

UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – proposed extension to house by addition of a third storey – building scheme – whether substantial effect on amenity of contiguous landowners on the estate – residents association – whether application if granted represents thin end of the wedge – character and ethos of the estate – whether temporary construction disturbance a relevant factor – application dismissed – s84 Law of Property Act 1925 grounds (aa) and (c)

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

BY

MRS GIOVANNA HUSSAIN

**Re: 23 Bartlett Close
London
E14 6LH**

Before: A J Trott FRICS

**Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
24-26 May 2016**

Justina Stewart, instructed by HSR Solicitors, for the applicant
Josef Cannon, instructed by HPLP Solicitors, for the objectors

The following cases are referred to in this decision:

Re Bass Limited's Application (1973) 26 P&CR 156
Re Vertical Properties Limited's Application [2010] UKUT 51 (LC)
Dobbin v Redpath [2007] EWCA Civ 570
Shephard v Turner [2006] EWCA Civ 8

The following further cases were referred to in argument:

Re Martins' Application (1988) 57 P&CR 119
Re Hunt's Application (1997) 73 P&CR 126
Zenios v Hampstead Garden Suburb Trust Limited [2011] EWCA Civ 1645
Re Thames Valley Holdings Limited's Application [2010] UKUT 325 (LC)
Perkins v McIver [2012] EWCA Civ 735

DECISION

Introduction

1. The applicant, Mrs Giovanna Hussain, owns the freehold interest in 23 Bartlett Close, London E14 6LH (“No.23”), a two-storey detached house forming part of a self-build housing development of 34 properties that was constructed between 1987-1989.
2. The applicant wishes to extend the property by the addition of a third storey. She first obtained planning permission in 2008 and renewed that permission on 17 September 2013. The development is there described as:

“Proposed roof extension to provide 2 additional bedrooms to create a 5 bedroom family dwelling plus the introduction of new rooflights within the roofspace and 2 Juliet balconies to the rear elevation of the property to serve the rear first floor bedroom.”
3. The applicant is prevented from implementing the planning permission by restrictive covenants that were imposed under the original conveyance of No.23 in 1989. The purchasers covenanted:

“With the Vendor and the [Bartlett Close Residents Associated Limited] for the benefit of the estate and every part of it in the terms set out in the Third and Fifth Schedule[s]”.
4. The Third Schedule contains the following covenants:

“(5) not to enlarge or exten[d] the house or the property otherwise than with the prior written consent of the Association and of the owners of all parts of the estate which are contiguous with the property.

...

(7) not to alter in any way the external appearance of the house on the Property and not to place any external ornaments on the property without the consent in writing of the Association.”

....

(9) no hoarding shall be erected on the property nor shall any building erection fence wall or any part of the Property be used as an advertising station or for advertising purposes of any description except for the letting or selling of the property.”

These covenants were common to all the conveyances of houses in Bartlett Close, the development of which is agreed by the parties to form a building scheme.
5. The applicant wishes to modify covenants (5), (7) and, if necessary, (9) to allow her to implement the 2013 planning permission for the extension of No.23. To this end she made an application to the Tribunal under section 84(1) of the Law of Property Act 1925 (“the 1925 Act”) on 15 August 2014 relying on grounds (a), (aa) and (c). The applicant subsequently abandoned her reliance on ground (a). The applicant proposes that the modification of the covenants should be effected by the addition of the following words at the end of each of them: “... except in accordance with the planning permission dated 17 September 2013 with reference PA/13/01748.”
6. There are five objectors to the application:
 - (i) Bartlett Close Residents Association Limited;

- (ii) Mr Kieron Collins, 20 Bartlett Close;
- (iii) Mr Michael Collins, 21 Bartlett Close;
- (iv) Mr Peter Platt, 24 Bartlett Close; and
- (v) Mr Steven Quinn, 25 Bartlett Close.

Objectors (ii)-(v) are freehold owners of houses which are contiguous with No.23.

- 7. Ms Justina Stewart of counsel appeared for the applicant and called Mr Michael Singh Maan BA MRTPI, a sole practitioner, as an expert planning witness and Mrs Hussain as a witness of fact.
- 8. Mr Josef Cannon of counsel appeared for the objectors and called Mr Trevor Sutters DipArch, RIBA, ACArch, FRSA, senior partner of Sutters Partnership Architects, as an expert architectural witness; Mr Christopher Quinn on behalf of the Residents Association; and Mr Steven Quinn, Mr Michael Collins, Mr Peter Platt and Mr Kieron Collins as individual objectors. Witness statements were also received from eight other owners of houses on the estate but by agreement these witnesses were not called to give oral evidence.
- 9. The parties jointly instructed Mr Peter Tobin BSc, MPhil, FRICS, FCI Arb, a part-time consultant with Strettons Chartered Surveyors, as an expert valuer. Mr Tobin produced a written expert report but, by order of the Tribunal, was not called to give oral evidence.
- 10. I made an accompanied site visit to the property, the objectors' houses, the Bartlett Close estate and the surrounding parkland on 26 May 2016.

Facts

- 11. I derive the following facts from the evidence and my site inspection.
- 12. Bartlett Close is located in the London Borough of Tower Hamlets approximately 400 metres north of the East India Dock Road (A13) and the same distance west of Langdon Park Docklands Light Railway Station. It is a horse-shoe shaped development built around the Grade II listed, but currently derelict, St Saviour's Church. Planning permission was granted in July 2014 for the conversion of the church into 19 residential units and the construction of a new residential block. This planning permission has yet to be implemented. The land for the development of Bartlett Close was purchased from the local authority in 1984 by a group of local self-builders who formed the Arcadia Self Build Housing Association Limited.
- 13. Access to the estate is from Arcadia Street to the north and Northumbria Street to the south. Bartlett Close is a private unadopted road the maintenance of which remains the responsibility of the residents association. The development is flanked to the north, south and west by Bartlett Park.
- 14. The development comprises 34 houses built between 1987 and 1989. There is a mix of two and three storey family houses (some of which are part two-storey and part-three storey) ranging in size from two to five bedrooms (900 to 2,000 sq ft). The houses are all terraced apart from the subject property which is the only detached house on the estate. There is a visual unity to the buildings on the estate which are constructed from similar materials with a common brick-type and colour and slate-covered pitched roofs. There is a varied building line and semi-private spaces formed from set back garden frontages and courtyards. The appearance of the estate remains largely unaltered since it was built with the exception of a number of conversions of integral garages into living accommodation.

15. No.23 is located at the north west of the estate at the end of the access road from Arcadia Street. There is a landscaped courtyard in front of the house which is planted with shrubs and a tree. No.23 does not have a garage and there is no car parking space outside the property (the applicant has an allocated space on the southern part of the estate). To the rear of the property the applicant has built a single-storey, flat roofed, wooden extension to the lounge for which she did not receive written permission from either the residents association or contiguous landowners. However, no objection has been taken to its construction.
16. Four houses adjoin the property, two to the north (Nos. 24 and 25) and two to the south (Nos. 20 and 21). All four owners have objected to the application.
17. No.20 is a part two-storey, part three-storey mid-terrace house. It is a corner property with No.19 adjoining it to the south and No.21 to the east. Its northern, three-storey, elevation faces the southern elevation of No.23. There are windows facing No.23 at ground floor level (lounge), first floor level (stairwell) and second floor level (bedroom). No.20 is located further west than the property and the proposed Juliet balconies will be obliquely visible from it. The northern elevation of No.20 is approximately 6.75m from the southern elevation of No.23.
18. No.21 is aligned parallel to, and to the south of, No.23. It is a mid-terrace house with its rear (north) elevation overlooking No.23. It is part two-storey and part three-storey. At ground floor level there are two sets of French windows facing No.23. On the first floor there are two windows in one bedroom and one window in another bedroom which overlook No.23. At second floor level at the eastern end of No.21 two windows face No.23. The rear patio of No.21 lies immediately south of No.23. At their closest point the properties are approximately 4.5m apart.
19. No.24 is an end of terrace two-storey house aligned, like No.23, in an east to west direction. It is located immediately to the north of No.23 at a distance of some 5.2m. French windows in the ground floor lounge, two windows on the stairwell and a first floor bedroom window all face No.23.
20. No.25 is a two-storey mid-terrace house adjoining No.24 to the east. The house is aligned north to south and the southern elevation lies to the north east of No.23. At their closest point the properties are approximately 2.75m apart. The southern elevation of No.25 has a ground floor bay window to the kitchen and three windows at first floor level including two bedroom windows. The view from these windows is predominately of the landscaped open area giving pedestrian access to this part of the estate and it does not directly overlook No.23 in the same way as Nos.20, 21 and 24.
21. No.22 is not contiguous with No.23 and the owner has not objected but in his expert report Mr Tobin considered that there was likely to be some overlooking if the application were granted for which compensation should be payable. No.22 is a part two-storey, part three-storey end of terrace house adjoining No.21. It is located to the east of No.23. The northern elevation of No.22 has oblique views of No.23 from some of its windows. At its closest point No.22 is approximately 4.75m from No.23.
22. The proposed development comprises the addition of a third storey to No.23. The footprint of the property would be unaltered. It is agreed that the height of the building would be increased by 1.6m. The only change to the existing accommodation would be the installation of Juliet balconies (with full height, 1.65m, opening doors) in bedrooms 2 and 3 on the west elevation overlooking Bartlett Park. A new second floor would be created and a north facing dormer window would be needed to accommodate the necessary head room at the top of the extended staircase. The approved plans show opaque glazing to this window.

23. The second floor accommodation would comprise a master bedroom with en suite bathroom at the west of the property, a bedroom at the east of the property and a family bathroom between the two. The master bedroom and en suite bathroom would be served by a total of four rooflights. The other bedroom would have two windows facing east. The bathroom would have no natural light. The east elevation of the property would have a gable end while the western elevation would have a hipped roof. This is the same arrangement as the existing building.

Statutory Provisions

24. Section 84 of the 1925 Act provides so far as relevant that:

“(1) the Upper Tribunal shall ... 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 –

...

- (aa) that (in a case falling within sub-section (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

...

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

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

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

...

- (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) ...;

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.”

The case for the applicant

25. Mrs Hussain explained that she had purchased No.23 in 1994 and lived there with her husband and two children. She now wished to extend the property so that her mother, for whom she was the sole carer, could live with them. She had twice obtained planning permission for the proposed extension, firstly in 2008 and again in 2013, but on both occasions the residents association and the contiguous owners had refused their consent to the proposal. She criticised the procedure adopted by the residents association when dealing with her application to extend No.23. She said it lacked transparency and meant the association had not given fair and objective consideration to her proposals.
26. Ms Stewart analysed the application under ground (aa) by reference to the series of questions first set out in the Tribunal's decision in *Re Bass Limited's Application* (1973) 26 P&CR 156. There was no dispute about the first two questions: the proposed user was reasonable and it was impeded by the restrictive covenants. Ms Stewart considered the next two questions, whether by impeding the user the covenants secured practical benefits to those entitled to the benefit of them, and, if so, whether those benefits were of substantial value or advantage, by reference to four issues.
 - (i) *Whether the design of the proposed extension was incompatible with the character and design of Bartlett Close.*
27. Mr Maan said that the proposed extension made no change to the footprint of No.23, maintained the original profile of the existing roof (except for the new dormer) and matched details of the existing property regarding brickwork, brick detailing, window frames, fascia boards and rainwater goods. He considered that the extension respected the integrity of the original design of the house and of the estate as a whole. The proposed development was entirely in keeping with the character and appearance of the estate and the extension was sensitive, logical and proportionate.
28. Ms Stewart submitted that the setting of No.23 had been materially altered by the development of large blocks of flats to the west of Bartlett Park and which now dominated the sightline westwards from Arcadia Street. The "sense of spatial connectivity with the surrounding parkland" which Mr Sutters said was achieved by the design and layout of this part of the estate was no longer achieved.
 - (ii) *Whether the extension was contrary to the ethos of the Estate*
29. Ms Stewart submitted that the ethos of the Bartlett Close Estate had been described by the objectors as an intimate housing development creating a sense of place within the surrounding public open space of Bartlett Park and with a strong sense of community based upon a diverse range of family houses. Mr Maan said that, based upon Mr Sutters' evidence for the objectors, he understood the ethos of the estate to be the provision of family accommodation in a safe, stable and pleasant environment. The proposed development, which would enable the applicant to care for her mother at No.23, was consistent with that ethos. There were a number of examples on the estate of garages having been converted into habitable rooms and which had not been opposed by the residents association. Mr Maan said that the provision of additional floor space in these instances was no different in principle to the applicant's proposal to extend No.23 and he saw no reason why, so far as the ethos of the estate was concerned, the residents association should make an exception of the applicant's proposals.
 - (iii) *Whether the extension of No.23 would be the thin end of the wedge and set a precedent for other such development elsewhere on the estate*

30. Mr Maan said that as the only detached house No.23 was unique on the estate. It was located at the north west corner of the estate and was a stand-alone structure visually separate from its taller neighbours. In townscape terms there was no visual requirement that No.23 be restricted to two storeys.

31. Ms Stewart said that the uniqueness of No.23 placed it on all fours with the facts in *Re Vertical Properties Limited's Application* [2010] UKUT 51 (LC) where the Tribunal, His Honour Judge Reid QC, said at [121]:

“The existing house on the Property is materially different from, and not in harmony with, other houses in Ingram Avenue. It is separated from the adjoining property at 22 Ingram Avenue by a vehicular access way to Turner’s Wood and from the house on the adjoining property at 30 Ingram Avenue by an expanse of garden and woodland. This is in contrast to the rest of the street, and to its ‘rhythm and regularity’.”

32. Ms Stewart submitted that the objectors had not made out a coherent case in favour of their argument that to grant this application would open the floodgates to similar proposals elsewhere on the estate. There was no evidence that the extension of the only detached house on the estate would lead to similar applications for extensions to any of the two-storey terraced houses.

33. Ms Stewart submitted that it was clear from the cross-examination of Mr Christopher Quinn that the residents association had not appreciated that the modification being sought was to be restricted to the development for which planning permission had been obtained. Granting this application would not be a carte blanche for similar applications.

(iv) *Whether there would be any adverse effect upon the amenity of the objectors*

34. Mr Maan approached this issue from a town planning perspective. He could not see what the covenants were trying to protect that the planning officer had not considered when determining the applicant’s planning application to extend No.23. In short he agreed with the planning officer’s conclusions contained in her report dated 16 September 2013 that there would be no adverse effect on the amenity of neighbouring residents arising from the application. He concluded that:

“The implementation of the Extension will not have any unacceptable detrimental effect on the amenity of the occupiers of the adjoining contiguous properties in terms of loss of light, privacy and outlook. The general level of amenity of the occupiers of the contiguous properties will remain protected.”

35. Mr Maan said at paragraph 10.1 of his expert report:

“Section 84(1)(aa) enables a restrictive covenant to be challenged if it can be demonstrated that the development the subject of a covenant is unreasonably withheld thereby impeding a reasonable user of the land for public or private purposes.”

He concluded that such consent was being unreasonably withheld and that “there can be no basis to restrict the Extension which has the benefit of planning permission.” In reaching this conclusion he considered each of the objector’s properties (Nos. 20, 21, 24 and 25) in terms of light, view, privacy and amenity and found that none of them would be detrimentally affected by the proposal.

36. In cross-examination Mr Maan said that he had not visited the objectors’ homes and that his comments about the effect of the proposal on the amount of daylight and sunlight represented a “broad brush analysis”. He disagreed with Mr Tobin, who had been inside the objectors’

properties, that “natural light” to Nos. 20, 21 and 24 would be adversely affected to varying degrees. Mr Maan emphasised that the extension of No.23 involved an increase in height of 1.6m and was akin to an extension into the roofspace. A full height second floor extension would have increased the height of the building by some 2.5m.

37. Ms Stewart submitted that it was not the applicant’s case that the grant of planning permission for the extension should be determinative of the current application. That misrepresented Mr Maan’s evidence. In this case the planning application had raised the same issues as those to be considered under section 84(1)(aa) and Mr Maan had considered them appropriately. Ms Stewart concluded that the evidence showed that the covenants did not secure practical benefits of substantial value or advantage.
38. Turning to the remaining questions set out in *Re Bass Limited’s Application* Ms Stewart said that it was not the applicant’s case that impeding the proposed user was contrary to the public interest. The final question was whether, given the applicant’s case that the covenants did not secure practical benefits of substantial value or advantage, money would be an adequate compensation for any loss or disadvantage that would be suffered by any person entitled to the benefit of the covenants.
39. Ms Stewart said that the basis for Mr Tobin’s findings about compensation was his conclusion about loss of light to, and overshadowing of, Nos. 20, 21, 22, 24 and 25 Bartlett Close. Mr Tobin’s views about those matters were contrary to Mr Maan’s opinion that there would be no such adverse effect on the amenity of the neighbouring properties. Mr Tobin’s estimate of compensation was based on “his long experience” but, said Ms Stewart, that was not an adequate basis to award compensation without further justification. Ms Stewart submitted that the question of compensation to the residents association did not arise given the applicant’s case that the application did not represent the thin end of the wedge. The residents association would not suffer any loss or disadvantage.
40. In response to a question from the Tribunal, Ms Stewart said that there would not be any undue disturbance caused by the construction of the extension. There would be enough space on the property for the applicant to erect scaffolding and, in any event, the First Schedule to the conveyance dated 1 June 1989 permitted the applicant to enter other parts of the estate upon notice including with scaffolding. Mrs Hussain produced a second witness statement giving outline details of how the works would be carried out.

The case for the objectors

41. The case for the objectors is in two parts: firstly, the objection from the residents association and, secondly, the objections from the contiguous land owners.

The objection of the residents association

42. The residents association argue that the covenants secure a practical benefit of substantial value or advantage by allowing them to maintain the character and ethos of the estate under the building scheme. Mr Sutters, who was the architect for the scheme, gave evidence about the principles behind the development. He explained the background of the scheme as a self-build housing project on derelict land purchased from the local authority. The objective was to create an intimate, high density housing development with a sense of community clustered around the focal point of St Saviour’s Church.
43. The development was unified visually by the use of similar materials, brick colour and slate roofs and careful attention was given to scale, massing and the position of buildings and the creation of an intricate series of semi-private spaces. The high density of development was achieved by the use of interlocking footprints but overbearing uniformity was avoided by using

stepped building lines and a combination of two and three-storey roof forms across the development. There were gaps and openings between buildings which Mr Sutters said gave a “sense of spatial connectivity with the surrounding park at key points.” The mix of height and form ensured a human scale to the development that achieved reasonable privacy and daylighting levels for all residents. Mr Sutters considered that any additional bulk, scale or massing of buildings would compromise the design and appearance of the estate and would adversely affect the balance of the original built form to the detriment of the scheme as a whole.

44. The scheme was designed as three main building clusters surrounding the church. The massing of the clusters was relieved by the creation of gaps at the end of the long sightlines along Northumbria Street to the south and Arcadia Street to the north. The houses at the end of those sightlines, Nos.15 and 16 to the south and No.23 to the north, were deliberately designed with two storeys to reduce the massing and to provide greater openness and spatial connectivity to Bartlett Park. No.23 was therefore located in a key position at the head of the northern access road where, said Mr Sutters, “it is a focal point on entry to the scheme framed at the end of the access road by sky to either side that arrests the eye and hints at the open space beyond.”
45. Mr Sutters said that the estate had changed very little over the years and the overall pattern and integrity of the built form had remained to preserve the amenity of the residents. Those changes which had occurred comprised minor detailed elements such as the addition of porches above front doors. The conversion of a number of garages into habitable space had no discernable effect upon the external appearance of the development. The addition of the single-storey wooden extension at the rear of No.23 had reduced the garden area by at least 50% and left the property with very poor private amenity space. This would be exacerbated if the application were allowed and an additional two bedrooms provided.
46. Mr Sutters said that Nos.20, 21, 24 and 25 had a direct and intimate relationship with No.23 with their main habitable rooms and gardens overlooking No.23. He said they would suffer loss of light and increased overshadowing if the application succeeded and he considered that the present eaves height of No.23 was the maximum to preserve the amenity of the neighbouring properties. The proposed extension would change the scale and proportionality of the building for the worse and would “start to intrude and overpower” this conclave of the estate. It would adversely affect its amenity. No.23 was not unique just by virtue of being a detached house; its built form was shared by seven or eight other houses which could also be extended.
47. Mr Christopher Quinn of 31 Bartlett Close gave evidence on behalf of the residents association, speaking to a witness statement prepared by Mr Alan Moran, the chairman of the association. Mr Moran was unable to attend the hearing and Mr Quinn, the secretary of the association, deputised for him.
48. Mr Moran’s statement described the history and organisation of the residents association and gave the background to the development of the estate. He explained the origin of the restrictive covenants and produced minutes of a meeting held on 21 January 1986 at which the proposed covenants were first described. He said that they “comprise a reasonably comprehensive scheme for ensuring that the close retains its character and continues to be a pleasant place to live.” He gave an example of how the association had recently acted to prevent unneighbourly parking of cars on a grassed area and said that the association continued to rely on the covenants to preserve the character and ethos of the estate. Mr Moran described how applications for consent under the covenants were dealt with and, in particular, applications to convert garages into living accommodation. The association had consistently opposed Mrs Hussain’s planning applications for the extension of No.23 (as had 13 individual house owners on the estate). It remained opposed to the proposed development. Mr Moran emphasised the association’s concern that to allow this extension would set a precedent for similar proposals elsewhere in Bartlett Close and would mean the erosion of the association’s ability to defend the character and ethos of the estate.

The objections of the contiguous land owners

49. Mr Kieron Collins (No.20) is one of the original self-builders who constructed the estate and has lived there ever since. He felt that all residents moving onto the estate knew about the covenants and were happy to accept them. Their enforcement had preserved the unique character of the estate as a whole. The upward extension of No.23 would overpower No.20's small garden and reduce the amount of light in the house. The proposed Juliet balconies would overlook No.20. Mr Collins said that the proposal would greatly affect his amenity.
50. Mr Michael Collins (No.21) is the treasurer of the residents association. He said that 50% of the original self-builders, including himself, still live on the estate. The north elevation of No.21 faced onto No.23. The two houses are parallel and close to each other and his natural light levels were already low. He thought that the proposed development would dramatically reduce the amount of light to his dining room, lounge and two bedrooms and would "totally dominate" his outlook. Mr Collins said that the scheme of covenants was effective in regulating the estate and he was concerned that the proposed extension of No.23 could set a precedent for other owners to extend their houses and let them out. Mr Collins had organised two petitions against Mrs Hussain's planning applications which had been signed by 26 and 20 house owners respectively.
51. Mr Peter Platt (No.24) bought his house in 2013. He was aware that Mrs Hussain had planning permission for the extension of No.23 but he thought that the restrictive covenants "would hold". He had been impressed that the estate was well maintained and it had what he described as a "cohesive unified feeling". He considered that the proposed extension would significantly affect No.24 and would reduce the light to his house and to the decked area of his garden located between the two properties. The proposed Juliet balconies and dormer window would overlook his property. If the application was allowed it would set a precedent for other such extensions and the character of the estate would be lost.
52. Mr Steven Quinn (No.25) is a previous chairman of the residents association and is one of the original self-builders. He had been involved in the discussions about the imposition of the restrictive covenants and said that they were intended to preserve the character of the estate as built. He had consistently opposed Mrs Hussain's proposals and, as a site manager, foresaw practical difficulties in undertaking the extension, both in terms of doing the work and moving and storing materials. The proposal was likely to be far more significant and harmful than the garage conversions that had taken place on the estate and Mr Quinn said that the increased height of No.23 would reduce the amount of light to his kitchen/diner.
53. All four of the contiguous landowners confirmed that the planning officer had not visited the properties to see for herself how the proposed development would affect their amenity when considering Mrs Hussain's planning application.

The evidence of the joint valuation expert

54. Mr Tobin submitted a written expert report but did not appear at the hearing by order of the Tribunal. He said that he was instructed jointly "to provide my opinion of the compensation (if any) due to the objectors under section 84(1)(aa) of the Law of Property Act 1925". Mr Tobin listed those objectors as the owners of Nos. 20, 21, 24, 25 and, mistakenly, No.22 (Mr Das).
55. He expressed the view, which he thought the market shared, that the estate, by reason of its design and the supervisory role of the residents association, had a "sense of community not found in most inner city schemes." While he considered this to be an attraction for the existing owners he did not think from his analysis of comparable transactions that it had any influence on the market value paid by new purchasers.

56. Mr Tobin said that it was unnecessary for him to provide firm opinions of value. Instead he identified the “tone” of value of three and four bedroom houses on the estate as being in the range £450,000-£600,000.
57. Mr Tobin identified the most significant issue as being the loss of natural light arising from the proposed increase in height of No.23 and, to a lesser extent, some inconvenience due to overlooking. He inspected the properties on a dull, wet day and acknowledged that his judgments were necessarily subjective and that he was not an expert on sunlight and daylight. But he had long experience of valuing houses and dealing with occupiers’ issues and derived assistance from the expert reports of Mr Maan and Mr Sutters.
58. Mr Tobin concluded that:
- “... the development will not result in a specific loss in Market Value to any of the Objectors’ properties and any loss is difficult to quantify empirically. The effect of loss of light on privacy is so small in market terms that I believe any effect on Market Value could depend on prevailing weather conditions at the time of sale and in any event is subjective. However, in my judgement there will be a loss in advantage, albeit it is difficult to quantify, insofar as the ‘after’ situation will undoubtedly be less favourable than the existing.”
59. Mr Tobin described this loss of advantage as “nominal” which he quantified as being between £2,500 to £10,000. He said that the upper end of this range was less than 2.5% of the lower end of the value range. He assessed monetary compensation for each of the objectors (and Mr Das at No.22) under section 84(1)(i) of the 1925 Act as follows:

Mr Kieron Collins, No.20:	£ 5,000
Mr Michael Collins, No.21:	£10,000
Mr Das, No.22:	£ 5,000
Mr Platt, No.24:	£ 7,500
Mr Steven Quinn, No.25:	£ 2,500

Mr Tobin described these figures as “broad-brush” but considered them to be realistic and reasonable. He thought no compensation was due to the residents association because “this entity neither owns or enjoys affected property.”

60. Mr Tobin also thought that there would be inconvenience to adjoining land owners during the construction period. He noted the restricted amount of space at the side of No.23 for material storage and none for the parking of builder’s vehicles. But he doubted that the intrusive part of the works would last more than 12 weeks and that it was unlikely that there would be prolonged periods of noise or dust generation. Mr Tobin said that a further sum of £250 per objector would adequately compensate for this added inconvenience.

Discussion

61. There is no dispute that the restrictions are to be treated as covenants within a building scheme. The existence of a building scheme is a contextual matter to which I am required to have regard under section 84(1B) of the 1925 Act and is a matter upon which I am entitled to place weight: see *Dobbin v Redpath* [2007] EWCA Civ 570, per Carnwath LJ (as he then was) at [29].

62. I had the benefit in this case of hearing evidence from the architect who designed the estate and from three objectors who were part of the original team of self-builders who constructed it and who have lived there ever since.
63. The design concept was to create a high density housing development with a sense of place and community providing family accommodation of various sizes clustered around the dominant structure of St Saviour's Church. In my opinion that concept was skilfully achieved and the estate retains those characteristics today. That is not to say that the estate has been immutable over the last 27 years. As many as eight garages have been converted into living accommodation (the parties did not agree the details) although in each case the footprint of the building remained unchanged. Also, the sightline along Arcadia Street towards No.23 has been significantly affected by the construction of blocks of flats to the west of Bartlett Park and which now form the backdrop to the view. Nevertheless the overriding impression is of an estate that is predominantly unchanged and consistent with the original design objectives.
64. The residents association has played an active part in maintaining the character and form of the estate, albeit that its procedures for considering applications for written consent under covenants (5) and (7) of the Third Schedule are, in my opinion, neither clear nor consistent (Mr Moran says in his witness statement that "record keeping has not been ideal"). Mrs Hussain is understandably aggrieved about how her application for such consent was dealt with, but this application is not concerned with whether the association's consent was unreasonably withheld. I also note that Mr Michael Collins may have a potential conflict of interest since he is both the treasurer of the residents association and an individual objector. Both he, and his brother, Mr Kieron Collins, are objecting as contiguous landowners. Similarly Mr Christopher Quinn, who spoke on behalf of the residents association, is, I understand, the brother of Mr Steven Quinn who is the objector at No.25. But I do not consider that the views of the residents association would have been different had these relationships not existed. The association's objection appears to have widespread support from other landowners on the estate. The association has previously opposed changes which would alter the character or appearance of the estate and the present application is for a significant increase in the size and mass of No.23 by the addition of a third storey, albeit one which is not as tall (by 0.9m or so) as the neighbouring three storey elements of the contiguous houses. Nevertheless this is a proposal which is different in scale and kind to those previously considered by the residents association.
65. It is argued by Ms Stewart that the association has already conceded the principle of increased living accommodation by consenting (or not objecting) to a number of garage conversions. I see some force in that argument but the tenor of the association's objection is directed more towards the increase in the size of No.23, the detrimental effect the association considers it will have on the amenity of its neighbours and the possibility that the proposed development would set a precedent for similar extensions elsewhere on the estate.
66. The applicant dismisses fears that the extension of No.23 would be the thin edge of the wedge for similar developments by emphasising that it is the only detached house on the estate. Ms Stewart says that the application is on all fours with the facts of *Re Vertical Properties* in that No.23 is materially different from, and not in harmony with, the other houses on the estate. While No.23 is the only detached house on the estate it is not materially different from the other houses in terms of size, materials or design and it cannot reasonably be said to be out of harmony with the "rhythm and regularity" of the estate as a whole. Nor is it the only two-storey house on the estate. I accept that it would be more difficult to extend a terrace house by adding a further storey and that this would reduce the chances of the application setting a precedent but nevertheless the thin end of the wedge argument carries weight in this context.
67. I am satisfied that the proposed development would not result in problems of overlooking any of the neighbouring properties. There would be two new windows in the east elevation but these would look directly towards Arcadia Street. There would be a new dormer window in the

north elevation which would directly face No.24. The approved plans show the glazing to this window to be opaque. Mr Kieron Collins is concerned that the proposed Juliet balconies to the first floor windows would overlook his garden. I do not think that is a matter of real concern. The balconies only project a short distance (0.2m) from the French windows and the predominant view is of Bartlett Park to the west. There would only be an oblique view of No.20. The remaining windows serving the proposed third storey would be roof lights (three on the south elevation, and one each on the north and west elevations). It would not be possible for the occupants of No.23 to see any of the neighbouring properties from these windows.

68. The other main ground of objection from the contiguous landowners is the effect of the proposed development on the outlook from their properties and upon the daylight and sunlight which they receive. Mr Maan, Mr Sutters and Mr Tobin all gave evidence on the point. Mr Maan said that there would be no loss of daylight or sunlight to any of the objectors' properties, except for No.21 where any loss would be negligible. He thought the view from, and amenity of, the objectors' houses would be unaffected. Mr Maan reached these conclusions without the benefit of an internal inspection of any of these houses.
69. Mr Maan also relied upon and agreed with the planning officer's report into Mrs Hussain's 2013 planning application. The planning officer, who did not visit any of the objectors' properties, considered that the proposed development would be sympathetic to the adjoining properties and the estate as a whole; respected the integrity and the form of the estate and generally would not be out of character. She said the proposal did not undermine relevant planning policies from the London Plan (2011), The Adopted Core Strategy (2010), The Managing Development Document (2012) and the National Planning Policy Framework (2013). Overlooking would not be a problem and the additional height of No.23 "would not have an unduly detrimental impact on neighbouring residential properties in terms of unacceptable loss of sunlight/daylight, overshadowing, reduction in privacy or loss of outlook."
70. None of the experts professed to be experts about sunlight and daylight and their opinions on this matter were informed by their professional experience generally. I had the advantage of viewing all of the relevant properties both internally and externally in the early afternoon of a sunny late spring day. I was therefore able to see the current effect of No.23 on the outlook of its neighbours and to assess the degree of overshadowing and massing that the proposed extension would involve.
71. In my opinion the restrictions, by impeding the proposed development, secure practical benefits of advantage to the objectors by protecting their outlook and amenity. The relevant question is whether those practical benefits are substantial, by which is meant "considerable, solid, big" and is to be interpreted "in a common sense way": see *Shephard v Turner* [2006] EWCA Civ 8 per Carnwath LJ at [23] to [24].
72. My decision on this issue is a matter of judgment and degree. For the following reasons, I determine that the practical benefits secured by the restrictions are of substantial advantage:
 - (i) The estate is carefully designed to maximise density whilst retaining a variety of form, height and building line. But it is a delicate balance to ensure that each house owner's amenity and outlook is protected. In my opinion the proposed extension to No.23 would jeopardise that balance in a way which would change the intimate relationship between No.23 and its neighbours into an overbearing one and it is a substantial benefit to the objectors to be able to prevent this.
 - (ii) I do not accept Mr Tobin's view that the loss of advantage arising from the proposal would be "nominal". Nos. 21 and 24 in particular are a short distance from No.23 and have parallel main elevations. The extension of No.23 by 1.6m will have a material

impact on their outlook and must, to some degree at least, adversely affect the amount of sunlight (in the case of No.24) and daylight which they receive.

- (iii) The estate enjoys a distinctive character and ethos which was established, and has been maintained, through the building scheme and which the residents association has been at pains to protect. The proposed extension of No.23 would be a material change to the physical character and form of this part of the estate and the restrictions are a practical benefit of substantial advantage to the residents association in maintaining that character for the benefit of the estate as whole.
73. In reaching this conclusion I have had regard to section 84(1B) of the 1925 Act and to the development plan. I note the planning officer's comments on that plan and other policy documents but I do not agree with her conclusions having had the benefit of a detailed site inspection of all the affected properties. The restrictions were created in the context of a building scheme to which I have had regard. I must also take into account any other material circumstances and, in my opinion, this includes the potential difficulty of constructing the extension identified by Mr Tobin and Mr Keiron Collins. Mrs Hussain produced a summary method statement in a supplemental witness statement and while this gave some reassurances I share Mr Collins' scepticism, given the restricted size of the site and the fact that the rear garden has been reduced in area due to the construction of the single storey rear extension, that materials could be stored and works carried out entirely from within the applicant's property.
74. The Third Schedule to the conveyance contains a covenant (No.11) "not to do or suffer any act or thing in or about the property or the estate which shall or may grow to the annoyance nuisance damage or disturbance of the Vendor and its successors in title or the owners or occupiers of any neighbouring property." In *Shepard Carnwath* LJ said at [60] that:
- "I do not think such a covenant is to be equated with a covenant providing a specific protection from construction disturbance."
- But he also said at [58] that:
- "The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."
75. The location of No.23 is such that there will be particular difficulties in carrying out the proposed works without considerable disturbance to neighbours and I consider this justifies giving special weight to this factor. I am not satisfied that paragraph (4) of the First Schedule to the conveyance will enable the applicant to erect scaffolding (if necessary) on her neighbours' land as suggested by Ms Stewart. Those rights are confined to "inspect, clean, maintain, repair and replace any building on the property". This does not appear to include an extension to the property.
76. My conclusions at paragraphs 66 and 72 above are sufficient to refuse the application on ground (aa) but they are supported by the adverse effect on the amenity of the neighbouring objectors that would likely arise from the proposed building works.

Determination

77. The applicant has failed to satisfy me that ground (aa) has been made out. That being so the application on ground (c) must also fail. The application is therefore refused.

78. 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 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: 4 July 2016
A J Trott FRICS