

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2018] UKUT 99 (LC)
Case No: LP/7/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – whether prohibition on use other than for residential purposes to be modified to permit use as annex to boutique hotel – application allowed

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

Between:

**MICHAEL DONALD STEPHEN and
TIMOTHY DAVID MILLS**

Applicants

and

**MR JAMES LEWIS and MRS PATRICIA
LEWIS**

MR DAVID JONES and MRS DIANNE JONES

Objectors

**Re: 21A City Walls,
Chester**

Before: Martin Rodger QC, Deputy Chamber President, and Peter McCrea FRICS

Chester Civil Justice Centre

30 and 31 January 2018

Nicholas Jackson for the applicants

Julian Shaw, instructed by Storrar Cowdry, for the first objectors

Mr David Jones, in person and on behalf of Mrs Dianne Jones

No cases are referred to in this decision

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Introduction

1. The applicants, Mr Michael Stephen and Mr Timothy Mills, are the freehold owners and proprietors of Edgar House, a boutique hotel at 22 City Walls, Chester. As its address indicates Edgar House is located on the City Walls surrounding Chester, overlooking the River Dee. In February 2016 the applicants purchased an adjoining private house, 21A City Walls, which they now wish to use as an annexe to their hotel. They have planning permission for this use, but its implementation is prevented by a number of restrictive covenants which prohibit the use of 21A except as a dwelling house.

2. On the opposite side of 21A from the hotel is another private house, 20-21 City Walls, the home of Mr James Lewis and Mrs Patricia Lewis, who have the benefit of the covenants and who object to the applicants' plans.

3. Mr David Jones and Mrs Dianne Jones own an investment property at 14 Duke Street, a short distance to the rear of Edgar House, which also has the benefit of the covenants. Mr and Mrs Jones do not object to the proposed use of 21A City Walls in principle, but seek compensation to reflect the possible effect of its proposed use on the value of their property.

4. Faced with the objections of their neighbours, Mr Stephen and Mr Lewis applied to the Tribunal on 22 March 2017 for the modification of the covenants under section 84(1), Law of Property Act 1925.

5. At the hearing of the application the applicants were represented by Mr Nicholas Jackson of counsel, who called Mr Stephen and Mr Edward Clark MRICS of Fisher German, Surveyors, to give expert evidence. Mr and Mrs Lewis were represented by Mr Julian Shaw of counsel, who called Mrs Lewis herself, Mr Ian Ellis and Mrs Rhiannon Walker OBE. Mr Jones spoke on his own and his wife's behalf.

6. A significant proportion of the written and oral evidence concerned events that occurred between October 2013 and February 2016 before the applicants acquired 21A. Whilst these were regarded as being of importance by the parties, and in particular by the objectors, they were of little, if any, relevance to the application itself. Legal proceedings between neighbours do not contribute to good relations, and it is understandable that parties engaged in such proceedings find it difficult to be objective, but the details of their deteriorating relationships rarely have much to do with the issues to be determined. While we have listened carefully to all the evidence we will concentrate on those parts of it which relate to the grounds of the application.

7. On the second morning of the hearing we inspected Edgar House, 21A, and 20-21 City Walls, and viewed the exterior of 14 Duke Street and the immediate surroundings.

Statutory provisions

8. Section 84 of the Law of Property Act 1925 gives the Tribunal power to discharge or modify restrictive covenants affecting land, where certain grounds in section 84(1) are made out. The applicants rely on grounds (aa) and (c).

9. So far as is material ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction must impede some reasonable use of the land for public or private purposes. Satisfaction of subsection (1A) is therefore essential to a successful claim under ground (aa); it provides as follows:

(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.

10. To succeed in their alternative case under ground (c), the applicants must demonstrate that the modification of the restrictions would not cause injury to those entitled to the benefit of them.

The properties

11. Numbers 19, 20-21, 21A and 22 City Walls, are all situated in an elevated position overlooking the River Dee, from which they are separated by the historic city walls themselves. Although they are all within the city centre conservation area, the buildings are of mixed age and architectural merit, with only 19 City Walls being a listed building. They are all bounded on the river side, which we shall refer to as the front of the property in each case, by the top of the battlements of the wall. A pedestrian walkway runs along the battlements, and forms part of a continuous two-mile circuit of the city centre, providing a popular route for tourists.

12. From left to right when viewed from the river, the group of buildings may be described as follows.

13. Edgar House (22 City Walls) is a wide-fronted two-storey building which has been refurbished to a high standard, with seven double bedrooms and a small range of reception rooms. At the front of the property, overlooking the Dee, an attractive terrace is available for use by guests of the hotel and patrons of its restaurant. The terrace can be accessed directly

from the ground floor bedrooms, whilst the first-floor bedrooms have balconies overlooking it and the river. Edgar House benefits from a sizeable car park to the rear.

14. 21A City Walls, the subject of the application, is a two-storey house, dating from the 1960s. It appears incongruous in its setting and its limited architectural appeal is not improved by its current shell condition, the whole of the interior having been stripped out by the applicants. At the rear of the building is a gated car park with space for two vehicles. At the front is a small garden, not much wider than the house itself, to the left of which is the terrace of Edgar House while to the right lies the somewhat larger garden of 20-21 City Walls.

15. 20-21 City Walls is a well-appointed three storey house which Mr and Mrs Lewis have refurbished to a very high standard. It benefits from a front sun lounge and a wide terrace, both of which afford excellent views over its small garden and, beyond that, the Dee. The side elevation of 21A is almost on the boundary and both it and the garden of 21A are clearly visible from the Lewis's own garden. 20-21 has rear vehicular access with car parking, and pedestrian access at the rear.

16. One feature of all three properties is that the level of the land at the rear is much higher than the level of the terraces and gardens adjoining the top of the City Wall at the front. Owing to the stepped topography of the site the entrance to each of the buildings from the rear is therefore at first floor level.

17. The final building in the group, 19 City Walls, is now known as Recorder House, and was previously the Recorder Hotel; it plays a peripheral part in this application. It is a grade II listed early 19th century town house, constructed over four-storeys with an attractive bay overlooking the Dee. Until recently it traded as a bed and breakfast establishment but is now undergoing conversion to residential use.

18. Rear vehicular access to all of the above properties is from Duke Street via a shared private drive which runs adjacent to the side elevation of 14 Duke Street. Mr and Mrs Jones's property is a modern three storey end of terrace house, with two car parking spaces in a shared rear car park, accessed from the private drive.

19. The various properties are very close to each other. Mr and Mrs Lewis's lawn at 20-21 is approximately 1 metre higher than the rear garden of 21A, from which it is separated by a brick wall, topped with decorative concrete blocks. The properties do not form a straight line, but instead are staggered, with 20-21 set back further from the riverside boundary than 21A, which in turn is set back further than Edgar House. Accordingly, when sitting in Mr and Mrs Lewis's sun lounge it is not possible to see much of the garden of 21A, the view of which is blocked by the side wall of 21A and by the falling ground. In contrast, from the Lewis's terrace and from their garden itself a relatively clear view of most of the small garden of 21A is available. The rear entrance to 21A is also visible from a kitchen window in the side wall of 20-21, and from a bathroom window above it.

The restrictive covenants

20. On 31 July 1981, Thomas and Marjory Astbury sold 21A City Walls to Ernest and Thelma Ellis. At that time the Astburys were also the owners of Edgar House (then known as the Riverside Hotel) and of 20-21 City Walls, as well as a number of other properties in the vicinity which they retained. The transfer of 21A included the following restrictions, which were expressed to benefit all parts of the retained land belonging to the transferors:

“(a) Not to use the land hereby transferred for any purpose other than one dwelling house with one garage thereto;

(b) Not to make any external alterations to the buildings at present hereby erected on the property hereby transferred without first obtaining the consent of the Transferors;

(c) Not at any time to make any demolition, alterations or additions save for the erection of a garage and garden shed to the rear of the property hereby transferred to be erected only in accordance with plans first approved by the Transferors’ surveyor;

(d) No noisy offensive or dangerous trade or pursuit shall be carried on on the property hereby transferred nor any trade or pursuit which may be or become in any way a nuisance annoyance or danger to the Transferors or their successors entitled to the retained properties or any part thereof or which may tend to depreciate the value of the said retained properties or any part thereof especially the Riverside Hotel and the businesses conducted thereon;

(e)-(f)...

(g) Not to paint the external parts of the buildings at present situate upon the property hereby transferred except in a colour which is first approved in writing by the Transferors;”

21. It is common ground that 20-21 City Walls and Edgar House both have the benefit of the restrictions. The right of the owners of 14 Duke Street, Mr and Mrs Jones, to enforce the restrictions is less clear, and was not the subject of submissions by Mr Jones. The registered title to which the benefit of the restrictions was originally annexed has been combined with other adjoining titles and closed, and there is some uncertainty over the extent to which the current title was formerly within the ownership of the original covenantees, Mr and Mrs Astbury. On behalf of the applicants Mr Jackson suggested that the benefit of the restrictions might be enjoyed only by the area now used as a car park. We will assume, however, that the benefit of the covenants extends also to the town house at 14 Duke Street itself.

The applicants’ proposals

22. Evidence about the sale of 21A to the applicants was given by Mr Ian Ellis who, together with his brother, had inherited the property on their father’s death in October 2013. In mid-2014 they put the property on the market at an asking price of around £500,000. A sale was negotiated to a Mr Hutchinson, but on learning of the restrictions and being unable to persuade the applicants (in their capacity as the owners of Edgar House and thus as beneficiaries of the

restrictions) to allow building work, he had withdrawn in January 2015. Mr Ellis then agreed a sale to Mrs Walker and her husband. Mrs Walker gave evidence and explained that despite significant effort on her part, the applicants would not permit any building work, fearing that it would disrupt their new business, so the proposed sale fell through in June 2015. The same thing happened again with a Mr Dixon, who agreed terms before withdrawing in September 2015. In the end, Mr Ellis agreed to sell 21A to the applicants for £450,000, and contracts were exchanged in February 2016.

23. The applicants wish to convert and extend 21A to provide four *en suite* bedrooms in a detached annexe to Edgar House, in accordance with a planning permission granted by Cheshire West and Chester Council on 26 May 2016 under code 16/01008/FUL.

24. The front of the building is to be altered slightly, with the current aluminium conservatory being replaced by a solid-roofed single storey extension across the whole of the front elevation.

25. The internal staircase is to be removed. A new porch will be constructed at the rear of the building at first floor level, giving access from the car park to a small shared lobby off which there will be two bedrooms. Access to this porch will be across a new bridge structure spanning a lower courtyard or area at the rear of 21A. Two further bedrooms at ground floor level will be reached from the car park by going down some steps into this rear courtyard, but these rooms will also have a more convenient direct access out into the garden at the front of the property and from there through a gate onto the terrace of Edgar House from which the ground floor public areas of the hotel can easily be reached. The first floor bedroom furthest from 20-21 will have access on to a new balcony, which is to be screened from the garden of 20-21 by an opaque privacy panel.

26. The applicants now apply for modification of the restrictions sufficiently to enable the planning permission to be implemented and to allow 21A to be used as a detached annex with no more than four additional guest bedrooms in conjunction with and not independently of the use of Edgar House as a hotel. As a concession to the concerns expressed by objectors, the applicants do not now ask that the modification extend (as they had originally proposed) to “any minor permitted amendment” to the scheme for which planning permission has been obtained. They also propose two conditions, namely that the gable wall adjoining 20-21 must not be rendered, clad, covered or painted, and that the garden of 21A must not be raised above its current level or landscaped other than in the fashion of a residential garden. It is suggested that following the deaths of the original covenantees the restrictions at (b), (c) and (g) are unenforceable and should be discharged on the ground of obsolescence.

27. In his oral evidence Mr Stephen confirmed that the level of the garden of 21A would not be raised, and that there was no intention to remove the boundary fence between Edgar House and 21A; access between the hotel and the annex would be via the existing double gates, or via the car park at the rear.

28. Mr Stephen relied on the planning officer's report which had stated that "the proposals would not give rise to significant adverse impacts upon the quality of life, including residential amenities, of the occupiers of the neighbouring properties", and stressed that the immediate locality already comprised mixed uses, including domestic, hotels, offices, a pub and eating establishments all within 100 metres of 21A. The application was therefore compatible and consistent with uses in the immediate neighbourhood.

29. Mr Stephen considered that the applicants' proposals would not adversely affect the amenity of anyone who was inside 20-21, but he acknowledged that the alterations to the front of 21A might be said to have an effect on the amenity value of a small part of Mrs Lewis's garden, at the end furthest from her house, from which someone looking along the building line to the west would see the new balcony serving the further of the two first floor bedrooms. Nevertheless, there would be little overlooking of the garden from the proposed balcony, as the end of the balcony would have an obscured glass privacy panel and only the most inquisitive guest would be able to lean over the balcony rail to peer round this panel to look into the adjoining garden.

30. Mr Stephen explained that patrons of Edgar House are typically older and more affluent, being prepared to pay over £200 per night to experience the "peaceful riverside luxury" which the establishment promises. The hotel does not cater for the type of guest who comes *en masse* to Chester to party and there would be no risk of noise from barking dogs, children, late night barbecues, or any other activities which might disturb neighbours if 21A was used as a family home. Edgar House does not accept dogs, except assistance dogs, and is not open to children under 14.

The objectors' concerns

31. Mrs Lewis considered that the restrictions secured practical benefits of substantial value to her and her husband, and that no sum of money would adequately compensate them for the disadvantage they would suffer if they were modified in the way the applicants requested. She gave evidence of a variety of intrusions which the guests of Edgar House already made into her life and the tranquillity of her home, including the arrival of taxis at all hours, and their practice of depositing customers outside the door of 20-21, rather than at Edgar House. We accept this evidence, and having visited all of the properties we can well understand how the very close proximity of the Lewis's house to Edgar House, and the restricted access to both, might occasionally result in inconvenience. Nevertheless, this application is not about the current use of Edgar House, but about the consequences, if any, of the proposal to use 21A for the same purpose.

32. The real substance of Mrs Lewis's objection was the anticipated impact on her enjoyment of her home if No. 21A ceased to be used as a permanent family home and became used instead as temporary accommodation for up to eight individuals who would be strangers to her and her husband, and whose identity would be likely to change every few days. They would be holiday-makers, and not a family with an interest in having good relations with their neighbours. It was likely that there would be far more noise at all hours, and the potential for

drinking, smoking and talking in the garden late into the night. Motion-triggered lighting may well have to be put around the property, which would disturb her and her husband's sleep.

33. The occupants of 21A would be able to look directly into Mrs Lewis's garden, depriving it of privacy, especially if the garden level was raised as she feared was likely to make passage between the two properties easier. She was also concerned by potential overlooking from the proposed balcony. Whenever they were in their garden or conservatory, the occupants of 21A would be bound to look over into the neighbouring house and garden out of curiosity, and in general their quality of life would be impaired.

34. Mr and Mrs Lewis had bought 20-21 because it met their needs for tranquillity, view and proximity to the city amenities and they would not be happy living next to a hotel. They didn't want to move, and it would be impossible to replicate what they now had, but to stay in their home would be out of the question if the application succeeded. Mrs Lewis told us that she had come close to deciding to move when the Recorder Hotel had permitted its guests to use a courtyard at the rear of 19, where they would smoke and talk in the evenings directly beneath one of the windows of her home. Fortunately, this use had been brought to an end, but it had distressed her greatly and she feared that similar disruption would be caused by the change of use of 21A.

35. The value of the Lewis's property to anyone else was immaterial, as its value to them was far more than its market price.

Expert evidence

36. Expert evidence in support of the application was given by Mr Clark, who is a partner of Fisher German, based in the Chester office, a short distance from the City Walls. In summary, his opinion was that the change of use of 21A from domestic to hotel use would amount to a negligible change in terms of visual impact and noise, and neither it nor the proposed physical alterations would unduly affect the saleability of 20-21 City Walls, or result in any diminution in its value. He valued 20-21 at £675,000, but had been unable to find any useful market evidence of comparable properties sold adjacent to hotels, guest houses or bed and breakfast establishments.

37. Mrs Lewis did not agree with Mr Clark's opinion of value, nor did she think that he was qualified to assess the impact of the modification on her or Mr Lewis. She rejected Mr Clark's view that there would be negligible intensification in terms of visual impact and noise, which was at odds with the views of his colleague Mr Harris, to which we will refer below.

38. Mr Clark's evidence was that whilst the proposed use of the application property was reasonable having regard to the neighbouring properties, the location, and the planning permission, it would, if implemented, be in breach of restrictions (a), (b), (d) and (g). Mr Clark then assessed the seriousness of these infringements.

39. In accommodating a maximum of eight additional guests, the proposed use of 21A as an annex to the neighbouring hotel would not be significantly more intense than the current domestic use, which might entail a family of four people holding barbeques or having children playing in the garden.

40. Some of the physical alterations would be an improvement from the perspective of the occupiers of 20-21: the new porch at first floor level would be turned through 90 degrees so that those entering the building would not overlook 20-21 as they do at present.

41. The proposed new conservatory extended no further into the garden than the existing structure, and whilst it would be wider than at present, it would not be seen from 20-21 owing to the layout of the buildings. The new balcony would not be visible from the house or sun lounge. It would be visible from the garden, but the balcony only serves one bedroom, with at most two occupants, and Mr Clark thought that it would be in a similar sight line to the existing balcony of Edgar House.

42. Mr Clark also considered the current setting of the neighbouring properties and the extent to which Mr and Mrs Lewis were already overlooked or intruded upon. The garden and terrace of 20-21 were clearly visible from the walkway running along the top of the City Walls to the rear. 20-21 was also overlooked from a window in the side elevation of 19 which in the recent past had operated as the Recorder Hotel bed and breakfast establishment.

43. In Mr Clark's view, whilst the proposed development would not have an adverse impact on 20-21, the restrictive covenants did provide a practical benefit by protecting against an alternative and prejudicial use in the future. But he did not consider that those practical benefits were of such value or advantage as to merit the payment of compensation to Mr and Mrs Lewis for any diminution in the value of 20-21.

44. Mr Clark's report was not the first involvement his firm had had in this matter. On 25 April 2016 his colleague Mr Michael Harris, the head of agency at Fisher German's Chester Office, had provided a marketing report to Mr and Mrs Lewis for a potential sale of 20-21 City Walls. He had recommended a guide price of £725,000. In an email to Mrs Lewis on 28 April, Mr Harris had expressed the opinion, based on having marketed many residential dwellings next to public houses, restaurants and hotels, that the presence of such an establishment did have a significant impact on market demand and thus on value. He suggested that the impact of having a public house or restaurant next door could wipe 10% off a property's value.

45. Mr Clark had been unaware that Mr Harris had already provided a marketing report when he accepted instructions in this case in August 2016. He said that Mr Harris's email contained general observations about the difficulty of marketing properties next door to pubs, restaurants or hotels and was not directed specifically to the impact of the proposed use of 21A on the value of 20-21. He did not disagree that in some cases a diminution in value of 10% might be

the result of such a use, but in other cases there might be only a negligible impact or no impact at all.

Discussion

46. The applicants' case focussed on the requirements of ground (aa) of section 84(1) and little attention was paid to the alternative ground (c). We will adopt the same course.

47. It was not suggested on behalf of the objectors that the proposed use of 21A as an annex to Edgar House was an unreasonable one, and it is obvious that by prohibiting its use other than as one dwelling house with one garage covenant (a) impedes that use. On the assumption that covenants (b), (c) and (g) remain enforceable at all following the death of the original covenantees, they also clearly impede the physical alterations which the applicants wish to make to facilitate the change of use.

48. The first contentious issue is therefore whether, in impeding the proposed use, the restrictions secure to the objectors some practical benefit of substantial value or advantage. It is not suggested that there is any element of public benefit which needs to be considered in this case.

49. The position of Mr and Mrs Jones can be dealt with summarily. No evidence was given by Mr Jones and his participation in the hearing was with a view to securing a payment offered by the applicants in return for his and his wife's consent to the proposed modification. That payment had been conditional on all parties agreeing to the modification, and the applicants' willingness to make it in those circumstances was not an admission that there was any injury to Mr and Mrs Jones which required to be compensated. There is nothing in the evidence which suggests to us that any practical benefit is secured to Mr and Mrs Jones by the restrictions in their capacity as owners of 14 Duke Street. Assuming the benefit of the restrictions is annexed to the house itself, and not simply the parking area at the rear, we are satisfied that this is much too remote for the activities of any person inside 21A to have any impact on the enjoyment of the house or its small rear garden. The only possible relevant difference which a change of use of 21A might have is on the volume of traffic using the shared access which the residents of 14 Duke Street also use to reach the parking area. The parking area itself is also shared with a number of other houses but 21A has no rights over it; the very small increase in the number of vehicles using the drive as a result of the proposed change of use of 21A will not cause anything more than the most fleeting inconvenience. The restrictions on physical alterations to 21A are of no consequence to the owners or occupiers of 14 Duke Street.

50. We are therefore satisfied that no loss or disadvantage will be suffered by Mr and Mrs Jones from the proposed modification of the restrictions.

51. Turning to the impact of the proposals on Mr and Mrs Lewis, as owners of 20-21, this must be assessed in the light of a number of established features of the immediate locality. The first of these, and the most significant, is that 20-21 is not in any sense secluded from its

neighbours. In particular, although the two are separated by 21A, it is already very close to Edgar House, which has operated as a successful hotel for many years and which will remain in use for that purpose whatever the outcome of this application. On the other side, the garden of 20-21 is directly overlooked by a window on the flank wall of 19, the former Recorder Hotel, while at the rear a bedroom window of 20-21 overlooks its neighbour's courtyard and entrance.

52. The presence of a hotel, as small and discrete as Edgar House may be, inevitably has consequences for its neighbours, some of which were referred to by Mrs Lewis in her evidence. Taxis and service vehicles will regularly pass the front door of 20-21, and occasionally a disoriented visitor may ask for directions or even let themselves in, wrongly assuming they have reached their destination. The terrace and gardens in front of Edgar House are separated from the garden of 20-21 only by the garden of 21A (although they would hardly be visible from the terrace of 20-21 because they are shielded by the side wall of 21A) and, at the closest point, the distance between the two gardens is only about twelve metres. The terrace and gardens of Edgar House are used for serving drinks and meals to guests and for small wedding receptions and other functions, with such noise and disturbance as events of that type are capable of generating. It was not suggested by Mrs Lewis that her use of her own garden or terrace was interfered with by these activities under current arrangements. The restrictions are not intended to provide protection from any adverse consequences of proximity between 20-21 and Edgar House, and the extent to which they provide other benefits must be considered in that context.

53. Nevertheless, we bear in mind that the proposal is to permit the change of use of 21A to become an annex to the hotel at 22 City Walls, rather than specifically as an annex to Edgar House under its current management. The applicants may decide to sell their business and some future operator of Edgar House may adopt a different trading style. Given the size of the buildings, and the fact that they are within a conservation area, there is little prospect that a hotel business on a substantially greater scale could be operated in this location, but we will make our assessment of the practical benefit of the protection offered by the restrictions in the knowledge that different styles of hotel trading are possible.

54. It is also relevant that the garden of 20-21 is adjacent to the top of the City Wall itself, along which runs a very well travelled pedestrian walkway. When the Tribunal visited the site (on a January morning) there was very little foot traffic along the wall, but the evidence of Mr Clark and Mr Stephen was that at other times the number of visitors and others using the route was substantial. Many visitors will be unable to see over the wall, but someone of above average height can do so without difficulty and is able to observe any activity on the terrace and in the sun lounge. The chances of this happening are, we suspect, increased significantly by the presence of a whimsical stone Cheshire cat placed on top of the garden wall by Mrs Lewis. It was not suggested by Mrs Lewis in her evidence that visitors passing on the other side of her garden wall in significant numbers, some of whom may take the opportunity to glance in, had an adverse impact on her enjoyment of her garden or terrace. Nevertheless, the extent to which the presence of strangers in the garden of 21A may realistically disturb that enjoyment must be judged in light of the fact that, even without them, the garden is not the most private space.

55. We are satisfied that guests arriving or leaving through the rear door of 21A will have little or no impact on 20-21. It is true that from the side windows of the Lewis's kitchen and on the first floor, and from the terrace at the side of their house, it is possible to observe someone entering or leaving the neighbouring building through the rear door to the first floor, but we think it very unlikely that a guest or member of staff would intrude on the privacy of 20-21 by stopping as they enter to stare into the garden or through the same windows. The impact which Mrs Lewis most apprehended is at the front of her house, and derives largely from the anticipated behaviour of hotel guests.

56. From the terrace of 20-21, from the front bedroom, and from the garden, it will be possible to see the top and side of the new ground floor extension which will take the place of the current conservatory at 21A. In terms of the appearance of 21A we think the presence of the new structure is likely to be an improvement and to have no adverse impact on the enjoyment of 20-21. The possibility cannot be ruled out that, at first floor level in 21A, an especially curious guest in the further of the two bedrooms might lean around the opaque privacy panel in order to look into the adjoining garden of 20-21, but we think that is likely to happen only very rarely. The risk of someone stretching far enough round to be able to view the terrace of 20-21 can be discounted. The view from the balcony directly to the front and to the right, into the garden of Edgar House itself, is likely to provide sufficient to occupy the attention of the curious guest; beautifully kept though the Lewis's home and garden are, they are intrinsically uninteresting and, we think, very unlikely to attract the attention of someone standing on the balcony.

57. We also think it very unlikely that, while hotel guests are in their rooms in the proposed annex, any other activity of theirs will disturb the enjoyment of the owners of 20-21. Any such annex will be very small indeed, with only four rooms on two floors and with no internal staircase. The opportunity for raucous behaviour inside the building is distinctly limited, even if no allowance is made for the fact that the current style of operation of the hotel appeals to older and more affluent visitors and prohibits children and animals.

58. The more realistic speculation is that, were 21A to become an annex to Edgar House, Mr and Mrs Lewis might, while in their own garden or on their terrace, occasionally come into contact with guests entering or leaving the annex through the front of the building, or in its garden. The number of occasions when this may be expected to occur is likely to be small. Only the two ground floor rooms will have immediate access into the garden. A guest in one of the upper rooms would have to come out at the rear of the building, negotiate the steep stairs into the rear area, and come around the side of the building to reach the garden. We think it much more likely that guests in the upper rooms will leave the annex and enter Edgar House through the rear, and go nowhere near the front garden of 21A. Guests staying in the two ground floor rooms will probably use the short route through the garden, via the gate in the fence, to reach the terrace and garden of Edgar House and from there enter the hotel itself. But they will do so, at most, on a few occasions during their stay. The hotel is very comfortable, but has only limited facilities, and most visitors are likely to use it as a base to visit the city or surrounding area, rather than as a home from home. They are likely to shuttle between the annex and the hotel on no more than half a dozen occasions during any day.

59. As for the use of the garden of 21A itself, this is a very small area adjoining the much larger garden and terrace of Edgar House which are well equipped with garden furniture. Unless similar furniture was provided in the garden of 21A we think it unlikely that much use would be made of the garden by guests and the risk of their disturbing the residents of 20-21 would be very small. Occasionally a guest might emerge into the garden to smoke, or take in the view, but so might any person staying at 21A, whether as their family home or only for a night or two. In our judgment the opportunity for any real disturbance from the garden is too small to be given much weight and can be further limited by prohibiting the amalgamation of the garden with the terrace and garden of Edgar House or the creation of a seating area. It will no doubt be necessary for lighting to be provided along the short route between Edgar House and the entrance at the front of 20-21, but this is likely to be discrete, in order to avoid disturbing hotel guests, and will be shielded from the bedrooms of 20-21 by the side wall of 21A. The walkway on top of the city wall is already illuminated by street lights, including one immediately beside the garden of 20-21, and we doubt that any additional light pollution will be significant.

60. The fact that those using 21A as an annex to the hotel will have no incentive to be accommodating to the permanent residents of the house next door is, we accept, a genuine fear on Mrs Lewis's part. We nevertheless consider the risk of additional harm to be without real substance; the risk of inconvenience from some poor behaviour already exists, the hotel being in such close proximity, and the use of 21A as an annex will create only limited additional opportunities for interaction between guests and permanent residents. Even if, whether in prospect or in reality, the presence of a small and changing population of strangers alarms, intimidates or offends Mrs Lewis, we are satisfied that by preventing the use of 21A as an annex to the neighbouring hotel, and by preventing the alterations now proposed, the restrictions do not secure any practical benefits of substantial value or advantage.

61. For the same reasons we are satisfied that the objectors would not be injured by the modification of the restrictions sufficiently to permit the use of 21A as an annex to the hotel conducted at 22 City Walls.

Disposal

62. These conclusions are sufficient to support the modification of restriction (a), the prohibition on the use of 21A other than as a dwelling, under grounds (aa) and (c) of section 84(1), so as to permit the use of 21A as an annex to the hotel operated at 22 City Walls.

63. It is likely that restrictions (b), (c) and (g) (the prohibitions on external modifications, new structures and colour schemes) have been discharged by the death of the original Transferors whose consent was required, but we received no evidence about them nor any argument on the current status of these covenants. The objectors themselves have no right to give or withhold consent to the restricted activities and in those circumstances we do not regard the covenants as conferring any benefit on them. The most appropriate course is for these covenants to be discharged absolutely on the same grounds.

64. Covenant (d) prohibits noisy, offensive or dangerous trades or pursuits being carried on at 21A, or any other trade or pursuit which may be a nuisance, annoyance or danger to those entitled to the benefit of the restriction. We can see no reason to discharge this covenant, and indeed its continuation is all the more important given the modification of covenant (a) to permit the hotel annex. It will be made clear however that the use of 21A as an annex to the hotel at 22 is not to be taken in itself to amount to a breach of covenant (d).

65. The applicants volunteered two conditions. The first was that the gable wall adjoining 20-21 must not be rendered, clad, covered or painted; as this has been offered, we agree that it should be introduced. The second condition offered by the applicants is that the garden of 21A must not be raised above its current level or landscaped other than in the fashion of a residential garden. We agree that this is an appropriate protection for the owners of 20-21, but we would add to it a requirement that for so long as 21A is used as an annex to the hotel at 22, no terrace, patio or decking shall be created in the garden of 21A and no garden furniture shall be placed there.

66. In response to the invitation in our draft decision, the parties agreed a form of words to give effect to these conclusions. Accordingly we order:

The restrictions in the second schedule to the transfer of the major portion of 21A City Walls, Chester made between Thomas and Marjorie Astbury as transferors and covenantees and Ernest and Thelma Ellis as transferees and covenantors and dated 31st July 1981 and now registered at H.M. Land Registry under title number CH 181 656 be discharged and modified pursuant to grounds (c) and (aa) of subsection 84(1) of the Law of Property Act 1925 as follows with reference to the several paragraphs of the said second schedule:

1. Paragraph (a) is modified by adding the following words at the conclusion thereof:

“or, in accordance with the planning permission dated 26th May 2016 (ref. 16/01008/Ful), as a detached annex comprising no more than four additional guest rooms in conjunction with (but not independently of) the use of 22 City Walls as a hotel, but on condition that for so long as the land hereby transferred may be so used as a hotel annex:

(i) no part of the present north easterly brick gable wall of the land hereby transferred shall be rendered, clad, covered or painted;

(ii) no window, door or other like opening or aperture shall be made in the said north easterly gable wall;

(iii) the front garden to the land hereby transferred shall not be raised above its present level or landscaped other than in the fashion of a residential garden and no terrace, patio or decking shall be created or garden furniture placed there.”

2. Paragraph (d) is modified by adding the following words at the commencement thereof:

“Subject to the second limb of paragraph (a) above, which said use as a hotel annex shall not be taken in itself to amount to a breach of this covenant,”

3. Paragraphs (b), (c) and (g) are wholly discharged.

67. The Land Registry shall give effect to this order upon application by the Applicants to alter the register pursuant to Schedule 4 of the Land Registration Act 2002 or otherwise as may be appropriate.

68. No compensation shall be paid by the Applicants to any of the Objectors.

Addendum on Costs

69. Following the publication of the Tribunal’s decision the applicants have applied for their costs of the application to be paid by the First and Second Objectors. Submissions have been exchanged in which the First and Second Objectors have themselves applied for a direction that their costs of the application be paid in full or in part by the applicants. No application has been made by or against the third and fourth objectors.

70. An unsuccessful objector is not usually required to pay the costs of a successful applicant for a direction under s.84(1), but as the Tribunal’s Practice Direction explains at paragraph 12.5(c), they may be required to do so if they have behaved unreasonably. One example of unreasonable behaviour may be the refusal of a reasonable offer of settlement.

71. In submissions in support of their own position the objectors have relied on the details of an unsuccessful mediation which the parties engaged in before the application was made. We disregard all of that material. In general, what happens in mediation is without prejudice to the parties’ public positions. In this case the mediation is said to have been undertaken expressly on a without prejudice basis. It is not open to one party to lift the cloak of confidentiality without the consent of the other. It would be contrary to the parties’ express agreement and prejudicial to the effectiveness of mediation generally if parties were permitted to attribute blame to each other for a mediation’s failure. The objectors have attributed the failure of the process to the applicants’ unwillingness to continue discussion after an agreement is said to have been reached in principle, and they liken that unwillingness to a refusal to mediate. This is not a case in which one party has refused altogether to engage in mediation, and reference to authorities on such cases is not in point. Any assessment of blame for the failure to reach a binding agreement would require consideration of the detailed positions which each party took in the mediation, which would be contrary to principle and their own agreement. We therefore disregard what we have been told about the mediation by the objectors.

72. We also disregard the objectors' complaints concerning the applicants' behaviour before the application was made. The restrictions did not limit what the applicants could do to modify the inside of their own property and they cannot legitimately be criticised for beginning internal work when they did.

73. Nothing in the conduct of the application by the first and second objectors was unreasonable except arguably their refusal to accept the applicants' offer of £35,000 in return for the modification of the restrictions sufficiently to allow the planning permission to be implemented. That offer was made, without prejudice save as to costs, on 30 January 2017 and remained available for acceptance until 9 February 2017. The period for acceptance was short, but it has not been suggested that the objectors would have responded to it differently if more time had been allowed. It is also true that the final order of the Tribunal includes details which were not offered in the letter of 30 January 2017, but we do not regard these as being of very great significance. Nor do we consider the offer to have been unclear. We therefore take the offer into account as a matter relevant to the issue of costs.

74. Had the objectors accepted the applicants' offer of 30 January 2017 in return for modifying the covenants, their pre-application costs would have been met and they would have received compensation of about £20,000 in addition. Both sides would have avoided the costs of the proceedings. We are satisfied that that outcome would have been significantly more advantageous for the objectors than the order we have now made. In those circumstances we are satisfied that it is appropriate to depart from the usual approach in section 84 cases and to order that the objectors make a contribution towards the applicants' costs to the extent that they were incurred after the expiry of time for acceptance of the offer.

75. We do not consider that any of the matters relied on by the objectors justify the making of what would be an exceptional order that the successful party pay the costs of the unsuccessful party, even in respect of the period before the making of the applicants' offer of 30 January 2017.

76. In quantifying the contribution which it is fair to require the objectors to make to the applicants' costs we take into account the fact that the applicants did not succeed on all of the grounds relied on, and for which the objectors had to prepare, or in modifying all of the covenants to the extent originally proposed. The applicants made some modest concessions in the course of the hearing. We also have regard to the additional expense incurred by the objectors' solicitors in connection with the preparation of the hearing bundle, which would not have been necessary if the applicants had adopted a more consensual approach.

77. The Tribunal's own fees for making the application, for the hearing itself and for drawing up the final order total £2,255. These have already been paid by the applicants and the first and second objectors should reimburse them. Taking into account all of the matters referred to by both parties in their submissions we direct that the first and second objectors should additionally pay to the applicants two thirds of the other costs which the applicants incurred in the proceedings after 9 February 2017.

78. If the parties are unable to reach agreement on the quantum of those costs they will be assessed by the Registrar on the standard basis. The applicants' relevant costs appear relatively modest and we very much hope they will be capable of being agreed.

Martin Rodger QC

Deputy Chamber President

Peter McCrea FRICS

Member

19 April 2018