UPPER TRIBUNAL (LANDS CHAMBER)

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Beverley Magistrates Court,
HU17 9EJ

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT - Covenant prohibiting use of property for business purposes – planning permission for beauty salon in garden – whether covenants secure practical benefits of substantial value or advantage – s.84(1)(aa), (b) and (c), Law of Property Act 1925 – application dismissed

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

BETWEEN:

RICHARD CHARLES HODGSON (1)
JOANNE MARIE CHANTELLE HODGSON (2)

Applicants

-and-

TERENCE COOK (1)
CAROLE COOK (2)
DAVID HOLDEN (3)

Objectors

Re: 7 Larkin Avenue,
Cottingham,
East Yorkshire,
HU16 4BY

Mr Mark Higgin FRICS
Heard on: 20 December 2022
Decision Date: 8 February 2023

Mrs Joanne Hodgson for the applicants
Mr Oliver Shipley, instructed by Andrew Jackson Solicitors LLP, for the objectors
Mr David Holden, representing himself

The following cases are referred to in this decision:

Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] UKSC 45

George Wimpey Bristol Limited and Gloucestershire Housing Association Limited [2011] UKUT 91 (LC)

Martin v Lipton [2020] UKUT 8 (LC)

Shephard v Turner [2006] EWCA Civ 8

The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd & Anor [2018] EWCA Civ 2679

Introduction

1. This is an application for the modification of a restrictive covenant attached to a house at 7 Larkin Avenue, Cottingham, East Yorkshire (the Property) where the applicants, Mr and Mrs Hodgson, wish to continue to conduct a beauty therapy business from a cabin in the rear garden. The Property is on a modern residential estate and the first and second objectors, Mr Terence and Mrs Carole Cook live next door at 5 Larkin Avenue. The third objector, Mr David Holden resides at 3 Larkin Avenue, the other side of Mr and Mrs Cook.

2. The restrictive covenant is in clause 2 of the Third Schedule of the transfer of the Property to the applicants dated 29 November 2013. The applicants covenanted with the developer of the estate, Redrow Homes Limited as follows:

> "No trade business or profession shall be carried out upon the plot and the plot shall not be used for any other purpose other than as one private dwelling."

3. I conducted a site visit on the afternoon of 19 December 2022. I was shown the application property and the building in the garden where Mrs Hodgson has conducted her beauty therapy business, trading as 'This is me Beauty', since April 2021. I also saw the interior, exterior and rear garden of 5 Larkin Avenue and the front parts of 3 Larkin Avenue. Additionally, I walked round the development of which Larkin Avenue forms part, and examined the roadways, paved areas and parking provision. The reason for doing this will become apparent later in the decision.

4. At the hearing Mrs Hodgson spoke on behalf of both of the applicants and the first and second objectors were represented by Mr Oliver Shipley of counsel who called Mr Cook as a witness of fact. Mr Holden represented himself. I am grateful to them all for their assistance.

The facts

5. Cottingham is located about 4 miles north west of Hull city centre and 4 miles south of Beverley. It has the appearance of a large village but is joined, at its eastern extremity, to Inglemere, which is part of Hull. Larkin Avenue is part of a development by Redrow Homes Limited comprising houses of various sizes and configurations which was completed in 2013. The development is situated just off the Dunswell Road about 0.75 miles north east of Cottingham village centre.

6. The development as a whole is approximately rectangular in shape and Larkin Avenue forms the southern and eastern boundaries. Along with Holtby Avenue it also comprises part of the spine road. The Property is situated on the eastern edge of the development and enjoys views over a communal grassed area towards open countryside beyond. The developer has not adopted a uniform design code and has incorporated a number of 1930's design elements in some of the houses, presumably to create the impression of a traditional residential street scene with a mix of styles and ages.

7. The houses on the eastern facing part of Larkin Avenue tend to be the largest and most prestigious in the development. Most of them have front gardens and parking for more than one car. Some have garages that are integral to the house and others are detached. The impression gained when entering the development for the first time is one of spaciousness because the Larkin Avenue houses are set well back from Dunswell Road and the irregular layout avoids a terraced effect. On closer inspection it is apparent that the density of development is higher than expected and that some of the houses are no more than a metre or so apart. Others are separated by little more than the width of the driveway providing access to the garage. This is the arrangement between the Property and 5 Larkin Avenue. The Property appears to have one of the longest driveways in the whole development and is easily capable of providing parking for 3 cars and possibly 4, depending on their size.

8. The road surface of Larkin Avenue is made up of sections of block paving in a herringbone pattern and sections of asphalt. The edges of the road are delineated by an edging paver with a bevelled edge set at a height some 50 millimetres above the road surface. Beyond that is a further area of block paving laid in stretcher pattern and four pavers in width. The entire width of this raised area is about 500 millimetres. It is not wide enough to be properly described as a pavement and is too narrow to easily accommodate a wheelchair or buggy. At the time of my visit it was being used at various points throughout the development for car parking (in parallel fashion with two wheels on the raised area).

9. The Property itself is a conventional detached two storey design, and has brick elevations together with a pitched, concrete tiled roof. At the rear is a rectangular garden, largely laid to grass with wooden boundary fencing. The garden contains a small shed and, in the north western corner, a cabin used by Mrs Hodgson for her business. The cabin is of wooden construction with a monopitch roof. On the eastern facing wall there are three full height windows and a door with a window in the upper half. There is a further window in the southern side. Internally the walls are finished in tongue and groove boarding and the floor is covered with a wood laminate finish. The ceiling is panelled with inset downlighters. The cabin is connected to the mains electricity supply but does not have central heating or a fixed water supply. Waste water is collected and used to irrigate the garden. At the time of my visit the cabin contained, amongst other things, a massage bed, various shelves and storage units, a small table suitable for undertaking manicures and an armchair. The plan below shows the arrangement of the relevant part of Larkin Avenue. The Property is shown outlined and marked ‘74’. Mr Cook’s house is shown as ‘73’ and Mr Holden’s as ‘72’. The cabin is shown on the plan below. It is sited parallel to the fences that separate the Property from plots 102 and 75. With the exception of the window in the end wall, the door and windows face towards the house.

10. Mr and Mrs Hodgson moved to Larkin Avenue in 2013 and were the first owners of number 7, having bought the Property from the developer. They first thought of building a cabin in the garden in 2019 and their plans came to fruition in February 2021. Mrs Hodgson had previously run her business from commercial premises in Cottingham village centre but owing to the trading uncertainty caused by the Covid-19 pandemic she decided to relocate the business to the cabin in April 2021 rather than use it for family purposes as originally intended.

11. Mrs Hodgson said that she only became aware of the covenant when she realised that planning permission would be needed to allow commercial use of the cabin. She explained that she had not been involved with the initial purchase which had been handled by her husband.

The planning permission

12. The use of the cabin for a beauty therapy business required planning permission for a change of use from residential to mixed use residential (C3) and beauty salon (sui generis). The application was made on 22 June 2021 at which point the cabin had already been installed and the business was operating. The application was therefore retrospective.

13. The planning officer's report made a number of observations about the nature of the proposed use and the likely impact on both neighbouring properties and the wider area. In recommending that permission be granted he concluded that:

> 'The timber beauty treatment building to the rear of the property and its use as a mixed-use comprising a residential dwelling and the private beauty business is considered to be acceptable in principle given the quiet nature of the use and the sustainable location of the site within the Development Limits of Cottingham. The detached outbuilding does not detract from the visual amenity of the area or the appearance of the existing property. The physical construction of the building and the use as a small-scale beauty therapy business provides holistic massages and facials and as such would not cause an unacceptable degree of harm to the amenities of neighbouring properties or the area generally'.

14. In granting permission on 6 October 2021, the Council attached the following conditions:

1. The beauty therapy element of the mixed use hereby permitted shall not operate other than from the detached outbuilding as shown on drawing no.3951/P2 (Proposed Site Plan and Location Plan). Otherwise, the outbuilding shall only be used for purposes ancillary to the residential use of the dwelling known as 7 Larkin Avenue, Cottingham.
2. The beauty therapy element of the mixed use hereby permitted shall only be operated by a person or persons occupying the dwelling known as 7 Larkin Avenue, Cottingham.
3. The beauty therapy shall only be open to customers between the following times:

   From 09:00am until 06:00pm during any day Monday to Saturday, and shall be closed to customers on Sundays and Bank/Public Holidays

The application

15. The application was made on 8 April 2022. The applicants' objective is to modify the covenant to permit the use of the cabin in the rear garden of the Property for the purpose of running a beauty therapy business in accordance with the planning permission granted to them by East Riding of Yorkshire Council. The application was made under grounds (aa), (b) and (c) of section 84(1) of the Law of Property Act 1925. The applicants requested that the covenant was modified in such a way that it was personal to them. It is worth noting that the Third Schedule contains a number of other restrictive covenants in addition to clause 2. These, for instance, prevent the owners from parking boats, trailers or caravans in front of the building line or so as to be visible from any road, changing the colour of rendered parts of the houses, painting any brickwork, erecting fences, gates or walls in the front gardens or driveways and a number of other cosmetic alterations.

The statutory provisions

16. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. In their application the applicants in this case relied on grounds (aa), (b) and (c).

17. 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.

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

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

20. The condition in ground (c) is satisfied where it can be shown that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

21. 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.

22. Should an applicant establish that the Tribunal has jurisdiction to modify the covenant, he has at that point only cleared the first hurdle; he then needs to persuade the Tribunal to exercise its discretion. This is a distinct and separate exercise and although the Tribunal will not normally refuse to do so if it is satisfied that jurisdiction has been made out, in this case the objector says that there has been a cynical breach of the covenant and should jurisdiction

be established, the conduct of the applicant should be taken in to account and the application refused. I now turn to the detail of the objections.

The objections

23. In their notice of objection Mr and Mrs Cook objected to all of the grounds advanced by the applicants. They did not accept that the proposed use was reasonable and said that the covenant secured to them practical benefits of substantial value and advantage in upholding the prosperity, amenity and ethos of the estate and wider neighbourhood. As far as ground (b) is concerned, they denied that they ever agreed to the modification of the covenant and said that the applicant's assertion that they had done so is misleading and blatantly untruthful. Finally, they say that the operation of the business has caused them 'an enormous amount of stress' and that it could not be said that the proposed modification will not injure the persons entitled to the benefit of the restrictions. Mr and Mrs Cook also said that the applicants have continued to operate the business in breach of the covenant and were still doing so at the date of the hearing.

24. Mr Holden objected in general terms but added a detailed list of reasons. These are set out later in the decision.

The applicants' case

Ground (aa)

25. Mrs Hodgson began by considering whether the covenant in its existing form impeded some reasonable use of the land, and specifically whether the use of the cabin for the beauty therapy business was a reasonable use of the land. Her reasons for believing that it was reasonable covered both economic and amenity issues.

26. She said that the covenant took away a right to earn a living and bring in an income. She also explained that a medical condition prevented her from working elsewhere and the covenant impeded her ability to work from home. Unless it was modified she would be out of work and seeking state benefits.

27. Turning to amenity matters Mrs Hodgson said that the nature of the business was 'very quiet and within (and below) the reasonable noise levels of a low level residential development'. She thought that if the cabin were be restricted to personal use it would be much noisier. The cabin could not be seen from the road outside the Property or from the objector's windows/gardens and consequently it did not affect the aesthetics of the development. Similarly, the parking of clients' cars in the road and on the pavement outside the Property was no different to any other household's reasonable use in a residential area and helped relieve congestion in the local village in alignment with local council policies. Finally, as a sole trader Mrs Hodgson saw only one person at a time and footfall was consequently minimised and kept within the hours dictated by the planning permission. At the hearing

Mrs Hodgson said that she was visited by between 2 and 5 clients a day and had 15 or so 'core' clients who visited every 3 to 4 weeks.

28. The applicants deny that the covenant secures any practical benefits of substantial value or advantage to the objectors. They noted that neither objector had adduced any evidence of diminution of value in relation to their houses and disagreed that noise levels are any higher than normal residential use. In this connection they noted the comments of the Deputy President, Martin Rodger QC in *Martin v Lipton* [2020] UKUT 8 (LC), (which concerned an application to modify a covenant preventing the development of a house in a garden):

> 'The restriction does not secure tranquility. Any one of the original houses on the estate might be occupied from time to time by an exceptionally boisterous family, or might become the home of a mute contemplative. The restriction does not protect, nor was it intended to protect, the occupants of the estate against the ordinary consequences of life in a low density residential neighbourhood'.

29. Mrs Hodgson explained that the parking of clients' cars had caused a great degree of upset between the applicants and the first objector. I have been provided with details of incidents involving Mr Cook and Mrs Hodgson's clients and in her witness statement Mrs Hodgson described the situation as follows:

> 'My neighbour uses the covenant to police all visiting people to my property. Friends, family, my children's friends. Our home has become a prison.'

30. Ultimately, the applicants sought redress through a Community Resolution which was issued by Humberside Police and compelled Mr Cook not to engage with Mrs Hodgson about her business or with her clients.

31. The applicants disputed that parking on the road and pavement outside the Property causes loss of views and pointed out that there are no parking restrictions in Larkin Avenue. Nonetheless they ensure that clients only park in the road immediately outside the Property. At the hearing Mrs Hodgson was unable to say why she did not ask clients to park on her driveway or to use the communal visitor spaces on the estate. Mrs Hodgson noted that Larkin Avenue was at its widest point outside the Property.

32. Mrs Hodgson noted the government's advice about working from home during the pandemic and that the practice was now commonplace.

33. The alternative limb of ground (aa) applies where the prevention of the proposed reasonable use is said to be contrary to the public interest. The applicants submitted that modification of the covenant would not be contrary to the public interest because it was supported by neighbours on the development, provided health benefits to the public and was aligned with working from home guidance issued by the government in connection with the spread of Covid-19. It was also said to be supportive of the local council's strategy to promote out of town centre amenities. Finally, it was additionally a source of employment to Mrs Hodgson who would otherwise need to rely on unemployment allowances.

Ground (b)

34. The applicants submitted that the objectors had by their actions or omissions agreed to the modification of the covenant notwithstanding their formal objections. They believed this to be the position because when Mrs Hodgson handed Mr and Mrs Cook a leaflet regarding the proposed beauty business in April 2021, they expressed no concerns and congratulated her on moving her business to the cabin.

35. The applicants also said that neither Mr Cook, Mrs Cook or Mr Holden objected to the change of use planning application in June 2021. This turned out not to be the case.

36. Mrs Hodgson admitted in cross examination that there was no evidence to support her case under ground (b) and thereafter did not rely on it as a means of securing the modification.

Ground (c)

37. The applicants asserted that there had been no injury to any of the objectors from the operation of the business. They observed that there was no evidence of any diminution of value, none of the objectors had visited the site and there had been no complaints to the local council by either the objectors or any other resident on the estate.

38. No expert evidence was provided by the applicants in support of their contentions.

The objectors' case

Mr Terence Cook

39. Mr Cook said that the restrictive covenant made it clear that the applicants were not to carry out any trade, business, or profession from 7 Larkin Avenue and that the Property should only be used as a private dwelling.

40. He considered that the beauty treatment business was clearly operating on a full-time basis. He had noticed customers frequenting the Property on a regular basis both during the week and at weekends. He was concerned that the noise levels were greater than they were prior to the business commencing operations and the applicants had made parking much more difficult. In his view parking in the neighborhood was already problematic and he had witnessed customers parking outside his property and nearby properties in order to use the applicant's service.

41. Mr Cook said he was very concerned about the impact that allowing the application would have on the value of his house and other nearby properties. At the hearing he said that he spoken to local estate agents about the impact of the business, and they had confirmed his

concerns that the presence of a business in a neighbouring property would adversely affect the value of his house. He had not instructed an expert valuer to quantify this effect.

42. He said that the applicants have displayed advertisement boards on their property and have distributed flyers promoting the business. He stated that the situation had caused an enormous amount of stress and had he and his wife known that a business would be operating from the neighbouring property they would not have purchased their house. At the hearing Mr Cook said the privacy he and his wife had previously enjoyed had been lost completely.

43. He did not believe it would be in the public interest for the application to be granted and saw no reason why the applicants could not carry on their business from commercial premises.

Mr David Holden

44. Mr Holden had attached a list of reasons to his Notice of Objection. The first of these related to the sale of properties by the original developer. He recalled that the developer had explained to all purchasers that they would be required to sign up to the restrictive covenant and each had paid a premium accordingly to protect the development as a solely residential environment.

45. He described the estate as being a congested and dense housing development typical of its age. It had narrow pavements for pedestrians and small front gardens. Parking for homeowners and visitors on the narrow estate roads was 'very limited' and access for emergency and utility vehicles was already tight.

46. He considered that clients of the beauty business might park for hours and obstruct safe passage for pedestrians and residents' cars. Parked cars also presented an environmental hazard and the noise from clients disturbed residents' enjoyment of their property.

47. Turning to the Property itself he thought that considering the small overall footprint of the garden the cabin was relatively large and oppressive.

48. Finally, he concluded that modification of the covenant would set an undesirable precedent with a consequent potentially negative impact on the value and desirability of the properties of the whole site, but especially those on Larkin Avenue who suffer the immediate inconvenience caused by the noise from clients and the parking of their cars.

49. Mr Shipley addressed what is commonly termed "the thin end of the wedge" point. To put it another way would the modification of the covenant in the way sought, create a damaging precedent? To use Mr Shipley's colourful phraseology, to permit the business to operate from the Property would 'open the floodgates' for further businesses to set up on the estate. The applicants sought to rely on the decision of the Court of Appeal in *Shephard v Turner* [2006] EWCA Civ 8 in support of their position on ground (aa) that each case was to be judged on its merits and there was no effect on any other property. It is worthwhile to examine what Carnwath LJ said at paragraph 26 of the decision about 'the thin end of the wedge':

> "It is not in dispute that one material issue (often described as the "thin end of the wedge" point) may be the extent to which a proposed development, relatively innocuous in itself, may open the way to further developments which taken together will undermine the efficacy of the protection afforded by the covenants. In *McMorris v Brown* [1999] 1 AC 142, 151, the Privy Council adopted a statement by the Lands Tribunal from *Re Snaith and Dolding's Application* [1995] 71 P&CR 104. The applicants had been seeking modification of a covenant, to enable them to build a second house on a single plot within a building scheme. The President (Judge Bernard Marder QC) said:
>
> > "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it… It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach….
> >
> > Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

50. Mr Shipley asked me to consider that the applicants presented their neighbours and the Tribunal with a *fait accompli* and that the assessment of public interest should take account of circumstances as they were prior to the relocation of the business to Larkin Avenue. He described the applicants as being "cynically in breach" and drew attention to the Court of Appeal's decision in *The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd & Anor* [2018] EWCA Civ 2679, in which Sales LJ said:

> *"…in general terms it is in the public interest that contracts should be honoured and not breached and that property rights should be upheld and protected".*

He went on to say that the applicants had operated the business in full knowledge of the restrictive covenant and despite opposition from neighbours.

51. He noted that in *George Wimpey Bristol Limited and Gloucestershire Housing Association Limited* [2011] UKUT 91 (LC), the Tribunal (Mr Norman Rose FRICS) said:

> *"…that, if ground (aa) had been made out, it is unlikely that I would have exercised the discretion that I have to modify the covenant. This is because I find on the evidence that the extensive works which Wimpey Homes have carried out on the application land were not an inadvertent action resulting from the discovery of the covenant at a late stage in the development programme. Rather, they were the result of a deliberate strategy of forcing through the development on the restricted land in the face of many objections from those entitled to the benefit of the restriction, to the point where they had so changed the appearance and character of the application land that the Tribunal would be persuaded to allow them to continue with the development. It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flout their legal obligations in this way."*

52. Mr Shipley said that by failing to curtail the operation of the business until the Tribunal had determined the application the applicants had engaged in the same behaviour. He also referred me to the Supreme Court's decision in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45, and in particular paragraph 59, where Lord Burrows said:

> *"As Mr Jourdan expressed it, in a submission with which I agree, "It is not in the public interest that a person who deliberately breaches a restrictive covenant should be able to secure the modification of the covenant in reliance on the state of affairs created by their own deliberate breach." By going ahead without first applying under section 84, Millgate put itself in the position of being able to present to the Upper Tribunal a fait accompli where the provision of affordable housing meant that it could (and did) satisfy the "contrary to public interest" jurisdictional ground. It is important to deter a cynical breach under section 84 but it is especially important to do so where, because the Upper Tribunal will look at the public interest position as at the date of the hearing, that cynical conduct will directly reward the wrongdoer by transforming its prospects of success under the "contrary to public interest" jurisdictional ground."*

He concluded that it was 'clear that the precedent set from the Upper Tribunal through to the Supreme Court is against Applicants who have already breached the restrictive covenant'.

Discussion and determination

53. As far as ground (aa) is concerned, it seems to me the use for which planning consent has been obtained can properly be described as reasonable. Low level use of an existing building in connection with a small scale business is generally consistent with a residential neighbourhood.

54. In my view the covenant was not intended to prevent owners from occasionally working from home, alone on a laptop in a spare room. I do not regard such activity as being in conflict with the covenant and for that matter, it does not in my view, offend the second limb of the covenant that the plot should not be used for any other purpose that as one private dwelling. A covenant against carrying on a trade, business or profession in a residential

property does not prohibit all activity with a commercial purpose and tasks which are consistent with ordinary residential use which are undertaken in connection with a business which is mainly carried on elsewhere are unlikely to be a breach. It is not necessary to decide where the dividing line should be drawn between conducting a business from home and occasionally working from home, because in this case there is no doubt that the whole of Mrs Hodgson's business is now conducted from the cabin in her garden, and from nowhere else. It follows that her continued use of the cabin for that purpose is impeded by the covenant.

55. Whether the effect of the covenant in preventing the use of the property for Mrs Hodgson's business secures a benefit for the objectors depends on the impact that use has on amenity. It is on that issue that the differences between the parties are most stark. The applicants regard the noise generated by the business as being unobtrusive and the parking of cars outside the Property as being nothing out of the ordinary in a residential estate. Mr Cook on the other hand bemoaned a loss of privacy and became vexed by the traffic and parking arising from the business. Given the level of aggravation and animosity that this latter aspect of the dispute provoked, it was surprising that the applicants did not request that their clients park on the driveway of their property since there was ample room. Similarly, it appears that no attempt was made to use the visitor spaces on the estate. Evidence adduced by the applicants which showed Mr Cook's interactions with Mrs Hodgson's clients also clearly demonstrated that their cars were parked on the road and pavements outside her house. Mrs Hodgson said in her evidence that she might have 3 or 4 clients a day and that she operates on 6 days a week. It seems to me unlikely that many clients would walk to the Property given its location on the very edge of the village. This makes it probable that cars are parked outside for a significant proportion of the day. I accept what Mrs Hodgson says about the low level of noise generated by the business and any noise on the driveway or in the road is likely to be minimal and not intrusive.

56. In granting planning consent for the change of use the planning officer carried out a thorough appraisal of the amenity issues and concluded that any loss of amenity arising from the application would be acceptable. In my view that was a reasonable conclusion from a planning perspective. However, he anticipated that clients' cars would be parked on the driveway of the Property and not in the road or on the pavements.

57. Nevertheless, the application before the Tribunal is not solely concerned with the planning matters at the Property itself and its immediate environs. Only 10 years have elapsed since the properties were sold and both the applicants and the objectors were aware of them when they purchased. Not only were they in the transfer document, and so should have been pointed out by conveyancing solicitors, but both Mr Cook and Mr Holden confirmed that the developer brought the covenants to the attention of the original purchasers and explained their purpose. The applicants and objectors all bought their properties directly from the developer. The purpose of the covenants appears to have been to secure effective estate management by restricting changes to the use and appearance of the properties. The developer's motives may have been to control what could be done to the houses whilst the development was ongoing thereby avoiding anything that might harm the value of the homes yet to be completed, but the restrictions were also intended to have permanent effect and to bind all owners indefinitely.

58. In my judgement the developer was offering purchasers an opportunity to buy in to a controlled environment where the appearance of the estate would remain the same and non-domestic uses would be prohibited. Commercial uses that generate the level of parking seen outside the Property over a significant portion of the day and over nearly every day of the week are prohibited by the covenant, whether they would be acceptable in planning terms or not. The covenant similarly prohibits commercial uses whether the noise or pollution they cause is below a threshold which is minimal, as I have found in this case.

59. Estates such as the one that Larkin Avenue forms part of are not designed with those using part or all of their property for business purposes in mind. The density of development is such that any noisy or unsightly use of one property is likely to have an impact on the enjoyment of their homes by a number of its neighbours. It would be easy to envisage the loss of amenity that would occur if a resident decided for instance, to run a car valeting business at his house, or use it as a guest house. In preventing such uses, the covenant provides a benefit to all the owners whether it's from the perspective of their wellbeing or from a monetary point of view.

60. Modification of the covenant in this application would remove the sense of certainty about what might be permitted in future and raise concerns about the loss of amenity that might follow. More importantly, those concerns would be justified, because every house on the estate has the potential to be used for business purposes of one sort or another and if Mrs Hodgson's business were to be permitted, it would be difficult to justify enforcement of the restrictions against other residents. The covenant ensures that characteristics that make Larkin Avenue a pleasant place to live are preserved. This dispute and the arguments over parking demonstrate just how easily the state of equilibrium can be disturbed and how important the proper functioning of the covenant is to those who live in the development. It is likely in a development of this size that others would aspire to use their homes for similar businesses and the covenant provides a high degree of protection for neighbours.

61. It is my judgement that the covenant protects aspects of the estate that should be maintained. It prevents activities that would, if left unchecked, significantly impinge on the amenity of the development and is the sole means by which this protection can be secured. It ensures the quiet enjoyment of the houses on the estate and underpins their value. I regard this as a practical benefit of substantial value or advantage. The requirements of section 84(1)(aa) are in my view not satisfied and I therefore have no jurisdiction to grant the modification.

62. Even if I had come to the opposite conclusion on whether the ground (aa) conditions were satisfied, I would have been very reluctant to lift a restriction which the applicants themselves freely accepted less than ten years ago. The more recently a restriction has been imposed the stronger the case for modification must be.

63. For completeness I will also deal with the alternative limb of ground (aa). I agree with Mr Shipley's submission that in general terms it is in the public interest that property rights should be upheld. Mrs Hodgson's contention that it is in the public interest that she continues to provide services to the public and does not become a drain on the public purse is well intentioned but ultimately misconceived. It is no doubt generally in the public interest that businesses such as Mrs Hodgson's be carried on, and that employment opportunities are

available for people who might otherwise find it difficult to work. But the statutory question is whether this covenant is contrary to the public interest by preventing Mrs Hodgson carrying on her business from this Property. It would require some significant public benefit to outweigh the public interest in maintaining covenants recently and freely entered into for the benefit of all the owners of homes on a new residential estate. My conclusion is that the applicants have not made out their case on this ground.

64. The same can be said for their case under ground (c). Having determined that the covenant confers practical benefits of substantial value on the objectors, it would be contradictory to conclude that they would not be injured by its modification.

65. As for ground (b), Mrs Hodgson did not press this aspect of the case and acknowledged in cross examination that there was no evidence that her neighbours had consented to her business being run from the Property. Even if they did not immediately confront her when they were first informed of her intentions, their reticence could not be mistaken for acquiescence or consent and they made their objections known in the context of this application.

66. There is no need for me to consider whether the applicants were in "cynical" breach of the covenant. There is no doubt they were in breach and have remained so throughout the continuance of the application. But this case involves no opportunism or secrecy and the applicants are private individuals making use of their own home to make a living, not large scale property developers intent on a substantial profit. Cases of this sort can be determined without adding unnecessary insult to the ample disappointment which the dismissal of the application will cause.

Mr Mark Higgin FRICS

Member

Upper Tribunal (Lands Chamber)

8 February 2023

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.