

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 315 (LC)
Case No: LP/11/2018**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – house in large residential plot – outline planning permission for care home – restrictions held not to be obsolete – practical benefits held to be both of substantial value and substantial advantage to objectors – application dismissed – Law of Property Act 1925 section 84(1) (a) and (aa)

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

BETWEEN:

BRIAN LESLIE WILLIS

APPLICANT

and

**(1) MARK ROLLINS
(2) ANGELA ROLLINS AND OTHERS**

OBJECTORS

**Upcot, Tydehams,
Newbury,
Berkshire, RG14 6JT**

Elizabeth Cooke, Upper Tribunal Judge and P D McCrea FRICS

**The Royal Courts of Justice
on
10-11 September 2019**

Mr Joshua Dubin for the Applicant instructed by Spires Legal Ltd

Mr Rupert Cohen for the third to fourteenth Objectors instructed by Penningtons Manches LLP

© CROWN COPYRIGHT 2019

The following cases are referred to in this decision:

Re Afzar's Application [2002] P & CR 17

Re Foggs' Application [2018] UKUT 114 (LC)

Re Geall's Application [2018] UKUT 154 (LC)

Re Kerai's Application [2014] UKUT 153 (LC)

Introduction

1. This is an application for the modification of restrictive covenants attached to Upcot, a substantial house and surrounding land on Tydehams, a cul-de-sac off the Andover Road in Newbury. Upcot has a frontage to Andover Road, but is accessed from Tydehams. The applicant, Mr Brian Willis, has outline planning permission for the construction of a care home for 25 residents, and the restrictive covenants would prevent that development.
2. The objectors to the application live in 14 named properties on Tydehams with the benefit of the covenants. They are: Mark and Angela Rollins, of Ranworth; Christopher and Rachael Winchester, of Merricot; Robert and Tricia Whiting, of The Field House; Gill Ringland, of Shepherds; Hayley and Steve Mann, of Long Acre; Ian and Pat Dixon, of Tydehams Corner; Trudy Rogers, of Dormers; Francis and John Clayton, of Baytree House; Karen Sadler, of Ashby; Richard and Susan Jarvis, of Birch Paddock; Paul Donald, of Brockwell House; Mike McKenzie, of Southwood; Matt Franklin, of Allways; and Samuel Simpson, of California House.
3. The objectors' properties that are closest to Upcot are Merricot, which adjoins it immediately to the east, Tydehams Corner, which is immediately opposite, and California House, which next to Tydehams Corner. Hence, the entrance to Tydehams from the Andover Road is framed by Upcot and Tydehams Corner, with Merricot and California House the second house on each side. The other objectors' properties are some distance away.
4. We conducted a site visit on 9 September 2019. We were shown the exterior of Upcot, where poles have been placed to indicate the extent of the footprint of the proposed new building. We saw inside and outside Merricot and went into the gardens of Tydehams Corner across the road and of Monks View, a short distance away. As we explain below, Monks View does not have the benefit of the covenant, but the parties considered it should be included in the inspection. We are grateful to the parties for allowing us access to their properties.
5. We heard the application at the Royal Courts of Justice on 10 and 11 September 2019. The applicant was represented by Mr Joshua Dubin and the objectors (except for Mr and Mrs Rollins) by Mr Rupert Cohen, both of counsel, and we are grateful to them for their helpful arguments. We heard evidence from the applicant, from two of the objectors (Dr Winchester and Mrs Ringland) and from Mr David Pearce, of Monks View. We also received written expert evidence from Mr Steven Smith FRICS, a partner of Haslams, for the applicant, and from Mr Richard Meeson MRICS, a partner of Carter Jonas, for the represented objectors. The first and second objectors, Mr and Mrs Rollins, were not represented and did not attend the hearing.
6. In the paragraphs that follow we set the scene by describing Andover Road and Tydehams, and the development proposed by the applicant. We set out the law, and consider the applicant's case for modification of the restrictive covenants under two of the grounds set

out in section 84 of the Law of Property Act 1925. We conclude that neither ground is made out and we refuse the application.

Andover Road and Tydehams

7. Andover Road is the main road into Newbury from the south-west. Development along it is a mix of residential and commercial. The *Area Design Focus* for Andover Road, published by the West Berkshire Council as a Supplementary Planning Document in 2006, describes the properties on Andover Road near Tydehams as “large detached properties set in very spacious gardens.” It goes on to say:

“The road and most pavements are wide, and there are many mature trees. Set well back from the road, the houses are of individual high quality design, giving the Andover Road a great deal of style and charm.”

8. However, the pattern of development on Andover Road is varied and there is evidence of a gradual move away from the pattern of single residential buildings on large plots. We are told that planning permission has been granted for a nearby development of 63 retirement flats on Andover Road; a hospital site has been converted in 97 retirement flats; a former school has been converted into residential apartments.
9. Tydehams is an adopted cul-de-sac leading off Andover Road to the east. It is a broad, largely tree-lined road. The houses on Tydehams and on the two small private roads leading off it are known as the Tydehams Estate; they have names, not numbers, and they are all substantial dwellings in large plots. There are no commercial buildings. The houses stand on land purchased in the early 1920s by a Dr Simmons, whose hobby was building houses. By 1931 14 of the 26 planned properties had been built, nine of them commissioned for Dr Simmons and his family. He settled in the largest, the Red House, set in 9 acres of land.
10. The publication *The Tydehams Estate* by KW Allen and AJ Martin states that in 1965 “the Estate was virtually complete”, comprising 28 houses. All the plots were sold subject to restrictive covenants in identical form:

“3. No building of any kind other than a private dwellinghouse summerhouse garage and tool shed with appropriate offices and outbuildings to be appurtenant thereto and occupied therewith shall be erected on the said plots and no trade profession or business of any kind other than that of a duly qualified medical practitioner shall be carried on upon any part of any plot and any dwellinghouse erected thereon shall (subject as aforesaid) be used as a private residence.

4. Not more than one dwellinghouse shall be erected on the said plots of land conveyed and no dwellinghouse shall be erected thereon other than a detached residence ...

8. No plot shall be used any purpose other than garden ground meadow land or orchard until built upon nor shall any act or thing be done upon either of the said plots or upon any building thereon which may be or grow to be a nuisance or annoyance damage or disturbance to the Vendor or any person deriving title under him or which may tend to depreciate the value of the adjoining land of the Vendor forming part of the said Building Estate.”
11. These restrictions were included in the first schedule to a Transfer of Upcot dated 2 March 1925 made between George Alan Simmons and Ellie Forman.
12. After 1965 a couple of plots were subdivided, and two significant developments have taken place. The first was the construction in 1985-6 of seven new houses on the land formerly belonging to The Red House (now known as Brockwell House). Agreement was reached with those who had objected to the development and had the benefit of the covenants, on the basis that there would be one house per plot and that no further building would take place. Those houses are now approached by a private road leading off Tydehams. A visitor who did not know the history of the estate might not notice that this was a later development; the houses are very much in keeping with the rest of Tydehams, in style and size.
13. The second significant development was the building of Heather Gardens and the 20 houses on it, on a slice of land removed from the back gardens of five houses on the south side of Tydehams. Heather Gardens is a cul-de-sac leading not from Tydehams but from the road to the south of the estate, Monks Lane. Again, agreement was reached with those who objected to the proposal. We were told at the hearing that an important element in that agreement was the fact that the new houses were not approached from Tydehams and did not have a Tydehams address. They are built to a greater density than the Tydehams properties; nevertheless they are large dwellings with gardens. Some of them are visible from Tydehams and from the back gardens of the properties whose former land they occupy, including Monks View, from whose back garden we could see the roofs of two of the Heather Gardens houses; to the side and front of Monks View there remain extensive gardens, with attractive planting, tennis courts and bee hives.

The applicant's proposed development

14. Upcot itself is, as we said, on the corner of Tydehams and Andover Road. It is of similar size to most of the Tydehams properties; there was some disagreement in the evidence as to whether it was originally a double plot, or two half plots, but a glance at the plan shows that the Upcot plot is smaller than for example Tydehams Corner and Monks View. The house was built in 1925; the applicant's expert witness describes it as “a traditional house of its age and type albeit it is now in a somewhat dated and tired condition and requires modernisation,” and we would agree with that description.
15. The applicant has lived at Upcot since 1987. He has made a number of planning applications. In 1996 permission was granted for Upcot to be redeveloped as a residential care home, but was not implemented. An application for the demolition of the house and its

replacement with 4 dwellings was refused in 2011, as was another in 2012. In 2016 he applied for planning permission to demolish the house and build a care home; permission was refused in April 2017 but granted on appeal on 27 March 2018. It was granted in outline form; the reserved matters include the appearance of the building, the landscaping of the grounds, and the arrangements for air handling plant for the kitchens.

16. That means that the footprint of the building and of its car park is known, but the style and height of the building is not. The drawings of the elevation as presently intended depict it in an Arts and Crafts style in keeping with the rest of the buildings in the cul-de-sac. It will have a basement, and will be two storeys high, although somewhat taller than it is currently. The expert witnesses agree that the new building will be three times the size of the existing house.
17. It is agreed that the restrictive covenants prevent the proposed development, and the applicant seeks their modification. No proposal for the terms of a modification was made by the applicant and it was agreed at the hearing that if we were to find that the covenants should be modified we would invite submissions as to the wording of the modification.

The law

18. The Tribunal's discretionary jurisdiction to discharge or modify restrictive covenants is created by section 84 of the Law of Property Act 1925, which reads (so far as is relevant to this case) as follows:

“(1) 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;

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.”

19. The applicant seeks the modification of the covenants so as to permit the proposed development on ground (a), that they are obsolete, or on ground (aa), that the restrictions do not secure to the objectors practical benefits of substantial value or advantage.

Are the covenants obsolete?

20. Mr Dubin for the applicant argued, first, that the covenants 3 and 4, and the first part of 8 are obsolete in their current form. (he accepted that the second part of 8, referring to nuisance, could not be considered obsolete). He submitted that the purpose of the covenants was to ensure the initial building of the estate on the basis of one house per plot, but that after that initial building the covenants have no effect except to prevent nuisance.
21. There is nothing to limit the effect of the covenant in paragraphs 3 or 4 of the Transfer in that way. We find that the effect of the covenants is to prevent the owner of each plot from building anything other than a single private residence on it, at any time. The idea that the

covenants have that effect only once, when the first building is constructed, contradicts the plain words of the covenants and is not tenable.

22. Mr Dubin argues further that the covenants are no longer able to achieve the purpose for which they were designed, due (as the statute says) to changes in the character of the neighbourhood. He suggests that Dr Simmons wished to surround himself with similar people: affluent, distinguished professionals living in substantial houses with their live-in staff (gardeners, nannies, and so on). The historical records show that retired majors, a headmistress, and spinsters engaged in charitable works were among Dr Simmons neighbours. Such a population is no longer in existence, and it is no longer appropriate to restrict the character of the estate in this way.
23. Again, we have to dismiss that suggestion fairly shortly. The covenants say nothing about who is to live in Tydehams. There are to be no professional premises save for doctors; and there is to be one house per plot. Romer LJ in *Re Truman Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261 said:

“if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come. It may be said that the covenants are obsolete, because their original purpose cannot be served.”

24. Upcot stands in two neighbourhoods, Andover Road and Tydehams. There is mixed development on Andover Road, but not on Tydehams, which remains far removed from the situation described by Romer LJ. Not only is there no trace of commercial development, the cul-de-sac retains much of what must have been its original character – a leafy drive surrounded by large houses in spacious plots. The houses built on the land that belonged to the Red House have done nothing to detract from the character of the estate. Heather Gardens was certainly a significant development, but it had the effect of removing land from Tydehams rather than of changing the character of what is left, which is by far the greater part of the estate.
25. The covenants have prevented development that would change the character of Tydehams, and ensured that it remains free of commercial development. There is nothing in the character of the neighbourhood, nor are there any other circumstances, that prevent that purpose being achieved. We find that the covenants are not obsolete and that that ground for modification is not made out.

Ground (aa) and practical benefits of substantial value or advantage

26. Ground (aa), together with section 84(1A), requires us to consider whether the covenants are impeding a reasonable use of land; if they are, then they may be modified only if both

- a. they either do not give the objectors any practical benefits of substantial value or advantage to them or are contrary to the public interest, and
 - b. money will be an adequate compensation for any loss or disadvantage caused by the discharge or modification.
27. In deciding whether the matter falls within subsection 1A we are to take into account the development plan, the pattern of grants and refusals of planning permission, and the period when and the context in which the restrictions were imposed. We have in mind that permission for the care home has been granted, and also that permission to build four houses on the site has been refused. We are conscious of the age of the covenants and the circumstances of their imposition by Dr Simmons but, as we have said, the covenants continue to play an important role in the preservation of the character of Tydehams.
28. It may well be that the use of Upcot as a residential care home would, in itself, be a reasonable use of the land, although we cannot make a finding about that in the absence of information about its appearance, the landscape, and the air handling. It is agreed that the covenants prevent the development.
29. The applicant has not argued that the covenants, in preventing the use of the land as a care home, would be contrary to the public interest. While the public interest point did not feature in the applicant's statement of case, paragraph 64 of Mr Rubin's skeleton argument asserted that the development would be in the public interest; that may be true, but that is a different point and not the one that the statute requires us to address.
30. However, applicant has argued that the covenants, in preventing the use of the land as a care home, do not confer on the objectors any practical benefits of substantial value or advantage to them. We find that they do, for two reasons: first, the loss of amenity that the development would cause to the three nearest properties, Merricot, Tydehams Corner and The California House (and particularly to Merricot), and second the diminution in value that is agreed by the parties' experts will be caused by the development.

Loss of amenity caused by the development

31. We have already indicated something of the impact that the new building will have in terms of its size, by comparison to the current house, and as a house with 25 residents and the associated staff. Increased vehicle movement will be inevitable; residents may not have cars but staff and visitors will need to park, there will be delivery vehicles for food and laundry, doctors will have to attend and there will occasionally be ambulances. The current plan is to have 17 parking spaces on site. We find that it is likely that there will have to be some parking on Tydehams.

32. The junction of Tydehams and Andover Road suffers from restricted visibility. The planning permission requires the felling of a tree at the Andover Road boundary of Upcot, and then the moving of the fence so as to provide greater visibility. It is agreed by the objectors that this would benefit everyone. The planning inspector in granting permission found that there would be an increase in traffic of 8%; he took the view that the improved visibility would outweigh the disadvantage caused by increased traffic.
33. However, parking on Tydehams close to the junction would be dangerous because it would obstruct visibility; the applicant suggests that the local authority might assist with parking restrictions. So it might, but one of the pleasing features of Tydehams is the absence of lines on the road; if lines were painted, the impression of seclusion as one enters the road would perhaps be lost.
34. So there are some concerns about traffic and parking, which would affect only the western end of Tydehams. By far the greatest concern that we heard was about the effect of the development on houses nearby. The planning inspector in granting permission took the view that the development would not have an adverse effect on the neighbours, including Merricot; we have to say that from our own observation, and in the light of the evidence we heard, we disagree.
35. The objectors' concerns about loss of amenity focus on the size of the proposed house and its appearance; disturbance from light and noise; the specific loss of amenity for the three closest houses; and the possibility both of more commercial development on other sites on Tydehams and of different commercial development at Upcot itself in the future.
36. The applicant's case is that these concerns are exaggerated. In his statement of case he says that the care home will not detract from the residential nature of properties on the estate and will have far less impact than did the buildings on the Red House land. Where there was formerly one substantial building on Upcot, there will still be one substantial building; it will be a residence for those who live there; they will have medical attendants and there is no restriction on medical premises on Tydehams.
37. In cross-examination the applicant said that he was confident that screening would minimise the visual impact; air handling plant will be on the Andover Road side; and the design of the exterior will be in keeping with the rest of the estate. The design is of course a reserved matter so far as planning permission is concerned, but he would be content to have the covenants modified so as to permit a building whose outward appearance matched that depicted in the current drawings. As to traffic, he points out that there are deliveries on Tydehams, and construction vehicles.
38. The applicant explained that he had been a successful builder for many years; his plan was to have the care home built and then retain ownership, but not to manage it himself. He was keen to minimise the scale of cooking that would have to take place for 25 residents and at least 8 staff members, suggesting that residents would not need three meals a day. He was asked whether he would contemplate other developments that were also within the scope of

the planning permission, such as a rehabilitation facility, and he said that he would not. He was also asked what he would do if the venture proved not to be profitable; he said that either he would demolish the new building, or he would live in it himself.

39. In argument Mr Rubin suggested that the objectors are motivated by fear of what the development will look like and that the reality will be nowhere near what they fear.
40. We heard evidence from two of the objectors and from Mr Pearce who is not an objector.
41. Dr Christopher Winchester lives with his family at Merricot, next door to Upcot; the expert witnesses agree that his property would suffer the highest proportion of diminution in value as a result of the proposed development. He and his wife bought the property in 2017, aware of the applicant's planning application and aware of the restrictive covenants. He objected to the planning application, and indeed heard the news that it had been rejected two days after completing the purchase. He has made a small extension to his property on its western side by removing one of the front doors (there used to be two) and extending the ground and first floor outwards; this was to enable the construction of a corridor so that the master bedroom could be accessed without going through one of the other bedrooms. No new first floor windows were created, and one new ground floor window was put in.
42. The short western side of Merricot is the nearest to Upcot and is separated from it by Merricot's drive, some planting and some trees. The front door, kitchen, two bedrooms, three bathrooms and a ground floor room containing a grand piano are all on that side of the house. The present house on Upcot is some way away from the boundary. The screening is all on the Merricot side. There are mature trees with the lower branches removed and some shrubbery. The screening is not complete, even in summer with all the leaves on the trees and bushes.
43. In his witness statement Dr Winchester said the he and his family enjoy their large garden and the tranquillity of the area. He is concerned that Merricot would be overlooked by the new building, of which the eastern end would be 3 or 4 metres away from the boundary of Merricot and two storeys high. He is not persuaded that additional tree screening would help with this because the presence of mature trees, lacking their lower branches, along the boundary would make it difficult to plant additional trees.
44. Dr Winchester is concerned about noise from the care home from deliveries, staff and the residents themselves. He expects that the disturbance will be much greater than one would expect from a family home with children. He expects smells from the kitchen; and the noise of reversing commercial vehicles. He anticipates additional external lighting, and while he accepts that other houses on Tydehams may have external security lights he is not able to see them, whereas these will be in close proximity to Merricot.
45. As to the appearance of the development, Dr Winchester points out that almost half the plot will be covered by the building and its car park. There will be signage for the care home.

There will be additional traffic which presents a hazard for residents including children walking home from school. There will be visitors parking outside on Tydehams itself.

46. Dr Winchester is also concerned about the risk of further development occurring once this first commercial property is allowed on Tydehams. He observes that a 25-bed care home may not be viable, being rather small in contrast to the 64-bed care home already approved to be built nearby on Andover Road. If that proves to be the case it is unclear what the eventual use of the site will be.
47. Mrs Gillian Ringland lives at Shepherds, which is on the north side of Tydehams and near its eastern end. She enjoys the unusual style of her house and the attractive cul-de-sac with its calming atmosphere. She acknowledged the major developments on the Red House plot and Heather Gardens, but pointed out that those developments – while agreed in order to support changes reflecting modern life – protected the visual appearance and ambience of Tydehams.
48. Mrs Ringland accepted that she cannot see Upcot from her house and would be unaffected by any disturbance caused by its construction. However, she believes that the proposed development, being very visible to residents and visitors on the corner with Andover Road, would change the nature of the cul-de-sac and start to destroy a local asset. In cross-examination she remained unconvinced that additional tree screening would help. She accepted that improved visibility on the corner with Andover Road would be a benefit. She also accepted that residents do have commercial traffic, for example for the renovation taking place at her house at the moment which is expected to last about three days; she points out that there is plenty of room for the vehicles needed by the workmen on the drive at Shepherds.
49. Mr David Pearce owns Monks View, which stands on a 1.5 acre plot. He is not one of the objectors; his understanding is that his plot was sold by Dr Simmons before the rest, and therefore his land does not have the benefit of the covenants subsequently imposed on the other plots. He gave evidence in support of the objectors' case.
50. Mr Pearce has done extensive research into the history of Tydehams; he observes that whilst some of the covenants have been modified, in all cases this has enabled only the construction of large single houses on substantial plots that maintain the character of the estate.
51. He is concerned about adverse effects from the construction of a very much larger building, with 3 times the footprint of the existing house, and which he says will dwarf the surrounding houses. The proposed southern elevation is 15m long rather than the existing 6 m. He says the sheer size of the building will change the street scene and have a major impact. He is concerned about traffic; he agrees that the improved sight line will be a benefit to residents but otherwise says that the development would adversely affect road safety. He is unhappy about the introduction of a commercial property on a residential road; he feels it would set a precedent; he believes that to allow the applicant's application would be to

erode the covenants that bind the properties together. He is unconvinced that tree screening is practicable and points out that additional trees on the south side of Upcot where it fronts Tydehams, would take away sunlight from the residents – we take it that he means that it is unlikely therefore that such planting would take place.

52. Mr Dubin put to Mr Pearce, as he did to Mrs Ringland, that a luxury mansion of the same size as the proposed development would not be in breach of covenant and could not be opposed. We are not convinced that that is a relevant point; as Mr Pearce put it, such a mansion would not sell, and is therefore not a useful hypothetical.
53. We find that the fears of the residents are well-founded and realistic. There will be an increase in traffic; there will be a substantial visual impact on the western end of the estate and the houses nearby; there will be a great loss of privacy to Merricot, as well as unwanted noise, light and probably cooking smells. It is not certain at this point that air handling plant will be on the Andover Road side of the building and we cannot be confident that the applicant is right about that. We accept the applicant's sincerity when he says that he thinks these concerns are overplayed, but we find that they are not. There is also some force in the objectors' concerns about future development, not on the rest of Tydehams but on Upcot itself. We were not convinced by the applicant's reassurance on that point.
54. We find that the ability to prevent these problems is a practical benefit to all the objectors. The impact on amenity would be greatest at the western end of the road and we find that the practical benefits secured by the covenants are plainly of substantial advantage to the owners of Merricot, Tydehams Corner and California House. That by itself is sufficient to prevent the modification of the covenants. However, we also deal below with the issue of whether the practical benefits are of substantial value to any of the objectors.
55. Mr Cohen took us to a number of authorities in which similar features of developments were found to be unacceptable, and reminded us of the similarity between what is proposed here and the proposed development in *Re Afzar's Application* [2002] P & CR 17. We think it is important to say that each application turns on its facts and our decision is specific to these covenants in this place.

The valuation evidence

56. We received written expert reports on valuation together with two versions of a statement of agreed facts from Mr Steven Smith FRICS, a partner of Haslams, for the applicant, and from Mr Richard Meeson MRICS, a partner of Carter Jonas, for the represented objectors. Neither expert was called to give oral evidence, not least because of the amount of common ground that they were able to agree, and the propinquity of their respective opinions of value, and diminution. We should record our appreciation to both experts whose evidence we found credible and objective.
57. The experts were able to agree:

- a. the “no scheme” values of each objectors’ property on Tydehams, i.e. the values on the basis of the restrictions being maintained;
 - b. that the modification of the restriction would result in a diminution in value, to some degree, to each of the objectors’ properties;
 - c. that the diminution in value lay within a range of parameters; and
 - d. that the three properties most affected were Merricot (agreed at £1.1 million assuming the modification did not occur), California House (£1.285 million), and Tydehams Corner (£1.2 million).
58. Mr Meeson felt able to assess the diminution in value for each property within a band of 5%. For the three properties most affected, these ranges lay as follows, ignoring for the moment any element for disturbance during the construction work: Merricot – 10-15%; California House – 5-10%; and Tydehams Corner 7.5 – 12.5%.
59. Mr Smith accepted that it is challenging to be precise with a specific figure without post-development comparable evidence, and that any valuation falls within a range. In the final version of the statement of agreed facts, he said that he had “adopted the midway figure within say a 7.5% range either side of each figure”. We took this to mean that the band of 7.5% had at its mid-point his figures of 12.5% for Merricot; 6.5% for California House; and 9.5% for Tydehams Corner
60. As for the remaining objectors’ properties, Mr Smith’s diminution percentages varied for each property, within a range of 0.35% to 2%, whereas Mr Meeson adopted a blanket reduction, irrespective of location of 5%. For all of the properties concerned, where the diminution would settle in the range of parameters would depend upon the final style and appearance of the care home, with a modern contemporary style having a greater impact on value than a more “arts and crafts” style. However, in determining whether the ability to impede the proposed use secures practical benefits of substantial value, the real battleground lies in the three closest properties, as both experts identified. From the above, the ranges lay as follows

Property	Mr Smith		Mr Meeson	
	Range	Mid-point	Range	Mid-point
Merricot	8.75% - 16.25%	12.5%	10% - 15%	12.5%
California House	2.75% - 10.25%	6.5%	5% - 10%	7.5%
Tydehams Corner	9.5% - 13.25%	9.5%	7.5% - 12.5%	10%

61. Without the opportunity to hear live evidence from the experts, but having inspected the appeal site and viewed it from the three most affected properties, we consider that the effect on Merricot would be at the higher of the experts' parameters, with a likely diminution in the order of 15%, with Tydehams Corner again at the higher end, approaching 12.5%, and with California House at the mid-range of 7.5%, slightly above Mr Smith's figure. We prefer Mr Smith's graduated approach to the remaining objectors' properties: in principle those closer to the development would, in our view, be more affected than those at the cul-de-sac end, but we accept that such a graduation would not necessarily be linear.
62. But it is not necessary for us to consider the more remote properties if the covenant secures to the owners of the nearer properties a practical benefit of substantial value. In making that assessment, we accept Mr Rubin's submission that the Act does not provide a numerical threshold of diminution above which the Tribunal is bound to find the level as substantial, and that even if an applicant's valuer assessed diminution at more than say 5% of the value of an objector's property, that should not necessarily lead to an automatic finding that a practical benefit was of substantial value. However, he accepted that he was unable to point to a decision of the Tribunal in which a finding of 10% was determined to not be substantial.
63. In *Re Kerai's Application* [2014] UKUT 0153 (LC) the Tribunal (Mr P D McCrea FRICS) determined that a reduction of 5% in the value of an objector's house worth £1.5m, i.e. £75,000, was not substantial for the purposes of section 84 of the 1925 Act. Nor, in *Re Geall's Application* [2018] UKUT 0154 (LC) did the Tribunal (Mr A J Trott FRICS) consider a diminution in value of £65,000 in the context of a landed estate worth £2.6 million (2.5%) to be substantial. However, in *Re Foggs' Application* [2018] UKUT 114 (LC) the Tribunal (Mr A J Trott FRICS) considered that a diminution of between 5% and 11% amounted to a substantial reduction for the purposes of the Act.

In this case, given our assessment of a diminution in value of Merricot of 15%, or even on Mr Smith's best case of 10%, we are satisfied that the ability to impede the development secures to Dr and Mrs Winchester a practical benefit of substantial value. Similarly, the diminution in value to Tydeham's Corner, at 12.5%, that would result in modification represents a practical benefit of substantial value to Mr and Mrs Dixon.

Conclusion on ground (aa)

64. In the light of the conclusions we have reached above about practical benefits, the further questions posed by section 84(1A) do not arise; we take the view that money would not be an adequate compensation at least for the owners of Tydehams, Merricot and The California House, in view of the substantial loss of amenity and continuing annoyance that they would suffer, but even if it were it is not open to us to modify the covenants.

Conclusion

65. For the reasons given above, the application is dismissed.

66. This decision is final on all matters other than the costs of the application. The parties may now make submissions 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 17 October 2019

A handwritten signature in black ink, appearing to read 'E Cooke', written in a cursive style.

Elizabeth Cooke
Upper Tribunal Judge

A handwritten signature in black ink, appearing to read 'P D McCrea', written in a cursive style.

P D McCrea FRICS