IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 379 (LC)
Case No: LP/49/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge/modification – garden land with planning consent for additional residential dwelling – Building Scheme - restrictions preventing erection of any new building other than garden shed without submitting plans and specifications to transferor and obtaining written approval – obsolescence – reasonable use – impeding development - practical benefits of substantial value or advantage – Law of Property Act 1925 section 84(1) (a), (aa) and (c) - application allowed

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

BETWEEN

VEEE LIMITED

Applicant

and

ANNE BARNARD (1)
RAYMOND RICHARDS (2)
PETER OLIVER (3)
GRETA THORNE (4)

Respondents

Re: 1 Cresswell Road, Chesham Buckinghamshire. HP5 1SX

Before: Judge Elizabeth Cooke and Mr P R Francis FRICS
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
8 & 9 October 2018

Toby Boncey instructed by Saul Marine & Co, solicitors, for the applicant
The objectors in person

The following cases are referred to in this decision:

Re Bass Ltd (1973) 26 P & CR 156
Crest Nicholson Residential (South) Ltd v McAllister [2002] EWHC 2443 (Ch)
Crest Nicholson Residential (South) Ltd v McAllister [2004] EWCA Civ 410
Cryer v Scott Bros (Sunbury) Ltd (1986) P & CR 183
Shephard v Turner [2006] 2 P & CR 28
Sims v Mahon [2005] 3 EGLR 67

DECISION

Introduction

1. The Applicant, Veee Ltd, is the proprietor of 1 Cresswell Road, Chesham HP5 1SX ("the property") which is registered at HM Land Registry under Title No: BM32189. It is a three-bedroomed house standing at the end of a 1960s terrace of houses, and unlike its neighbours it has a garden large enough for another house to be built there. On 29 May 2015, the Applicant obtained planning permission to do so (Chiltern District Council reference CH/2015/0436/FA), but the property is subject to restrictive covenants, two of which prevent the development, and so the Applicant has applied for discharge of the first, and discharge or modification of the second. Of the fourteen property owners with the benefit of the covenants, the four Respondents have objected to the application.

2. We heard the application at the Royal Courts of Justice on 8 and 9 October 2018, after a site visit on 4 October. We are grateful to Mr Toby Boncey of counsel, who represented the Applicant, and to Mr Peter Oliver who spoke for the Respondents.

3. In the paragraphs that follow we say a little more about the property, the proposed development and the covenants, and then summarise the relevant law. We then discuss whether one of the two covenants in question is obsolete, and we conclude that it is. Finally, we consider the arguments for and against the modification of the other covenant and explain our decision that it should be modified.

The property

4. The property is shown edged in bold on the plan at **Appendix 1**.

5. The property is in Chesham, Bucks, on the north side of Cresswell Road, which is for the most part an adopted road, 300m long, with several cul-de-sacs leading off it. The Tribunal visited on a sunny day and the impression we had was of a very pleasant road, thoroughly developed with houses along both sides but with plenty of gardens and trees. Numbers 1 – 29, on the left some 80 yards after one enters the road, form an L-shaped development of 15 properties, of which numbers 17 – 29 face Cresswell Road while numbers 1 – 15 look out on to a cul-de-sac which is part of Cresswell Road but unadopted; each of numbers 1 – 15 owns the slice of the unadopted road directly in front of their house.

6. All 15 properties have a detached garage, in a row behind numbers 17 - 29. Parking in Cresswell Road is unrestricted and on the unadopted road most of the houses have one space marked on the road but the property, and a couple of others, have two spaces. The property therefore currently has three parking spaces, one in the garage and two outside on the road. However, the garages are quite small and not all modern cars will fit in them.

7. We have been told by Mr Oliver, and it does not appear to be in dispute, that this small development of 15 houses has remained largely unchanged since its construction, and that would appear to be correct. A couple of houses have conservatories, and number 17 has hard-standing for cars at the side and front which can be used without crossing a pavement.

8. The Respondents live, respectively, at numbers 5 (Ms Barnard), 11 (Ms Thorne), 15 (Mr Oliver) and 29 (Mr Richards), which are marked on the plan.

The proposed development

9. The Applicant bought the property in August 2017 with the benefit of planning permission to build a house to the south, on the flank wall of the property; the plot would be divided in two so that the new house – number 1A – and the existing number 1 would each have a front and back garden. The planning permission imposes conditions as to size and building materials which will ensure that it matches its neighbours and lines up with numbers 1 to 15. The new house will not have a garage. As to parking, number 1 will lose one of its spaces (because the one nearer the road will be outside number 1A). Where that parking bay is now marked there will instead be a dropped kerb giving access to two spaces at the side of number 1A. The front garden will be laid to a 'Hexapath' paving system which is a recycled polypropylene honeycomb grid filled with sand/soil and seeded to give the appearance of a natural lawn. It is laid over a sub base and designed for car parking with light to medium vehicle access. It is intended that this area will be used purely for access to the spaces. Since they are in tandem, cars parked there will not be able to manoeuvre past each other but will have to leave in the order in which they entered.

10. The plan at **Appendix 2** shows the parking and access arrangements proposed, overlaid on the existing parking space.

11. It is fair to say that the parking spaces at the side of number 1A will be a bit tight. They will be the width of a standard parking bay in a car park, and it is admitted by the Applicant that when a car is parked centrally it will not be possible to open both doors fully. We note that the hedge between the southern boundary of the property and the adopted part of Cresswell Road will be taken down and replaced with a fence insofar as it runs alongside the parking spaces, no doubt to maximise parking width as the hedge is quite bushy at present. But it is a condition of the planning permission that the rest of the hedge remain in place for at least 5 years.

The restrictive covenants

12. The covenants in question were one of a number imposed by the transfer of the property dated 9 February 1967 from the builder, Raymead Construction Company Limited, to Allan Eavis. The transferee entered into the restrictive covenants set out in the Third Schedule to the transfer *"to the intent that the benefit thereof may be annexed to and devolve with each and every other plot on the land edged blue."* The land edged blue on the plan was the L-shaped development of 15 houses. The transfer also declared that the development of fifteen houses was

a building scheme and that it was intended that each property should be able to enforce the covenants against each of the others.

13. Of the restrictions set out in the Third Schedule, the Applicant seeks to discharge the covenant numbered 1 and to discharge or modify number 3; the two covenants read as follows:

> *"1. Not to erect or permit to be erected any new building or any temporary or wooden building (other than a tool shed under five feet six inches in height) or any addition to or alteration to the elevation of the existing building on the land hereby transferred without first submitting plans and elevations thereof and a specification (if required) to the Transferor and obtaining its written approval and (if required) paying its fee not exceeding Two Guineas for such approval."*
>
> *"3. Not to use the property hereby transferred or permit the same to be used for any other purpose than a private dwellinghouse (with garage) for the use and occupation of one family only and not to divide the same into flats."*

14. It is worth noting that covenant number 7 requires the transferee not to fence the front garden, and indeed the properties still have open plan front gardens. Covenant number 8 reads:

> *"At all times hereafter to maintain as a properly mown grass lawn the [front garden] (except the access paths) and not to grow or place any hedge or obstruction of any kind thereon other than such trees and shrubs as may be approved in writing by the Transferor."*

15. No modification of that covenant is sought. The parties agree that the prohibition of obstructions on the front garden prevents parking on the grass.

The law

16. Section 84(1), (1A), (1B) and (1C) of the Law of Property Act 1925 reads as follows:

> "The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private

purposes . . . or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, … have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

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

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

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

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

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

(b) is contrary to the public interest;

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

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

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition."

17. So, a restrictive freehold covenant may be discharged or modified for a number of reasons. Section 84(1)(b) is not relevant here because it is not the case that all those entitled to the benefit of the covenant have consented to it. The Applicant says that the first of the two covenants set out above is obsolete because of the dissolution of Raymead Construction Co Ltd and so should be discharged under section 84(1)(a) or, alternatively, 84(1)(aa) or (c). It further argues that covenant 3, the second of the two with which we are concerned, should be discharged or modified under section 84(1)(aa) and/or 84(1)(c). We now examine the arguments relating to the two covenants in turn.

Is the first covenant obsolete?

18. Covenant 1 prevents certain alterations and constructions on the houses in the development unless plans are approved in advance by the Transferor under the 1967 transfer, Raymead Construction Co Ltd. That company was dissolved on 13 June 2000, and so it could no longer approve plans. As a result, the Applicant says, covenant number 1 is already ineffective; it can therefore be discharged pursuant to section 84(1)(a) because it is obsolete as a result of a change in circumstances, or under (1)(c) because discharge cannot injure anyone.

19. Such covenants are of course not unusual. It is now well-established that where a covenant requires the owner of the property not to do something without the consent of the vendor, and that vendor no longer exists or (if a real person) has died, then either the restriction lapses or it becomes absolute. Although some early cases found that such covenants became absolute, in *Crest Nicholson Residential (South) Ltd v McAllister* [2002] EWHC 2443 (Ch) Neuberger J (as he then was) found that a covenant requiring plans to be submitted for approval to the vendor company was discharged when the company ceased to exist, and his decision was approved (obiter) by the Court of Appeal ([2004] EWCA Civ 410).

20. Has this covenant become absolute, or has it been discharged? The Tribunal can answer that question only by construing the transfer and deciding what the original parties are likely to have intended. Mr Boncey, for the Applicant, points out that the covenant does not prevent development (covenant number 3 does that), but imposes quality control and requires a small fee. There is authority to the effect that the approval of plans under such covenants is not to be unreasonably withheld: *Cryer v Scott Bros (Sunbury) Ltd* (1986) P & CR 183; *Sims v Mahon* [2005] 3 EGLR 67. Accordingly, he says it cannot have been intended that it would become absolute when the Transferor ceased to exist. He also argues that if the covenant has become absolute then none of the residents in the development would, for example, be able to replace a house that had been destroyed by fire, or to repair a roof if that involved any slight change to its elevation, or to build a conservatory – as two residents have done – or a garden shed in which someone of average height could stand up. The covenant was clearly not intended to prevent such works, only to impose some control over their design while the Transferor company still had an interest in the development.

21. Mr Oliver argued that the covenant has become absolute, and that anyone wishing to build in breach of covenant would have to approach each of the other 14 owners for a release. He

maintained that this would not cause practical problems, but that in the unlikely event of an unreasonable refusal it would be open to the owner concerned to apply to the Tribunal for a modification of the covenant.

22. That last point is not one that we can take into account in deciding what the original parties intended; when the covenant was imposed section 84(1)(aa) had not been enacted and therefore there would have been no basis for modification of the covenant in these circumstances.

23. We take the view that the intention of the parties to the 1967 transfer must have been for the covenant to enable the developer to exercise some control over the development of the properties in their early stages, while it was still selling them off and therefore had an interest in exercising that control. It was not their intention that when the developer ceased to exist there would be an absolute prohibition on the works listed in covenant 1 – of which most could be quite minor and for most of which consent would have been readily given. The circumstances are not dissimilar to those in *Crest Nicholson* and we have no hesitation in coming to the same conclusion. The covenant has ceased to have any effect because of a change of circumstances; it is obsolete, and therefore we discharge it pursuant to section 84(1)(a) of the Law of Property Act 1925. Its discharge does not injure any of the Respondents since it no longer has any effect and so it is equally liable to be discharged under section 84(1)(c). The Applicant also applies under section 84(1)(aa) but has not developed any argument under that sub-section and there is no need for us to consider it further in respect of this covenant.

Should covenant 3 be modified?

24. Covenant 1 has been discharged, but covenant 3 prevents the building of an additional house on the property. This is indisputably a covenant that the other 14 property owners have a right to enforce pursuant both to the words of annexation and to the building scheme. The Applicant says that it should be discharged, or alternatively modified, either under paragraph (c) of section 84(1), on the basis that the proposed modification would not injure the Respondents, or under paragraph (aa). As to paragraph (aa), it is agreed that the Respondents have the benefit of the covenant and that the covenant prevents the development; the issues for the Tribunal (following the questions traditionally to be answered in accordance with the well-known decision in *Re Bass Ltd* (1973) 26 P & CR 156) are:

a. whether the proposed development is a reasonable use of the land,

b. whether the covenant secures "any practical benefits of substantial value or advantage" to the Respondents and, if it does,

c. whether money would be an adequate compensation for that loss or disadvantage.

25. The modification proposed by the Applicant is that the covenant should read as follows:

> *"Not to use the property hereby transferred or permit the same to be used for any other purpose than two private dwellinghouses (with garages) [etc] …"*

26. We can dispose quite shortly of three issues.

27. First, we would regard it as out of the question to discharge the covenant. That would permit all sorts of development, subject to planning permission. The Applicant's case was presented at the hearing as a case for modification and we do not give any further consideration to discharging this covenant.

28. Second, it is not possible to modify this covenant under section 84(1)(c). That would be possible only if the modification caused no injury at all, and at the very least the modification will enable the construction of the new house, and the construction work itself will inevitably cause some inconvenience to the other residents in this group of houses. On that ground alone paragraph (c) is ruled out. So, we have to focus our analysis on section 84(1)(aa).

29. Third therefore, turning to section 84(1)(aa), we can dispose quickly of the question whether the covenant prevents a reasonable use of the property. In answering that we have to have regard to the planning permission (section 84(1B)), and the existence of planning permission is highly persuasive but by no means decisive. We have no difficulty in deciding that the use of half of the property for an additional house would be a reasonable use of it. Although as Mr Oliver pointed out the location means that this is not going to be an inexpensive house, housing is much needed and such use is perfectly reasonable.

30. That of course is not sufficient for the modification of the covenant under section 84(1)(aa); the Applicant must also show either that this particular covenant does not secure to the Respondents any "practical benefits of substantial value or advantage" or, if it does, that the loss of those practical benefits, despite being of substantial value or advantage, could adequately be compensated in money. Accordingly, although the rest of our analysis focuses on the problems that the Respondents claim would result from the development of the property, we have to bear in mind the statutory wording and the precise function of this covenant. For example, it is not open to us to refuse to modify the covenant on the basis that the new owners of number 1A may be tempted to park on the front garden (on the Hexapath), because the parties are agreed that the benefit of an open-plan and unobstructed front garden is secured by covenant number 8 and not by the covenant in question, number 3.

31. Equally, if the covenant secures benefits but those benefits are not of substantial value or advantage, then the covenant should be modified. The Respondents have not claimed that the value of their properties will be diminished and so they cannot resist modification unless they can demonstrate that the covenant gives them practical benefits which amount to a substantial advantage and whose loss cannot be compensated in money. In the paragraphs that follow we assess whether the grounds for modification of the covenant have been made out by the Applicant. It obviously has the burden of proof, and in effect it has to prove a negative in respect of each of the reasons put forward by the Respondents for resisting modification. We go through those reasons in turn after summarising the nature of the evidence put before us.

The evidence

32. Witness statements were made for the Applicant by its director, Mr Thor Portess, and its expert witness Mr Neil Miller BSc (Hons), FRICS, IRRV (Hons). Mr Oliver provided and spoke to a witness statement. All three witnesses attended the hearing and were cross-examined.

33. Mr Portess' evidence described the proposed development and set out the precautions taken to ensure that the new house would fit well with the surrounding houses in terms of its position and building materials. He also explained the effect of the development on parking and traffic, and the precautions planned to ensure that building works would not cause disruption. Much of his evidence, inevitably, was opinion rather than fact, but it was important for him to demonstrate that the practical implications of the development have been thought through and evaluated by the Applicant.

34. Mr Miller was instructed by the Applicant to assess whether the covenant secures any practical benefit of substantial value or advantage to the objectors. That of course is a question for the Tribunal, which we must answer in the light of the evidence before us including Mr Miller's. He was also asked to give his opinion as to whether any of the objectors would suffer any loss of amenity as a result of the proposed building, or if any of their properties would suffer any diminution in value. As to the latter question he concluded that they would not, and the Respondents have not claimed otherwise. As to possible loss of amenity or enjoyment he also concluded that there would be none, after considering the appearance of the development and the traffic and parking arrangements proposed.

35. Mr Oliver was the only one of the Respondents to appear, but we understand the others to have adopted his evidence; they have all confirmed that he speaks for them. Ms Barnard, Ms Thorne and Mr Richardson all gave notice of objection to the Tribunal and set out their objections rather more briefly than did Mr Oliver although Ms Barnard made two additional points. We go through the objections to the proposed development one by one.

The loss of a view

36. Mrs Barnard, of number 5, objects to the modification on the basis that she will lose a view.

37. Anyone standing in front of number 1A on the private road, or in the front gardens of numbers 17 – 29, will be able to see number 1A, and the view of the trees behind what is currently number 1's garden will be impeded. That view is not particularly noticeable now because of the high hedge which shelters number 1's back garden. The view from the gardens or from the inside of the houses of any of the Respondents will be unchanged save perhaps for Mr Richards who may be able to see the new house from the front garden of number 29. Mr Oliver says that he enjoys the view as he drives or walks into the private road on the way to his house.

38. We have to disagree; we do not believe that the view of the trees behind it is of a substantial advantage to anyone, particularly in the context of a road with plenty of trees and gardens.

The appearance of the new house

39. Mr Oliver says that the new house will be prominent and visually intrusive and will destroy the open characteristic of the road and be out of keeping. He further argues that it will spoil the pleasing L shape of the development and will be out of kilter with the building line both along the fronts of numbers 17 – 29 and along the rest of Cresswell Road.

40. In response the Applicant points to the planning conditions which ensure that the new house will match its neighbours, and to the Planning Officer's Report which says that the new house will respect the uniform character of numbers 1 to 29 in terms of its size and the type of materials used, and that it will not be sufficiently prominent to harm the character of the area.

41. We take the view that the new house will not be at all visually intrusive, in light of the fact that it will match its neighbours. It will quickly cease to be noticeable once construction is over. We agree that the new house will not follow the building line along the fronts of number 17 – 29 and will break up the current L-shape but we do not believe that the L shape of the development is a practical benefit to anyone. We find that there is no clear building line along Cresswell Road. Indeed, no evidence has been put forward that there is one, save for a reference to a couple of the houses beyond number 29 on one of the plans. They are clearly not in a straight line. We did not see any discernible building line on our site visit, nor was one pointed out to us.

42. Accordingly, the covenant does not secure a practical benefit of substantial, or any, advantage in terms of the prevention of visual intrusion in the form of a new house at number 1A.

Loss of privacy

43. Ms Barnard says that there will be a loss of privacy from over-development. It is difficult to see how that can be the case. The house at 1A will overlook the garden of number 1 and perhaps of number 3, but all the houses have very small back gardens and are already overlooked. We find that there will be no effect on privacy.

The development will cause a decline in wildlife

44. Ms Barnard says that the removal of the hedge at the side will destroy a natural habitat for wildlife, and expresses concern over the decline in birds, hedgehogs, frogs and newts since she bought her property in 1993. No evidence was advanced for this, although as a matter of common sense we agree that the loss of a hedge is indeed a loss of some wildlife habitat. However, the loss of habitat is caused by the removal of the hedge and is only an indirect effect of the covenant and

so is not something to which we can attach great weight (see *Shephard v Turner* [2006] 2 P & CR 28 at paragraphs 41 and 42). In any event we take the view that in the context of a thoroughly developed area the loss will be minimal and that no practical benefit of substantial advantage has been shown in this respect.

The encouragement of further development

45. Mr Oliver says that the Applicant's proposal will encourage further development. In terms of section 84 of the 1925 Act this is commonly known as "the thin end of the wedge" argument. Mr Boncey in response says that this is unlikely because no other house amongst 1 – 29 has the space to build. It is true that numbers 15 and 17 have room for a small side extension but that is the limit of what is possible.

46. This house is unique amongst numbers 1 – 29 in having space to build a new house in its garden, and we take the view that it is very unlikely that further development will be encouraged by this one. No-one else can build a new house. The covenant does not prevent anyone building an extension, and it is very unlikely that its presence in unmodified form would discourage anyone from doing so.

47. Accordingly, the covenant does not secure any practical benefit in terms of the prevention of other development.

The effect on parking

48. It is argued that the addition of a new house, whose occupants are likely to own at least one car, will have an adverse effect on the parking situation in the private road and in the publicly adopted part of Cresswell Road.

49. Number 1 currently has three spaces: two in the road and its garage. The effect of the proposed building will be the loss of one of those spaces. The Applicant says that that is the only effect, because number 1A will have its own spaces at the side, and that therefore the effect on parking will be minimal or nil.

50. Mr Miller, who acknowledged that he is not an expert on parking or traffic, expressed the opinion is that it is unrealistic to say that the new house will give rise to parking congestion because Cresswell Road offers unrestricted parking.

51. Mr Boncey drew our attention to the 2011 version of the Chiltern District Local Plan which records that 85% of houses in the Chiltern area have "at least one car" while 48% have "at least 2 cars" and invited us to find therefore on the balance of probabilities that numbers 1 and 1A will have only one car each. That would be an unrealistic finding. Clearly it is highly likely that the occupants of the new house will have *at least* one car, rather than just one; we have to consider

whether the proposed development will make the parking situation significantly worse in view of the fact that the new house may well have two or more cars.

52. Number 1A will have two spaces of its own off the road. Those spaces may be insufficient if that household has more than one car for two reasons: first because the cars will have to leave in the order in which they parked, and that may not always be practicable. People leave for work and get home at different times and may not want to juggle cars while rushing out of the house in the morning. Second, the parking spaces are probably too narrow for disabled access and it may also be difficult to get a child into a car seat while the car is in one of the side spaces. We find therefore that it is likely that if number 1A has more than one car, one of them will park outside the property, either across the dropped kerb or in the adopted part of Cresswell Road.

53. We had no difficulty in parking on the adopted part of Cresswell Road on our site visit, and Mr Portess gave evidence that on his 9 visits to the site he had never had trouble parking. Mr Oliver gave evidence that parking can be difficult there later in the day, and we agree that that is likely to be true.

54. Mr Oliver also argued that it is likely that the new occupants will park on the corner, obstructing the access to the unadopted road and visibility for cars going in and out. He produced a photograph of a van parked on the curved corner and suggested that visitors to number 1A will park even more dangerously on the corner itself. We agree that this is not a good place to park, but it is happening already. A clear radius to the junction does not appear to be a benefit secured by the covenant.

55. We take the view that as a matter of common sense the addition of one extra car into the population of cars on the adopted part of Cresswell Road is not going to cause any great difficulty. We find that it is more likely that the occupants of number 1A will park across their dropped kerb, exactly where number 1's current second space is, and in that event the new development will have made no difference at all. If in fact the occupants of number 1A do park in their side spaces then the overall effect on the parking situation is likely to be positive; number 1 has a space in front, and its garage, and what used to be number 1's second space on the road will be clear.

The effect on the open plan front gardens

56. It is said that the development will encourage other residents to park on their front gardens and thereby upset the open plan design of the street.

57. This is of course conjecture. But all the houses have a space on the road across their front. If they were to park on the front garden instead, not only would they be in breach of covenant number 8, but they would not then be able to make full use of the on-street parking. We think that this concern is therefore without substance.

The effect on traffic and access

58. It is argued that the new development will cause traffic hazards. People will be reversing in or out of number 1A across the Hexapath and that will be a danger. Visibility splays are required by the planning permission for cars coming out of the front of 1A, but a car making its way into the front of 1A across the dropped kerb would not be able to see pedestrians behind a car parked outside number 1. Moreover, the access to the unadopted road for emergency vehicles and others would be impeded.

59. The Applicant has produced a letter from the Highways Authority, Buckinghamshire County Council, confirming that it is content with the proposed arrangements. Mr Oliver points out that this is an unadopted road and is outside the control of the Highway Authority; nevertheless, the Authority has considered the arrangements and does not regard them as problematic. Mr Oliver observes that the Highway Authorities in neighbouring counties require dropped kerb vehicle access to be at least 10m, and in some counties 15m, from a junction, whereas this one is 5.75 metres in. We do not consider the policies of neighbouring Highway Authorities to be wholly irrelevant, but we observe that this is a quiet road. We accept that drivers may put their foot down on the adopted part of Cresswell Road, but traffic speed is likely to be slow inside the unadopted road. The planning authority was content with the arrangements from the point of view of its effect on traffic.

60. As Ms Thorne points out in her letter of objection, the unadopted road is a single-track road; there is not room for cars to pass each other once the parking spaces are occupied. A fire engine might already have difficulty, but the removal of a parking space in front of number 1 is not going to make things any worse and may make things rather better.

61. Overall, we take the view that the construction of number 1A will not give rise to any additional traffic or safety problems and the objectors' concerns are not sustained.

The effect on the maintenance costs of the road and footpath

62. Covenant number 9 in the Third Schedule to the 1967 transfer requires the owners to make a proportionate contribution to the cost of maintaining the private road, which of course they all use for access to their garages.

63. It is argued that the cost of maintaining the road and the footpath will go up, particularly because of the passage of cars over the footpath to reach the parking spaces beside number 1A.

The Applicant naturally promises to adjust the liability to contribute so that each property pays one sixteenth instead of one fifteenth of the cost, but the Respondents say that that will not cover the increased cost.

64. There is no expert evidence about that increased cost. Mr Oliver tells us that the unadopted road has never been maintained and none of the properties has ever had to pay anything pursuant to covenant number 9. We find that the increased cost will be minimal and will, on the balance of probabilities, be compensated by the addition of an extra contributor to the repair bill, if repairs are ever undertaken.

The disturbance to be caused by construction

65. Obviously, there will be vehicles and people involved in the new building. There will be some noise and dust and some inconvenience to others while it goes on. The planning permission advises the Applicant that constriction vehicles should have their wheels cleaned so as to avoid carrying mud on to the highway and should not obstruct the highway. The Applicant has assured the Respondents that it will repair any damage to the road caused by construction vehicles.

66. We take the view that the construction will take a relatively short time and will not cause a great deal of difficulty. This is not a covenant whose primary purpose is to protect the residents from the disturbance caused by construction, and protection from disturbance does not amount to a substantial advantage (we compare the approach taken in *Shepherd v Turner* at paragraph 59).

The value of the covenant as a source of ransom

67. Mr Oliver argues that the existence of the covenant entitles the Respondents to a ransom payment. He regards its purpose as being to enable them to share in the profit on any new development, He sets that profit at about £240,000 and suggests that the Respondents should have £40,000 each.

68. This is wrong as a matter of law. It is well-established that the value of a covenant of this kind is not to secure a ransom. The point of section 84, and of its amendment in section 84(1)(aa) was on the contrary to ensure that the covenants were not used for ransom but retained only for the sake of *practical* benefits, and then only if they are of substantial value or advantage and cannot be compensated in money. So, there is no possibility of our making an order that would in effect impose a profit share so as to reflect the Respondents' loss of ransom power.

Conclusion on covenant 3

69. Accordingly, we find that the covenant does not secure to the Respondents any practical benefit of substantial value or advantage. The only advantages it secures are (1) the prevention of

the disturbance caused by actual development, which will be short-term and cannot be repeated on any other property in the development, and (2) the provision of car parking for number 1, whose loss together with the addition of two spaces for number 1A is going to make very little difference to anyone. Neither is a substantial advantage.

70. The question of compensation therefore does not arise, and we conclude therefore that the covenant should be modified.

71. The modification drafted by the Applicant does not seem to us to be quite right because it allows for an additional garage. The Applicant does not plan to build one and so we take the view that the modified covenant should read as follows:

> *"Not to use the property hereby transferred or permit the same to be used for any other purpose than two private dwellinghouses (with one garage) for the use and occupation of one family in each house and not to divide the same into flats."*

72. We have also considered whether we should impose a further condition (pursuant to section 84(1C)) to the effect that the residents of number 1A are not to park on their front garden. But since it is agreed, as we have said above, that covenant number 8 prevents that in any event we do not do so, as we would not wish to cast doubt on the effect of that covenant.

Disposal

73. Covenant 1 shall be discharged pursuant to section 84(1)(a). As to Covenant 3, the entry in the Charges Register for the property (BM32189) shall be modified as set out in paragraph 71 above.

74. The discharge and modification shall take effect provided that, within 3 months of the date of this decision, the Applicant signifies its acceptance to the discharge and modification of the restrictions set out in the Third Schedule of the Transfer dated 9 February 1967.

75. This decision is final on all matters other than the costs of the application. The parties may now make submissions in writing on such costs, and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

DATED 16 November 2018

Judge Elizabeth Cooke
Paul Francis FRICS

H. M. LAND REGISTRY

LP/49/2017

NATIONAL GRID PLAN SP 9600 SECTION B

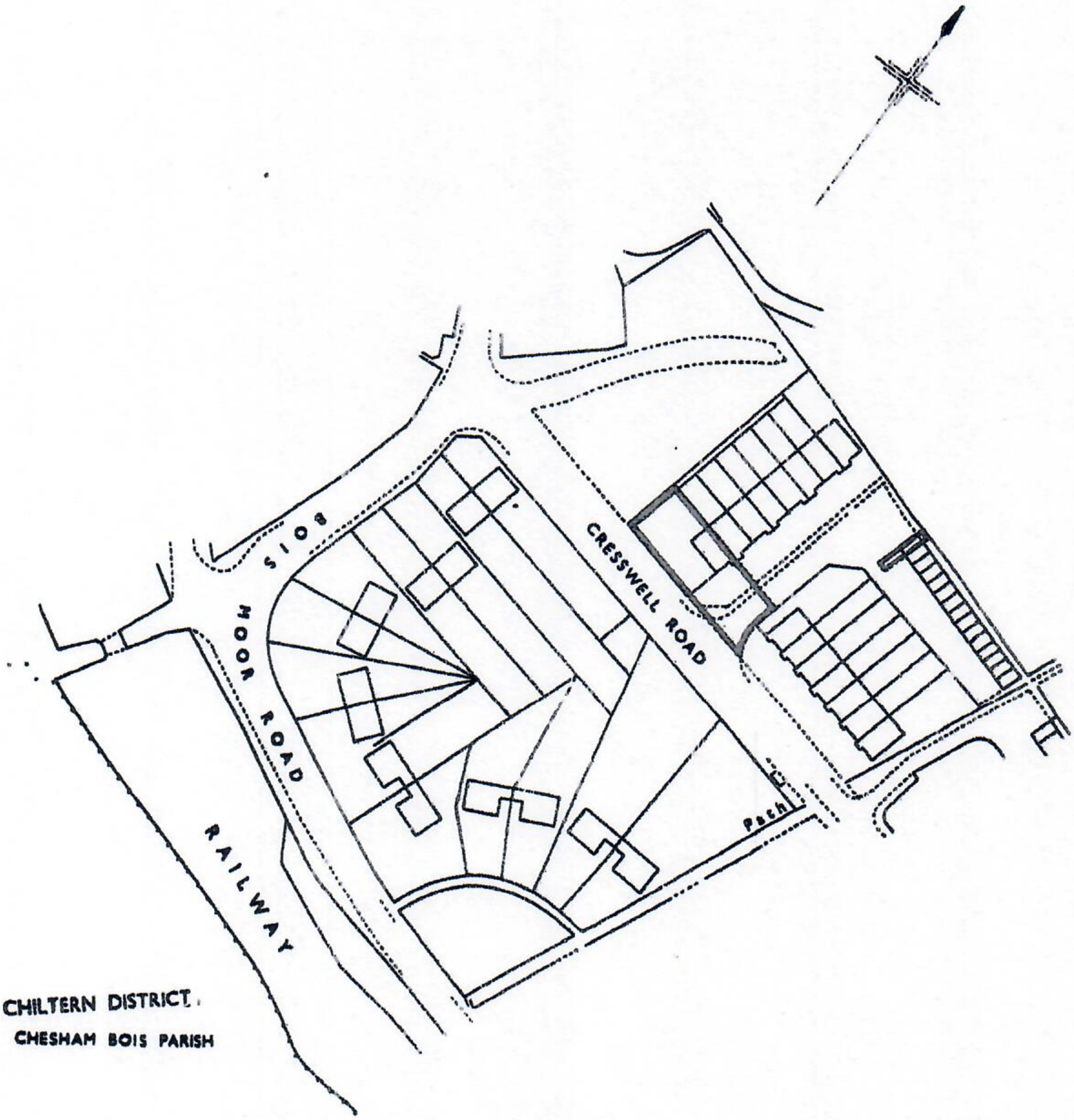
APPENDIX 1

BUCKINGHAMSHIRE

Scale 1/1250

CHILTERN DISTRICT

CHESHAM PARISH



CHILTERN DISTRICT

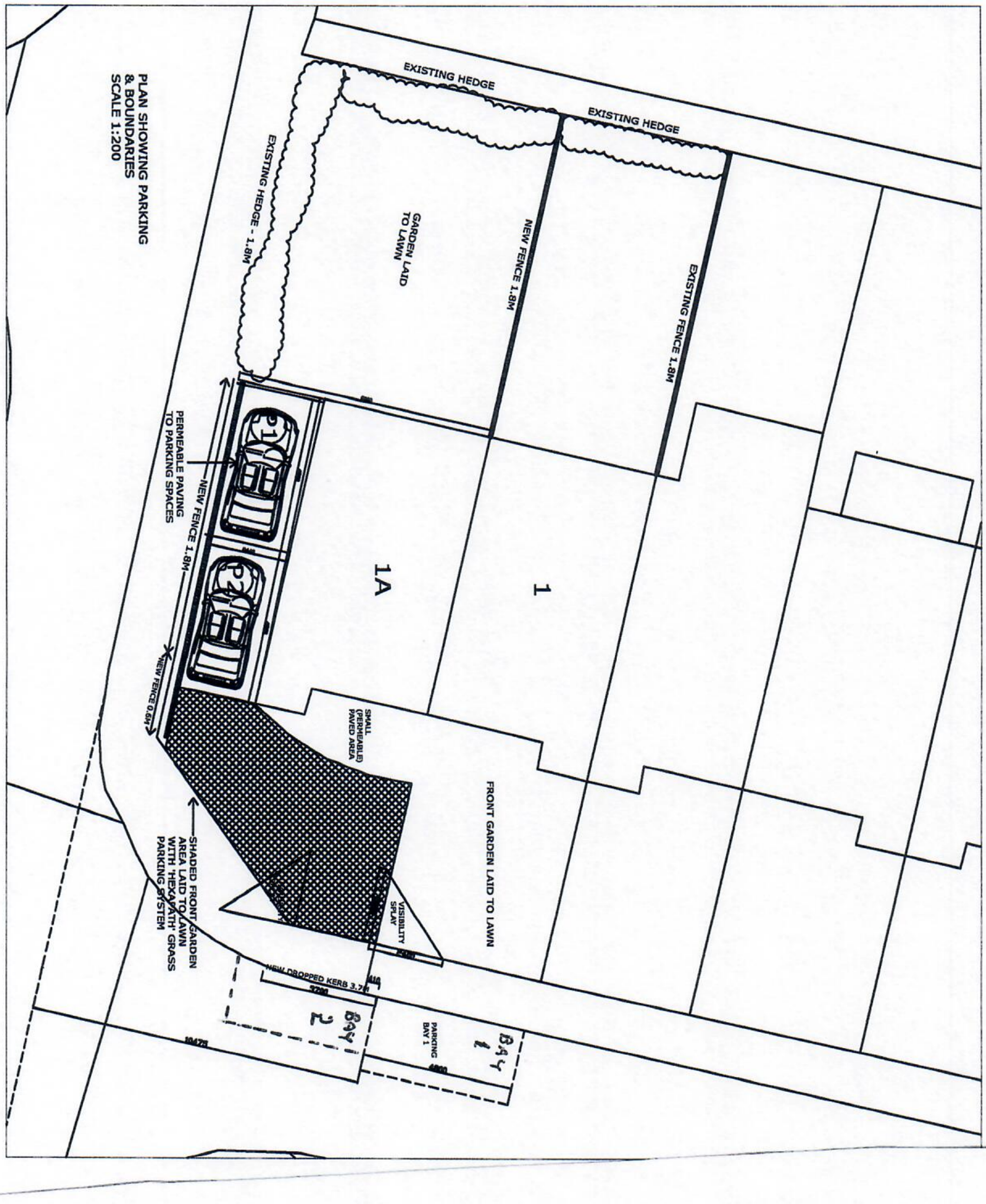
CHESHAM BOIS PARISH

Made and printed by the Director General of the Ordnance Survey, Chessington, Surrey. 1966 for HMLR

Filed Plan of Title No. BM 32189

LP/49/2017

APPENDIX 2



THIS DRAWING IS FOR INFORMATION ONLY. ANNOTATED DIMENSIONS PREFERRED. ALL DIMENSIONS TO BE CHECKED ON SITE.

client	[redacted]
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drawing	PLAN SHOWING PROPOSED PARKING, SURFACES & BOUNDARY TREATMENT
date	12-05-2015
scale	1:200@A4
dwg. no.	353-201
revision	D - 08-10-2018