UPPER TRIBUNAL (LANDS CHAMBER)

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Royal Courts of Justice,
Strand, London WC2

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – proposal to demolish bungalow and erect two new dwellings in breach of single dwellinghouse covenant – whether covenant secures practical benefits of substantial value or advantage – whether modification will injure anyone – application granted

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

BETWEEN:

JASPER EDWARD PECK DICKINSON

Applicant

-and-

WILLIAM GORDON ADAMS AND RITA JOY ADAMS

Objectors

Re: The Walk,
Lower Road,
Ufford,
Woodbridge,
Suffolk,
IP13 6DL

Mrs Diane Martin MRICS FAAV

Heard on: 27 April 2022

Decision Date: 27 May 2022

James McCreath, instructed by IBB Law, for the applicant

The following cases are referred to in this decision:

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

Introduction

1. This is an application for the Tribunal to modify a restrictive covenant on the understanding that it burdens the title to The Walk, Lower Road in the village of Ufford near Woodbridge in Suffolk ("the Property"). The applicant, Mr Jasper Dickinson, gained planning consent in July 2020 to demolish the existing four bedroom bungalow and sub-divide the Property to provide a replacement four bedroom house with an additional three bedroom bungalow to the rear ("the development").

2. A single dwelling restriction ("the restriction") is contained in a conveyance, dated 15 November 1957 ("the 1957 conveyance"), of a neighbouring property, Shincliffe, in which the vendor S & R Finance and Trade Limited covenanted to impose similar covenants on the future disposal of numbered plots shown on a plan. The Walk is one of those numbered plots but, although the 1957 conveyance and its covenants are referred to in the Charges Register of its registered title, the applicant wishes to reserve the right to challenge the entitlement of the objectors, as the owners of Shincliffe, to enforce the restriction against the owner of The Walk.

3. The applicant made an application to the Tribunal on 15 July 2021 seeking modification of the covenant, under grounds (aa) and (c) of s.84(1) of the Law of Property Act 1925, to permit implementation of the development. He has an earlier extant planning consent to extend and refurbish the existing bungalow to provide a five bedroom house which is not affected by the restriction. Should this application to modify the restriction be refused the applicant says that he intends to implement the earlier consent.

4. Shincliffe is owned by Mr William Gordon Adams and Mrs Rita Joy Adams, who are objectors to this application. It has no common boundary with the Property because another property known as Carousel sits between them. Carousel was also one of the numbered plots in the 1957 conveyance. The three properties share an access area, which is unregistered with no known owner.

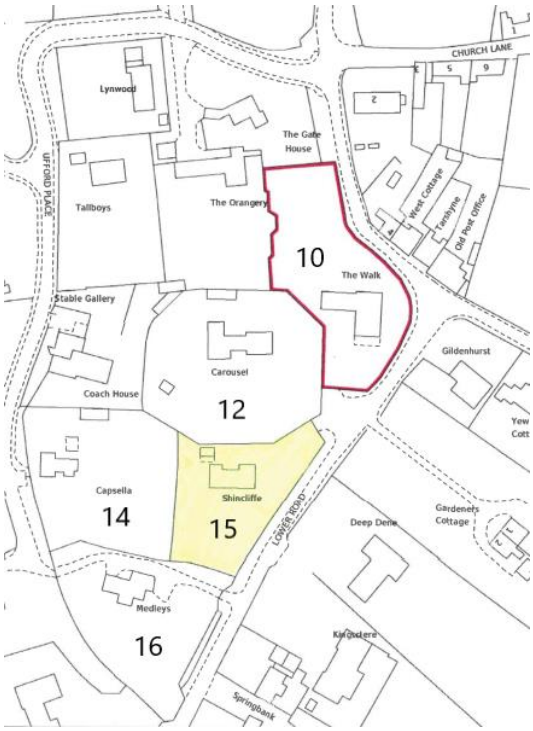
5. I made a site inspection on 26 April 2022, accompanied by Mr and Mrs Adams, Mr Dickinson and his counsel Mr James McCreath.

6. I heard the application at the Royal Courts of Justice on 27 April 2022. The applicant was represented by Mr McCreath, who called him to give evidence. Written expert evidence was adduced from Mr Ian Smith MRICS, a chartered building surveyor with Kirksop & Company. The objectors did not attend the hearing due to their age and health.

The factual background

7. The village of Ufford is situated beside the River Deben, two and a half miles north of the famous Sutton Hoo archaeological site. Most of the older part of the village, known as Lower Ufford, is designated a conservation area and the Property sits within that area. The former mansion house known as Ufford Place was demolished in the 1950s, and the break up of the estate included the sale of the plots referred to in the 1957 conveyance. The plan below

shows the relative locations of The Walk, Carousel and Shincliffe and their shared access area off Lower Road. The plot numbers are those shown on the 1957 conveyance plan.



8. The Carousel plot is notable for its shape as it is the former octagonal walled garden of Ufford Place. The conservation area does not include Carousel, but follows the line of the historic red brick wall boundary to Ufford Place, which now forms the western boundary of the Property. The Property is apparently named The Walk because it was the location of a walk around the outside of this wall.

9. Carousel and Shincliffe are detached houses dating from the late 1950s, in contrast to the Property which is a bungalow built around the 1970s. All three properties are set back from the access area within their gardens, on ground which is higher than the road. Screening is provided by mature hedges and trees, and the high red brick wall around Carousel, so that from the access area only their roofs are visible, to a greater or lesser extent. The Property is not visible to Shincliffe from within the plot.

10. The access area is unregistered land and there is no known owner. Schedule 1 to the 1957 conveyance included a covenant by the purchaser to pay a one third share of the expense of maintaining the area. This may be unenforceable (see later in this decision) but the three property owners accept that responsibility for maintenance is shared between them. It has a tarmac surface, overlaid with shingle, and one central manhole cover giving access to the main sewer. The surface is not new but appeared on my inspection to be in good condition, having stood the test of time with no evidence of patch repairs.

11. The applicant purchased the Property in 2011 and has since obtained three planning consents. The first, in 2014, was for erection of a detached double garage with first floor storage. In June 2017 consent was granted for extension and refurbishment of the existing

four bedroom bungalow into a five bedroom dwelling of one and a half storeys, i.e. with first floor bedrooms in the roof space ("the 2017 consent"). The footprint of the dwelling would be similar to that of the existing bungalow. A drainage trench has been dug to commence building operations for this dwelling, in order that the consent remains extant.

12. On 14 July 2020, consent was granted for the development, expressed as "Demolition of the existing dwelling (The Walk) and sub-division of the site into two plots. Two new dwellings, one being a replacement." The approved plans show a four bedroom house of one and a half storeys sited where the existing bungalow stands, but with a smaller footprint in order to allow construction of an access drive along the western boundary through to the rear of the Property. The detached garage would be demolished for the same reason. A three bedroom bungalow would be sited at the far end of the garden, close to the boundary with The Gatehouse (shown on the plan above). Conditions attached to the consent include completion of an approved scheme of investigation of archaeological assets and implementation of an approved tree and hedge planting scheme.

The legal background

13. The restriction relevant to this application arises from clause 3 of the 1957 conveyance of Shincliffe, which provides:

> *"3. THE Vendor for itself and its successors in title hereby covenants with the Purchaser:*
>
> *(a) For the benefit and protection of the land hereby conveyed and so as to bind the adjoining pieces of land Numbered 10 12 14 and 16 on the said plan into whosoever hands the same might come that the Vendor will not at any time sell or convey the said adjoining pieces of land or any part thereof without first imposing thereon similar stipulations and restrictions as those Numbered 1 and 2 in the said Schedule hereto*
>
> *…"*

14. The Schedule provides at 1 and 2:

> *"1. Not more than one private detached dwelling house or bungalow with garage and outbuildings for use in connection with the same shall be erected on the land hereby conveyed.*
>
> *2. No trade or business of any kind shall be carried on upon the said land or in any building erected thereon and no hoarding or advertising device shall be placed thereon*
>
> *…"*

15. Section 84(1) of the Law of Property Act 1925 gives the Upper Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The conditions relied on by the applicants in this case are (aa) and (c).

16. Condition (aa) of section 84(1) is satisfied 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.

17. 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 relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

18. Where condition (c) is relied on, the Tribunal may discharge or modify a restriction if it is satisfied that doing so will not injure the persons entitled to the benefit of the restriction.

19. 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.

20. The applicant's case is that the restriction should be modified under ground (aa) because it impedes a reasonable use of the land and does not secure to the objectors any practical benefits. Equally, since no injury would be caused to the objectors by implementation of the 2020 consent it should be modified under ground (c).

21. The objectors say that the restriction was intended to preserve the character of a very attractive and desirable neighbourhood and that the main benefits to them are: preventing a dominating new house which would unbalance the view to the three properties from the road; preventing increased wear and tear on the access area during construction and after completion, the repair cost of which would be shared by them; preventing an increased number of vehicles parking in the access area, first during construction and then after completion. Finally, the objectors say that modification or removal would create the risk of further development on the plot and of further applications for density restrictions to be lifted on the plots of surrounding properties. Initially the objectors wished to claim compensation should the application be successful but this was not pursued by them and neither party relied on expert valuation evidence.

The evidence of the applicant

22. Mr Dickinson explained that he has lived at the Property since 2011 and expects to continue living there for the foreseeable future. Since obtaining the 2017 consent his family

circumstances had changed and the purpose of the development was to provide separate accommodation for his elderly parents in the bungalow, while he and his son would live in the house.

23. Mr Dickinson was conscious of the objectors' concerns that the shared common access area may be obstructed and suffer damage during the construction period. He had therefore instructed Mr Ian Smith MRICS, a building surveyor, to prepare a method statement for the development to ensure that access would be unimpeded during the construction period and that the access area would be kept in good repair. During the 11 years that Mr Dickinson had lived at the Property no repair works had been necessary to that area, even though construction works had taken place for the garage at the Property and for an extension at Shincliffe. However, he was willing to give an enforceable undertaking to make good any damage, under-written by a deposit of £5,000 which the objectors could draw on should they feel the need to carry out repairs themselves. He agreed that patch repairs would be unsatisfactory and that the whole area would be resurfaced if necessary.

24. Mr Smith's method statement provides for a photographic schedule of condition of the access area to be prepared prior to commencement of work. Early enabling work would include construction of a temporary access road and turning head within the site, together with provision for temporary storage of spoil and a zone for plant and site accommodation. Once the existing bungalow was demolished there would be a large area of hardcore surface for delivery lorries to park. Vehicle movements for deliveries and removal of spoil would be managed by a banksman and his assistant. The access area would be cleaned of debris after each vehicle movement. A complaints procedure would be put in place for the objectors, who would be given a contact telephone number for the site manager in case of a problem with access.

25. Mr Dickinson was also aware of the objectors' concerns that because the development included no garages there would be insufficient parking for two dwellings, leading to the parking of cars in the access area once development was completed. His architect had been told that the local planning authority prefer developments without garages, which are additional built structures frequently used for storage rather than parking. By reference to the approved plans for the development, and during my site inspection, Mr Dickinson showed where three parking spaces for the house and two for the bungalow would be sited within the development. The two dwellings would share an access drive, which includes a lay-by where two cars could pass. This could also be used for temporary parking.

26. Currently delivery vehicles to all three houses turn into the drive and up to the house and this practice would be expected to continue. Parking in the village can be difficult and sometimes local residents park their cars on the side of the road opposite the access area, or even ask if they can park temporarily in the access area itself. The access area is also used by large delivery vehicles to turn around if they have taken a wrong road out of the village. Mr Dickinson said that none of this causes any problem.

27. Turning to the objectors' concerns over the view of the Property from the road, Mr Dickinson pointed out that the Property is currently the least attractive property in the road since it has an unattractive 1970s design and is rather tired. The ridge line of the single house

consented in 2017 would be the same as that of the replacement dwelling consented in 2020, but the view of the 2017 house from the access area would be more imposing because it would be larger, with two gables facing the entrance. In his view the development would be an improvement to the street scene.

28. Mr Dickinson quoted from the planning officer's report on the approved replacement house: "*The Council is supportive of creative and contextual new design in conservation areas as this is often preferable to pastiche and provides more opportunity to enhance the conservation area, making a high quality 21st century contribution to the development of the area over time. The submitted design is reflected of the predominant style within the conservation area, with its gabled roof form, traditionally styled dormers and material choices.*"

29. Regarding the new bungalow the planning officer's report commented: "*There is dense vegetation screening along Lower Street and the new building would be single storey. There would only be glimpsed views of the building from the public realm. Officers do not consider that a new dwelling in this location would impact the character of the conservation area."*

30. The final objection raised by the objectors concerned the density restriction imposed by the covenant, and the risk that lifting this for the application land could become a precedent for increasing the density in surrounding properties. Mr Dickinson commented by reference to a plan of surrounding properties that almost all of them had practical impediments to division, such as a small or banky garden or a square plot shape. The Property was unusual in having a long thin shape which could be divided between the front and back with a shared access drive.

31. Mr Dickinson confirmed that the length of time for completion of the development was expected to be no more than 12 months because the two dwellings would be timber framed with off-site assembly. The architectural survey required as a condition of the planning consent would involve digging four trial trenches to see if anything interesting was found, bearing in mind the proximity of Sutton Hoo, followed by a watching brief during the development.

Submissions on ground (aa)

32. Mr McCreath submitted that the restriction (assuming it is enforceable) impedes a use of land which has planning consent and is therefore reasonable. The objectors had claimed that the applicant bought the Property knowing of the restriction so could not now say it impedes a reasonable use. But, as stated in *Re Bass Limited's Application* (1973) 26 P&CR 156, at 158, the question must be considered on the assumption that the covenant does not exist.

33. The issue is whether impeding the use secures practical benefits of substantial value or advantage to the objectors. Mr McCreath suggested that the Tribunal must consider this by reference to what would happen if modification was refused. In this case the 2017 consent would be implemented to provide a single house of greater footprint and mass, which would be more visible to the objectors from the access area than the house in the development. The restriction provides no limit on the size or location of a single dwelling and the difference

which would be made by modification to allow the development is a smaller house with the addition of a single storey bungalow at the back of the site where it could have no impact on the objectors.

34. The benefits claimed by the objectors had all been addressed in Mr Dickinson's evidence. The fears over inadequate parking provision for the development were unfounded. The parking provision is sufficient for everyday use and there is no evidence of any current difficulty when temporary additional parking is required. Mr Smith's method statement would be followed to mitigate any problems during the construction period, even though the restriction does not protect the beneficiaries from construction and, moreover, similar issues would arise in constructing a single dwelling.

35. The covenant in the 1957 conveyance that the purchaser of Shincliffe would pay a one third share of the expense of maintaining the access area gave rise to the objectors' concerns about bearing a share of the additional cost of maintenance created by vehicles from a second dwelling at the Property. This was a positive covenant and Mr McCreath submitted that it is not clear that it is binding on the successors in title to Shincliffe, nor how it would be enforced as the access area has no known owner. In any event, the increased use and need for maintenance arising from the bungalow would be nominal. No repairs have been required during Mr Dickinson's time at the Property and this is an unrealistic concern, but should it arise it would be dealt with in a neighbourly way.

36. The objectors claimed that the development would affect their outlook when they left or entered their property, but had commented during the site inspection that at least the view of the church tower would be unaffected. Even if the outlook from the access area was sufficiently good to be a practical benefit, which was not clear, any change would be similar if the single dwelling in the 2017 consent was built.

37. Turning finally to the perceived benefit of preventing a precedent for future intensification of development in surrounding properties, Mr McCreath referred to the plots numbered 12, 14 and 16 in the 1957 conveyance, which may also be burdened by the restriction. A modification for the Property would create no precedent for those plots since the crucial difference is that each of them adjoins Shincliffe, which the Property does not, and any impacts of development in those plots would be experienced in close proximity. Permitting this development would not change the character of the area, which already has a mix of densities. The planning officer's report considered that overall the development conserved the character of the conservation area.

38. In conclusion Mr McCreath submitted that ground (aa) was satisfied since the restriction, in impeding the development, prevents a reasonable use of the Property and secures no practical benefits to the objectors.

Discussion

39. There is no suggestion that the restriction imposed by the 1957 conveyance of Shincliffe on the land retained by the vendor has been released. The inference from clause 3 of the 1957 conveyance is that the numbered plots there identified were still owned by the vendor and

the restrictions were stated to be imposed for the benefit of those plots, which included the Property. Although the applicant formally reserves his position on the enforceability of the restriction by the objectors I will proceed on the basis that they are enforceable.

40. This is a case where the objectors made clear that they did not object in order to obtain compensation from the applicant, but because they had genuine concerns over the development. They declined to indicate a provisional sum for compensation, which may perhaps have led to a negotiated release of the restriction, because they understood that the restriction in the 1957 conveyance was "for the benefit and protection of the land conveyed" and they felt strongly that they should be able to rely on that as a property right. The issues raised in the objections were not unreasonable and the fact that the applicant has commissioned an expert to produce a method statement for the construction period is some acknowledgement of that.

41. It is unfortunate that the objectors did not fully appreciate the nature of an application for modification under s.84, and the importance of comparing what is proposed with what could realistically be expected to be done without the proposed modification. The applicant would be entitled to implement the 2017 planning permission and I am satisfied that he would be likely to do so if this application is refused. In that context the objectors' concerns over impeded parking and damage to the access area during the construction period fall away, because constructing the single house in the 2017 consent would have the same impact. Concern over an altered outlook, towards the upper part of a one and a half storey house rather than the roof of the existing bungalow, would remain under the 2017 consent for a larger house.

42. The concerns which arise from having a second dwelling on the Property are the prospect of additional temporary parking in the access area and the prospect of bearing a one third share of additional wear and tear on that area. The approved plans make provision for two cars to be parked at the bungalow and for a passing area in the new drive which would be available for a temporary additional vehicle. At the site inspection Mr Dickinson indicated to us where the parking would be located. In my view that is an adequate provision and answers the concerns of the objectors over parking, but I also accept Mr Dickinson's evidence that it is not unusual for the access area to be used for occasional parking by a contractor visiting any of the three properties that currently use it and that this causes no problem. There is no reason to suppose that such occasional parking would become a problem as a result of the additional dwelling.

43. I form no view on Mr McCreath's submission that it is hard to see how the covenant in the 1957 conveyance requiring the purchaser of Shincliffe to bear a one third share of the cost of maintaining the access area remains enforceable. Whether strictly it is enforceable or not the additional wear and tear on the surface caused by the comings and goings of the occupiers of one additional house is unlikely to be significant. If and when repair to the access area is required, it is reasonable to assume that the neighbours would share it between them equitably. During my inspection I noted that the surface of that area is in good condition with no evidence of previous patch repairs. Mr Dickinson described the use which has been made of the area during his time at the Property, which has included construction traffic to the Property and to Shincliffe and frequent use as a turning area by vehicles which have taken a wrong turn. The surface has therefore stood up over time very well and I would not

expect an additional two cars at the bungalow to make any difference to it. Mr Dickinson has offered to underwrite the cost of a complete new surface should his construction work make repair necessary and this will be of comfort to the objectors.

44. The objectors' concerns over creating a precedent for increasing density are understandable but in my view do not amount to a practical benefit in this case. The planning officer stated in her report that each application is determined on its own merit and the same applies to any application to this Tribunal for modification of a restriction. Should a similar application be made for any of the other numbered plots in the 1957 conveyance the context would be that of immediate neighbours, which is not the case here, so the considerations would be different.

45. S.84(1)(B) requires the Tribunal, in determining whether a restriction ought to be modified, to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area. Evidence on this was provided by the applicant within the report of the planning officer who recommended the grant of planning consent.

46. The Tribunal is also required to take into account the period at which and context in which restriction was created or imposed and any other material circumstances. The covenant was entered into 65 years ago, when generous sized plots of land from the former Ufford Place Estate were being sold off for development. The planning policy framework for the area would have been very different at that time. Councils are now required to deliver a sufficient supply of homes and the planning officer's report explains that infill development represents an important source of new small-scale housing supply and is an important contribution to the district's overall housing supply. The application for this planning consent was tested and modified to ensure compliance with the relevant planning policies in respect of the conservation area and the residential amenity of neighbouring properties.

Determination

47. I am satisfied that ground (aa) is made out and that I have discretion to modify the restriction which impedes a reasonable use of the Property and does not secure to the persons entitled to the benefit of it any practical benefits. It follows that ground (c) is also made out because the proposed modification will not injure those persons.

48. The applicant has offered to implement a method statement for development and to provide a sum of £5,000 as security against the need for repairs to the access area. These are helpful offers which will give comfort to the objectors and I include them within the conditions for modification.

49. The following order shall be made:

The restrictions in the Charges Register for the The Walk, Lower Road, Ufford, Woodbridge IP13 6DL shall be modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words:

"PROVIDED that the development permitted under the grant of planning permission on 14 July 2020 by East Suffolk Council under reference DC/20/1768/FUL and subject to the conditions attached thereto may be implemented in accordance with the terms, details and approved drawings referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions thereto."

50. An order modifying the restriction shall be made by the Tribunal provided, within three months of the date of this decision, the applicant shall have:

(a) Signified his acceptance of the proposed modification of the restriction in the Charges Register of the Property; and

(b) Provided the Tribunal with a signed undertaking to the objectors to implement the method statement set out in Mr Smith's report dated 22 November 2021.

(c) Provided the Tribunal with a signed undertaking to the objectors (i) to carry out repairs to make good any damage caused to the access area made necessary as a result of demolition and construction work for the development and (ii) at their request and subject to receiving their reasonable co-operation in the same, to deposit £5,000 in an account in joint names with the objectors as security for the above undertaking.

Diane Martin MRICS FAAV

Member, Upper Tribunal (Lands Chamber)

27 May 2022

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.