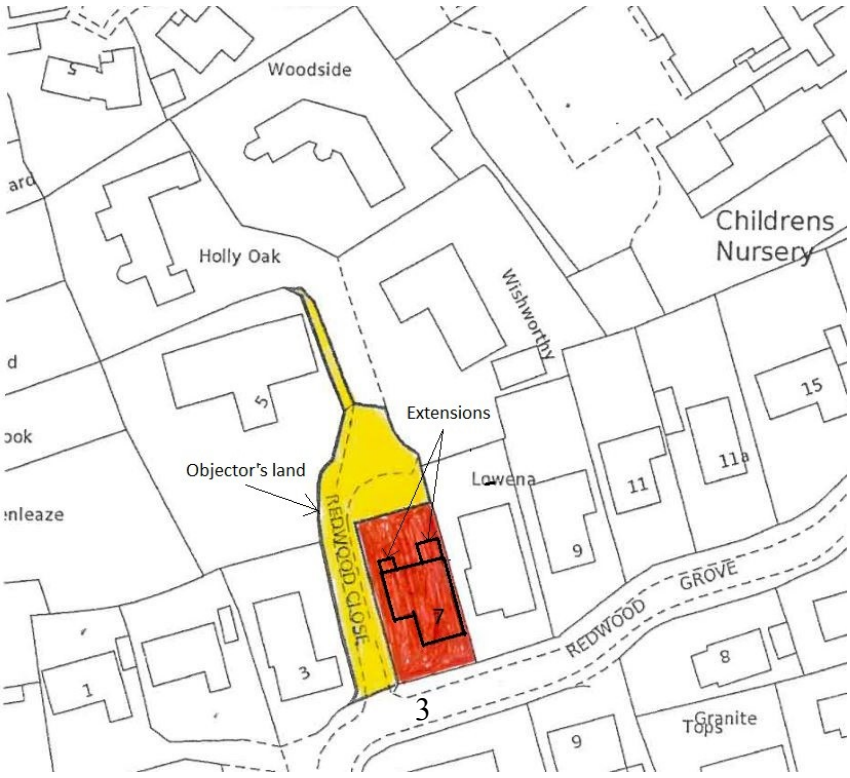
1. This application seeks the discharge of a restrictive covenant (the covenant) that burdens the title to 7 Redwood Grove, Bude, Cornwall (the property). The restrictions are contained in a conveyance dated 18 December 1980 between Roy and Jane Dinshaw and Guy Beresford and Angela Bendyshe. They prevent the construction of two unauthorised extensions to the property and have been breached by the current owner as a result of building work completed in 2018.

2. At the hearing the applicants were represented by Mr James Jarvis of counsel. The objectors, Mr Michael Dinshaw and Mr Ian Dinshaw represented themselves and their brother, Mr Anthony Dinshaw. I am grateful to them all for their evidence and submissions.

3. I inspected the property on the morning of 1 November 2023. I viewed the interior and the two extensions, as well as the garden space at the rear. I was accompanied by Mr and Mrs Rogers and Mr Martin Curnow from Paul Finn Solicitors. I also inspected the areas to the west and north of the property in the presence of Mr Michael Dinshaw and Mr Curnow. The relevance of these areas will become apparent later in the decision. I additionally walked into Redwood Close and along Redwood Grove in an easterly direction.

Facts

4. Bude is a small seaside town on the north Cornwall coast and is located about 19 miles north west of Launceston. Exeter is about 50 miles to the east and Plymouth is 45 miles to the south. Redwood Grove is a cul-de-sac containing 22 dwellings situated about 0.5 miles east of Bude town centre. The property occupies a rectangular site at the junction of Redwood Grove and Redwood Close, another cul-de-sac containing four bungalows. The site is orientated north/south with the front facing south and the rear and garden facing north. The plan below shows the property and its immediate surroundings.



5. The property was originally a detached bungalow with 3 bedrooms, one of which has an en-suite bathroom, a kitchen, lounge and further family bathroom. A short concrete driveway leads to an integral single garage. The rear garden is partly laid out as a patio with the remainder having a gravel surface. Part of the front garden is used for parking and has a concrete surface with the rest being laid to gravel.

6. The extensions were to the kitchen area and to the third bedroom and are indicated on the plan. They were conventionally constructed with rendered walls under a concrete tiled pitched roof. Both rooms have doors opening on to a small patio area. The kitchen extension has been constructed with a ceiling which is open to the underside of the roof structure and has full height glazing in the gable end. In terms of internal dimensions, the bedroom extension is approximately 2 metres deep by 2.5 metres wide and the kitchen extension is approximately 3.5 metres deep and 3.5 metres wide. The extensions did not require planning permission as their relatively modest size fell within the criteria for permitted development. Building Control approval was sought and obtained.

7. Although the conveyance containing the covenant was completed in 1980, it is necessary to go back a little further in time to fully understand the context and events that gave rise to the covenant. In 1969 Mr Roy Dinshaw, the father of Michael, Ian and Anthony, acquired Langfield Manor, a large house with grounds including what is now Redwood Close and part of Redwood Grove. Mr Dinshaw's wife at the time, was also a party to the transaction. In 1980 Mr and Mrs Dinshaw started to dispose of the land associated with the house. Much of the land had fallen into disuse and comprised, amongst other uses, a former tennis court, greenhouses, and scrubland.

8. The disposals appear to have been conducted in a piecemeal manner and the land was sold to local builders on a plot by plot basis for development. Amongst the first plots to be sold was the site of the property. Mr Roy Dinshaw and his wife built 5 Redwood Close and occupied it as their home. Langfield Manor was subsequently sold and has since been redeveloped. The objectors in this case inherited the benefited land from their father but the title is still registered in his name.

The statutory background

9. 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 (a), (aa), (b) and (c).

10. Ground (a) of section 84(1) is satisfied where it is shown that by reason of changes in the character of the property or neighbourhood or other circumstances of the case that the Tribunal may deem material, the restriction ought to be deemed obsolete.

11. 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. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.

12. 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."

13. Ground (b) is made out where it can be demonstrated that the persons of full age and capacity entitled to the benefit of the restriction have agreed, expressly or by implication, by their acts or omissions to the modification of the restriction.

14. 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.

15. The Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it. If the applicant agrees, the Tribunal may also impose some additional restriction on the land at the same time as discharging the original restriction.

16. Should an applicant establish that the Tribunal has jurisdiction to modify the covenant, he has at that point only cleared the first hurdle; he then needs to persuade the Tribunal to exercise its discretion. This is a distinct and separate exercise although the Tribunal will not normally refuse an application if it is satisfied that jurisdiction has been made out. I now turn to the detail of the application.

The application

17. The application was received by the Tribunal on 24 March 2023 and was for the discharge of the covenant on grounds (a), (aa), (b) and (c).

18. The covenant is imposed by clause 4 of the conveyance dated 18 December 1980:

> FOR the benefit and protection of the said adjoining and neighbouring land of the Vendors and any part thereof and their successors in title the Purchaser for itself and its successors in title covenants to observe and perform the restrictions and stipulations contained in the Fourth Schedule hereto.

19. The covenant is set out in schedule 4 of the conveyance:

> 'That no building or buildings outbuildings or extensions shall be constructed on the plot of land hereby conveyed unless prior thereto the plan showing full

particulars of such construction giving on such plan and specifications such information as the Vendors or their successors in title and their Surveyor shall require shall bear the written consent of the Vendors or their Surveyor endorsed thereon and no deviations or alterations thereto shall be permitted until the like consent shall first be obtained as aforesaid.'

The applicants' evidence

20. Mrs Rogers appeared as a witness of fact at the hearing and explained that she and her husband had often spent their holidays in Bude, and in 2017 they purchased the property and moved from Reading to the town. They quickly decided to extend both the kitchen/dining area and the third bedroom on to a raised area at the rear of the property. After Building Control approval was secured and a contractor was engaged, work was scheduled to commence at the beginning of May 2018.

21. Mrs Rogers explained that the access to the rear of the property was by means of a narrow path at the side which was unsuitable for delivering materials and machinery for the project. To resolve this problem Mrs Rogers decided to investigate the possibility of gaining access from Redwood Close, across a small strip of planted land between the western boundary of the property and the roadway. This approach would necessitate the removal and reinstatement of the boundary fencing. After approaching two of the neighbours in Redwood Close, one of them informed Mrs Rogers she would not be able to use the land for deliveries. A further neighbour advised that the land belonged to Mr Roy Dinshaw. Mrs Rogers was aware that Mr Dinshaw's son, Anthony Dinshaw was a close neighbour in Redwood Grove. She visited Anthony Dinshaw and explained her predicament. Mr Dinshaw knew Mrs Rogers' contractor and agreed to consult his father about the land. Mrs Rogers also expressed an interest in purchasing the land at the rear of her garden.

22. A few days later, Mr Roy Dinshaw called at the property. Mr and Mrs Rogers showed him their plans and took him to the rear garden to discuss where the footings and foundations would be. Mrs Rogers said that Mr Roy Dinshaw returned later that day and told her and her husband to carry on with the work as planned. Mrs Rogers inquired about buying the land at the rear and Mr Dinshaw advised her to take up the potential purchase with his son Michael, who would deal with the matter.

23. Mrs Rogers said that the building work commenced and continued through the summer of 2018. Periodically Mr Anthony Dinshaw would visit and on these occasions he would chat with the builder, Mr Ward and with the other workmen. When the work was completed Mr Anthony Dinshaw visited again and, according to Mrs Rogers, seemed genuinely impressed with the finished project.

24. Mr and Mrs Rogers were simultaneously corresponding by e-mail with Mr Michael Dinshaw regarding the possibility of buying the land at the rear. Mrs Rogers appended two e-mails to her written statement which were sent in relation to the prospective purchase. On 18 July 2018 she wrote:

'Hi Michael,

> Sorry to chase you again but Tony and I are wondering if you've made any progress with your investigations?
>
> We are making plans to sort and landscape the back garden once the building works are completed, we are planning to replace the fence to all sides of the property and to landscape the front garden once all the work is completed.
>
> For the time being these plans are in the early stages and in all honesty won't start before October but I'm sure you'll understand that we need to start obtaining quotes and costings for this work'

Mr Dinshaw replied the following day:

> 'Hi Patricia
>
> You can contact me at any time.
> I have passed on the information to my father's solicitor to review, once we hear back I will get back to you.'

Mrs Rogers sent a follow up e-mail on 23 August 2018:

> 'Hi Michael
>
> I hope this e-mail finds you well. Our building renovations are coming together and we are about six weeks away from completing the works. The garden will be cleared ready for making good so we can start to enjoy it at last.
>
> I'm wondering if you have any updates for us regarding the parcel of land to the back of our or house?
>
> If you've not yet had an update is there anything you can do or suggest to help to move things forward?'

And Mr Dinshaw replied two days later:

> 'Hi Pat
>
> Glad your renovations are going well, the matter of the parcel of land is with my father solicitors to first address the registering of the land, once that is complete we will go from there.
>
> I will be in touch if there is anything else we need'

25. Mrs Rogers explained that the negotiations to purchase the land came to nothing, Mr Dinshaw having stopped responding to her enquiries.

26. By 2022 Mr and Mrs Rogers had decided to move, had secured another property, and had accepted an offer for their own. In August of that year the purchasers' solicitors raised a query about the covenant. Mrs Rogers said that until that point they had no knowledge of the covenant but realising that the extensions had breached it, she and her husband decided

to write a personal letter of apology and request a retrospective consent. They visited Mr Anthony Dinshaw and his wife, to deliver the letter and according to Mrs Rogers they were very accommodating. Mr Dinshaw said he would refer the matter to Mr Michael Dinshaw and Mr and Mrs Rogers supplied copies of the plans, building control consent and photographs.

27. In November 2022 in response to an approach from Mr and Mrs Rogers solicitors Mr Michael Dinshaw advised that he and his family were taking legal advice. This was still the case a month later. Mr and Mrs Rogers then took the property off the market and pulled out of their intended purchase. The next contact from Mr Michael Dinshaw was on 9 January 2023 and further e-mails ensued over the next two months. Frustrated with the lack of progress Mr and Mrs Rogers applied to the Tribunal for discharge of the covenant on 24 March 2023.

28. In her witness statement Mrs Rogers set out her views on the objections to the discharge of the covenant. In particular she could not understand how the removal of the covenant would have any impact on the objectors, two of whom lived elsewhere and the third (Mr Anthony Dinshaw) could not see the property from his house.

29. Mrs Rogers disputed that the objectors' claim that they did not know about the extensions until August 2022. She considered that the extensions did not impact the land in the ownership of the objector and noted that since 1980 the land to the rear of the property had been developed. She believed the extensions to be 'nothing out of the ordinary'.

Submissions for the applicants

30. Mr Jarvis's submissions broadly followed the grounds in s.84, commencing with obsolescence (ground (a)). He noted that the neighbourhood did not exist in 1980 when the covenant was included in the transfer of the property and the area had changed beyond measure since then. He considered that no reasonable covenantee would have withheld consent to the extensions in 2018. Mr Jarvis also postulated, under the same heading although it was not a matter of obsolescence, that the objectors were well aware of the extensions at the time when they were being built and they had no real interest in preventing them. He drew attention to the decision of the House of Lords in *P&A Swift Investments v Combined English Stores Group Plc*, [1988] UKHL 3 where it was noted, in a case concerning a covenant in a lease and in particular whether an assignee of the reversion was entitled to the benefit of a surety covenant, the Court of Appeal had held that:

> '…a benefit under a covenant could be enforced by the assignee of the reversion without express assignment if the covenant touched and concerned the land; that whether a covenant touched and concerned the land depended on the covenant satisfying three conditions, namely, that it was beneficial only to the reversioner for the time being, and that it affected the nature, quality, mode of user or value of the reversioner's land, and that it was not personal in nature;…'

Mr Jarvis was more succinct commenting that to be to be enforceable by a successor in title, the covenant must affect the nature, quality, mode of user or value of the land.

31. Under the heading of 'impediment' his submissions largely aligned with ground (aa). He remarked that the Building Control department of the local authority had no issue with the extensions and neither did any of the neighbours including Mr Anthony Dinshaw. He asserted that the covenant did not secure any practical benefits to the objectors and that money would be adequate compensation to them. However, given that the extensions have not hurt the objectors any compensation should be extremely small.

32. Mr Jarvis then moved on to the acquiescence said to have been given by the original covenantee in 2018. He noted that Mr Roy Dinshaw was consulted and gave his approval for the extensions. Similarly, Mr Anthony Dinshaw appeared to expressly agree although his consent was verbal. He also referred to *Mahon v Sims* [2005] 3 E.G.L.R. 67, which he considered relevant in view of the similarity of its circumstances to this case. Hart J held that a freehold restrictive covenant prohibiting building which is not in accordance with plans approved by the person who has the benefit of the covenant will be subject to an implied term that consent will not be arbitrarily or capriciously withheld, nor withheld for improper motives.

33. In terms of injury (ground (c)), Mr Jarvis said that the original covenantee is no longer in a position to suffer any injury. He considered that objectively it was impossible to recognise how the objectors could suffer any injury because their land has no commercial value. Equally they could not suffer on behalf of other covenantees who have not themselves objected. He concluded that the objectors were motivated by securing substantial compensation for the discharge but there was little or no quantifiable loss. Referring to *Stockport Metropolitan Borough Council v Alwiyah Developments* [1986] 52 P&CR 278, he noted that the proper assessment of compensation for the purposes of section 84(1) is by reference to the diminution of the value of the land with the benefit of the covenant, rather than the loss of opportunity to extract a share of the development value of the applicant's land.

The objectors' evidence

34. All three of the objectors had submitted witness statements which were almost identical. At the hearing Mr Michael Dinshaw confirmed that he and his brothers as beneficiaries of his late father's estate, were the owners of land adjacent to the property. The land is depicted in the lighter shade on the plan that follows paragraph 4 above and has the benefit of the covenant. It comprises an area of tarmac road which extends about halfway along Redwood Close, a small area of grassed land at the rear of the property, a planted border adjacent to the western boundary of the property and a narrow sliver of land adjacent to the eastern boundary of 5 Redwood Close. Mr Dinshaw explained that the other land that was originally in his parent's ownership had been split in to ten plots and sold off.

35. Mr Michael Dinshaw said that the purpose of the covenant was to facilitate control of what was built on the land, and at the hearing he recalled an instance where his father had refused consent for plans submitted by a prospective purchaser and the sale had collapsed. In his view the wider purpose was to protect the character, visual amenity, and environment of Redwood Close and Redwood Grove. It also provided confidence to the owners of those properties that none of these attributes were at risk.

36. He said that as the transfer which included the covenant is a publicly available document it was not plausible that Mr and Mrs Rogers and their solicitor had not read and understood

the entry when the property was purchased in 2017. He considered that the covenant could not reasonably be considered obsolete because it had been entered in to relatively recently, there had been no material change to the density and character of the area and it was beneficial to the owners of the adjoining land. He concluded that Mr and Mrs Rogers chose to build the extensions in breach of the covenant and had benefitted from the enhanced amenity and the increased value of their property. Mr Dinshaw said that Mr and Mrs Rogers had deliberately built the extensions to a size just within the maximum allowed for the purposes of permitted development. By so doing, they had avoided the scrutiny that a planning application would have entailed, particularly in relation to whether the development met local and national policies and whether it would cause unacceptable harm. It also avoided the need to notify neighbours, a factor which would have brought it to the objectors' attention. He thought that the short time frame between the purchase and the start of the works indicated that the breach was part of a deliberate strategy.

37. In Mr Dinshaw's view any changes to the covenant would constitute the 'thin end of the wedge' and would be likely to cause problems in the future. To his knowledge, no other alterations had been sought or made to the other properties built on land that was originally part of Langfield Manor. He said that if the covenant was discharged it would open a 'Pandora's Box' of other applications and he and his family would be facing frequent litigation to defend their rights. Copies of other transfers said to contain similar covenants were appended to his witness statement, but from my reading of the documents I found no evidence that the other properties were burdened in the same terms as the property.

38. He requested that the Tribunal refuse the application and order the removal of the extensions. He also proffered that if the Tribunal allowed the retention of the extensions and the improved property were to be sold, he and his brothers should have the right to review and refuse any contract of sale and to further have the right to purchase the property on the same terms. He considered that damages should be paid on the sale of the property (presumably to a third party) based on the sale price less the 2017 acquisition value. Compensation in the sum of £50,000 was sought.

Discussion

39. Before I examine the arguments for and against the discharge of the covenant it is worth remembering that the covenant does not constitute an absolute prohibition on the building of extensions, rather it prohibits them without the consent of the vendor or their surveyor. There is no presumption against modification of the property, only a prohibition on modification without the consent of the covenantee. Mr Jarvis observed that no reasonable covenantee would have withheld consent for the works in 2018, but the covenant does not say expressly that the covenantee may not refuse consent unreasonably. In *Mahon v Sims*, Hart J considered whether any restriction on the covenantee's right to refuse consent could be implied in a covenant 'not to use the property hereby transferred for any purpose except that of a private garden and not to erect thereon any building other than a greenhouse garden shed or domestic garage in accordance with plans which have been approved previously by the Transferors in writing.'

40. His answer is contained in paragraphs 28 and 29:

> 28. In my judgment all these limitations on the power to withhold approval are necessary to give the contract business efficacy. The question which I find more difficult is whether the implication of a term that approval be not unreasonably withheld is the right way in which to capture their essence. The cases discussed show a possible hierarchy of implied terms ranging from (1) an obligation to use the power in good faith, through (2) an obligation not to use the power arbitrarily or capriciously, to (3) an obligation not to use the power unreasonably. In argument Mr Rumney accepted that there might be a difference between (2) and (3). In *Cryer*, however, the Court of Appeal proceeded on the basis that a proviso of the third kind was necessary in order to exclude an arbitrary or capricious exercise of the power. It therefore seems to have regarded (2) and (3) as in practice amounting to the same thing.
>
> 29. In the present context I do not think that it does make any practical difference whether the implied proviso is expressed as "not to be arbitrarily or capriciously withheld" or as "not to be unreasonably withheld". If the implied proviso takes the latter form it is important to bear in mind that this does not have the consequence that the court can, at the invitation of the covenantor, simply substitute its judgment as to what is reasonable for that of the covenantee. All that proviso means is that refusal of approval will be unreasonable if the court is satisfied that no reasonable covenantee would have refused approval in the circumstances. It is clear that the protection of the sensibilities of the covenantee is one of the purposes of the covenant in this case. The test, which the implied proviso requires in a context such as the present, is one which pays full respect to those sensibilities so far as any particular proposal is concerned. It will only be if satisfied that no reasonable neighbour could object to the proposal that the court will be justified in overriding a decision by the covenantee to refuse approval. If the refusal is on a subjective ground, on which the opinions of reasonable neighbours might differ, that will in a context such as the present be reasonable ground enough. In my judgment the application of such a test will not therefore deprive the covenantee of what the judge described as the ability "to exercise firm control over any building". It will however prevent him from acting arbitrarily or capriciously or from improper motives.

On the facts of this case it may indeed be unreasonable to withhold consent but that is not the question posed in the context of s.84; the Tribunal's task is to determine whether any of the statutory grounds are made out. Circumstances which go to establishing one or other of the grounds may also suggest that a refusal of consent is arbitrary, capricious or unreasonable, but the better approach is to concentrate on the grounds themselves.

41. I therefore turn to the grounds under which a covenant can be discharged or modified. The first is that the covenant is obsolete. In this case the covenant is relatively modern having been included in a transfer made in 1980. Unfortunately, Mr Roy Dinshaw, one of the parties to the original transaction has passed away in the period since the extensions that gave rise to this dispute were constructed. Mr Michael Dinshaw said that his parents wished to exercise control over what was built on the land they were selling. I note that the property was one of the first to be sold and was also close to the site of Mr and Mrs Roy Dinshaw's own home at 5 Redwood Close. A conventional house on the site of the property would have potentially overlooked their plot. In that context the ability to influence the design of whatever was built would be an understandable and desirable

prerequisite for a disposal. It is equally plausible that Mr Dinshaw's motivation was to protect the value of the other plots.

42. However, 43 years later, the context is different. The whole area has been fully developed and neither Mr Roy Dinshaw, prior to his death, nor his wife, from whom he was later divorced, were resident at Redwood Close by the time that Mr and Mrs Rogers started their building works. The original purpose of the covenant now has limited relevance, the constrained nature of the site limits development options and the protection of amenity for the other properties nearby is to an extent controlled by the planning system. However, the covenant does retain a modicum of utility for those, other than the objectors, who own benefitted land as it prevents development which might affect amenity but not require planning permission. This being the case I conclude that ground (a) is not made out.

43. Turning to ground (aa) neither party addressed the question of whether the covenant impeded a reasonable use of the land. In my view the extensions are a reasonable use, and they are clearly impeded by the covenant.

44. Mr Jarvis submitted that the covenant does not secure any practical benefits to the objectors, but the objectors' case is that it enables them to protect the character, visual amenity, and environment of Redwood Close and Redwood Grove. They view the discharge of the covenant as the 'thin end of the wedge' which would make it difficult for them to resist unfavourable change in the character of the neighbourhood and over development of the other plots. It is likely that the covenant at the property is enforceable by the current owners of the original vendors' retained land, which could encompass the ten plots that were created together with the roadway. On the evidence adduced it is not clear whether that is the case because I have not been shown a plan showing the extent of "the said adjoining and neighbouring land of the Vendors and any part thereof". I note however that the owners of properties in the immediate vicinity were given notice of the application and there were no other objections. That might be said to be consistent with the extensions being relatively inconsequential, and not being capable of setting any sort of precedent for more intrusive development. That is the view I take of them, and I am satisfied that the ability to prevent the retention of the extensions is not a practical benefit to the objectors.

45. The objectors did not identify any other practical benefits of the covenant but they considered that if the discharge led to more intensive use of the plots in Redwood Close, they would be likely to face greater costs for the maintenance of the road. Given the size of the plots and the fact that they are already built on I view the possibility of further development as a distant and unlikely prospect. None of the objectors' land has any potential for an alternative use other than the grassed area which Mr and Mrs Rogers thought could be usefully incorporated into their garden. Mr Jarvis noted that Mr Michael Dinshaw resides in the United States of America, Mr Ian Dinshaw in Weymouth and that Mr Anthony Dinshaw cannot see the benefitted land from his house. I conclude that ground (aa) is fulfilled.

46. It follows that the objectors will not be injured by the discharge of the covenant and ground (c) is therefore also made out.

47. Regarding ground (b), notwithstanding that one of the original covenantees was invited to approve the extensions before building work commenced it is acknowledged by the

applicants that they did not have consent in the appropriate form. Ground (b) does not require agreement in writing, but it does require that all those of full age and capacity entitled to the benefit of the restriction have agreed, expressly or by implication to the proposed modification or discharge. In her evidence Mrs Rogers said that she and her husband had shown Mr Roy Dinshaw the plans in 2018 and he had raised no objection which might imply that he consented, objectively to the proposed extension. Mr Michael Dinshaw did not deny that his father had seen the plans but questioned whether his consent simply related to the removal of the fence to facilitate the project.

48. However, there is no evidence that others with the benefit of the restrictions have consented, because it is not known who they all are and they have not been asked although those who are neighbours have been given the opportunity to object. In those circumstances, my judgement is that ground (b) is not satisfied.

49. In their notice of objection, the objectors stated that they were seeking compensation of £50,000 although they described the figure as provisional. They also sought a right of first refusal if the property were to be sold and damages equivalent to the enhancement in value that the extensions had created. Their approach is misguided. The purpose of compensation in these circumstances is to make good the loss or disadvantage suffered by that person resulting from the discharge or modification. It is usually quantified by the diminution in in value of the benefited land, but in this case there is no evidence that the objectors' land has suffered any decline in value and it is difficult to foresee how such circumstances might arise. I therefore reject the claim for compensation.

50. In circumstances where jurisdiction is established the Tribunal will not normally decline to exercise its discretion unless there is a compelling reason for it no to do so. In this case grounds (aa) and (c) are satisfied but the extensions were built in breach of the covenant and the application to the Tribunal was after the event. The objectors say that Mr and Mrs Rogers chose to build the extensions in clear breach of the covenant and that by avoiding the need for planning consent they had demonstrated an intention to subvert or circumvent the covenant. For her part, Mrs Rogers said that they built the extensions to provide the extra space they needed. I accept her evidence that she and her husband were unaware of the restriction when they built the extensions. Their motivation appears to have been to create a more comfortable home and the decision to sell was taken in response to a decline in Mr Rogers' health rather than to make a profit. Nevertheless, it is true that the extensions have physically enhanced their house and made it more valuable. In my judgement this is not a situation where an applicant, with profit in mind, cynically breached a covenant in the expectation that no objections would arise or that those with the benefit could be ameliorated with a financial inducement.

51. It is my judgement that there will be no harmful effects on the interests of the objectors. Their concerns about the interests of the owners of the other nine plots are in my view unfounded. Any future application to modify similar covenants, assuming they exist, to permit work on other plots would be decided on the facts of each case. The discharge or modification of the covenant at the property would make the prospect of modification or discharge on the other properties in Redwood Close and Redwood Grove no more or less likely.

52. Although this is an application for discharge of the covenant I have jurisdiction to allow modification instead. In my view that latter course of action is preferable as it enables the

applicants to sell the property but leaves the neighbours, who are likely to have the benefit of the covenant, with an assurance for the future that more extensive alterations could not be made without their approval. I therefore exercise my discretion to allow modification of the covenant to enable the retention of the two extensions as built.

Upper Tribunal Member, Mark Higgin FRICS
8 January 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.