UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE and MODIFICATION – practical benefits of substantial value or advantage – building line – effect of proposed house upon outlook, overlooking, privacy, security and overshadowing – effect and significance of screening beech hedge – application refused – Law of Property Act 1925 section 84(1)(aa) and (c)

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

BETWEEN:

CREEBRAY LIMITED

Applicant

and

(1) IAN HARRY DENINSON
(2) HELEN ELIZABETH DENINSON

Objectors

Re: Oldways,
Twitchells Lane,
Jordans,
Beaconsfield,
Buckinghamshire, HP9 2RE

Before: Judge Elizabeth Cooke and A J Trott FRICS
by Skype for Business
on
29-30 June 2020

Mr James McCreath for the applicant, instructed by IBB Law
Mr David Sawtell for the objectors, instructed by Lyons Davidson Solicitors

Introduction

1. Oldways is a vacant plot on Twitchells Lane, Jordans, Beaconsfield. It is subject to a restrictive covenant that prevents building in front of a line 50 feet away from its rear boundary. The applicant is the registered proprietor of Oldways and seeks to have the covenant discharged or modified pursuant to section 84 of the Law of Property Act 1925, so as to enable it to build a house, for which it has planning permission, in a position that would breach the restrictive covenant.

2. Mr and Mrs Deninson are the registered proprietors of Severalls, the house next door to Oldways. They have the benefit of the restrictive covenant and they object to its discharge or modification because of the detrimental effect they say the breach of the covenant would have on their property.

3. The hearing took place by remote video platform on 29 and 30 June 2020. The applicant was represented by Mr James McCreath and the objectors by Mr David Sawtell; we are grateful to them both, and to the parties for allowing us to visit their properties on 1 July 2020.

4. In the paragraphs that follow we set out the factual background to the application and the relevant law. We summarise the evidence, and then explain why we are not persuaded that the covenant should be modified or discharged.

The factual background to the application

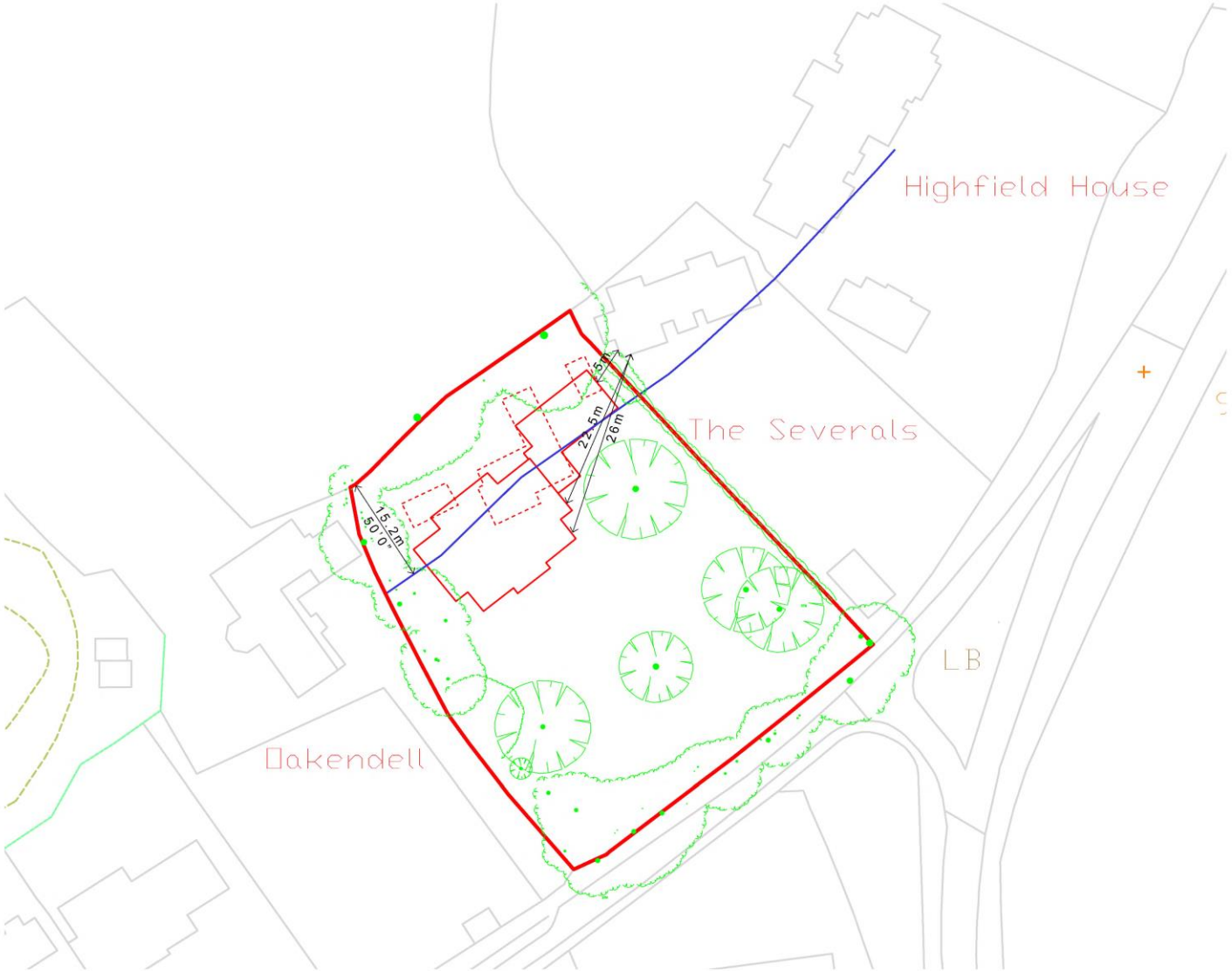
The properties and the covenant

5. Twitchells Lane is a pleasant rural road running north to south. On its west side at the junction with Wilton Lane are three adjacent properties: Highfield House to the north-east, then Severalls, then Oldways to the south-west. Each is burdened by the following restrictive covenant, imposed when the plots were sold for development in the 1920s, and each has the benefit of the other two properties' covenants:

> "No buildings shall be placed nearer to the road in front of the said land than is indicated by the building line shown on the said plan except garden sheds or garage or greenhouse not more than fifteen feet high and of a plan and position on the said land to be approved by the Vendor."

6. The Vendor of the 1920s conveyances has died so the requirement for approval is obsolete, but the covenant not to build in front of the building line remains. The plan on the following page shows the three plots and the building line. Each plot runs uphill as one walks away from the lane; the houses stand on the highest part of their plots. The front gardens, on the southern (sunny) side of the houses, slope downhill towards the lane. Highfield House is not visible as one stands in front of the house on Severalls looking

south, and similarly the inhabitants of Highfield House have a clear view southwards over their front garden. The plan also shows the outline of the house that is proposed to be built.



KEY

- *Site Boundary (0.30ha)*
- *Previous Dwelling (now demolished)*
- *Approved Dwelling (2016)*
- *Historic Building Line*
- *Existing Vegetation*

Rev.	Date.	Details.
-	-	-

Do not scale from this drawing. All dimensions to be checked on site. This plan is to be read with all accompanying documentation. © Bidwells 2020

Scale Bar: 0 4 8 12 16

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OLDWAYS, TWITCHELLS LANE, JORDANS

SITE PLAN

Job Code: 57519
OS License Number: 100017734
Drawing Scale: 1:500@A3
Date: 28.01.20
Drawn By: JS
Checked By: -
Drawing Number: UDS57519-A3-0100
Revision: -

7. Highfield House is owned by and is the home of Mr and Mrs John Woods, who moved there in 2000. It has a triple garage in front of the building line which, at 17 feet high, was built in breach of the height restriction in the covenant; Mr and Mrs Deninson did not object to that breach. Mr Woods is a director, and he and Mrs Woods are shareholders, of the applicant company; unsurprisingly therefore, although they have the benefit of the covenant, they have no objection to the applicant's proposed breach.

8. The house at Severalls is two storeys high; the objectors have lived there since 1996. They extended it in 2002, and the corner of the extension encroached 1.3 m past the building line; Mr and Mrs Woods did object to that, and the covenant was modified by agreement in settlement of an application made by Mr and Mrs Deninson under section 84, on the basis that the owners of Severalls would be obliged to maintain a hedge by way of screening between the properties.

9. There is no building on Oldways, although the concrete base of a building begun following a grant of planning permission in 2008 remains in place. Its garden, like those of Severalls and of Highfield House, is south-facing, sloping down towards the lane. The applicant acquired Oldways in 2011.

The proposed development at Oldways

10. When Mr and Mrs Deninson moved to Severalls in 1996 there was a house on Oldways, which was demolished in 2008. The plan produced by the applicant's expert, Mr Michael Derbyshire, show that house as breaching the building line; the objectors do not accept that it did. Whether it did or not is irrelevant to our decision. Planning permissions for a replacement dwelling were granted in 2007, 2008 and 2013. The house now proposed was granted planning permission on 4 September 2019; permission was granted for the same development in October 2016 but a fresh application had to be made when that permission lapsed.

11. The permission is for a six-bedroom family house over three levels (including accommodation in the roof space), and a triple garage with a gym above it. Its footprint would be larger than that of the demolished dwelling. It would have a ridge height of 9.8m and would be 17m deep by 33.3m wide. It would be at the northern end of the plot but the house would lie for the most part in front of the building line. The closest part of the building to Severalls would be the garage, some 5m to the west. The ground floor and first floor windows of the house would be respectively 22.5m and 26m away from the front elevation of Severalls, and the highest part of the roof would be over 5m further away still. A Douglas Fir stands between the front half of the house and the boundary with Severalls and is subject to a tree preservation order; and there is a beech hedge all along the boundary, on Oldways' land, some 7m high nearest the buildings.

12. The 2016 Planning Officer's Report included the following passages:

> "The increased crown roof would add to the bulk of the proposed dwelling when viewed from the side. However given the distance to the neighbouring dwellings the dwelling is not considered to have a materially different impact on

neighbouring residents in comparison to the previously permitted scheme. With regard to overlooking from side windows, if permission is granted a condition requiring first floor windows to be obscure glazed would be appropriate to address concerns with regard harm to the privacy or amenity of neighbouring residents."

13. The planning permission was granted subject to a number of conditions, including the following:

    a. The submission of a Tree Protection Plan before construction begins. The plan is to show, among other things, "no-dig construction" for the proposed hardstanding and drive within the root protection area of the Douglas Fir. Any hedge or tree shown to be retained on that plan cannot be removed, uprooted, destroyed or pruned for five years without the planning authority's prior consent;

    b. Any windows at first floor level in the north eastern and south-western elevations of the house are to be fitted with obscured glazing, and any window less than 1.7m above the floor is to be non-opening.

    c. No additional windows are to be inserted in the north-eastern or south-western elevations of the property at first floor level or above beyond those expressly authorised in the planning permission.

Severalls

14. The front garden of Severalls is terraced and has been cultivated with care; the back garden is very small and, for reasons we shall mention, not particularly pleasant or usable, and the front garden is therefore the family's outdoor space. There are garages at the entrance, by the lane, but a drive runs up the side of the garden so that it is possible to take a car up to the house to pick up and drop off - but not at the moment, because the beech hedge on the boundary has encroached on the drive.

15. The hedge is an important feature of the case. The house at Severalls, as we have said, is built on the highest part of the plot. There is a flat area in front of it, partly grassed and partly gravel. Although the house faces south, Oldways is screened from view by the hedge, which is some 7m tall nearest the house, dropping in height further away. It is a mature hedge with thick trunks and it looks, to our inexpert eyes, healthy. Importantly, it stands on Oldways not on Severalls, but of course the owners of Severalls are entitled to trim it when it encroaches on to their land.

16. When we visited it was mid-afternoon, and the hedge cast a shadow half-way across the drive. Anyone sitting on the double swing-chair that faces west on the eastern side of Severalls' garden looks across the garden at the hedge rather than the sunset, although that must vary with the time of year and the depth of the foliage.

17. It is not in dispute that the objectors engage professional contractors to trim the hedge annually; there is some dispute about when that is done and when it should be done, which we will come to. The objectors have trimmed a small area in order to demonstrate how much is needed to make room for a car, and we note that a lot of the foliage will be removed when this is done.

The reasons for the objection

18. The objectors' statement of case outlines the reasons why they are unhappy about the proposed development. They say that the building line protects their privacy and outlook, that the new building would overlook Severalls and would have a very significant impact on its value, that the new house will overshadow Severalls, will diminish their outlook, and will adversely affect their "sense of security" (objectors' Statement of Case paragraph 11a) and privacy.

19. At the risk of over-simplifying, we can say that at the heart of the objectors' case is, first, that they will be able to see the new house, despite the hedge, because of its great height and bulk and because the hedge is not completely opaque; and second that the inhabitants of the new house will be able to see them, removing their privacy and seclusion. There is also mention of security and of overshadowing. The objectors say these considerations will substantially reduce the value of their property.

The law

20. The applicant seeks the discharge or modification of the covenant pursuant to section 84 of the Law of Property Act 1925, subsections (1) (aa) and (c). Section 84 provides, so far as is relevant:

> "84(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 subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; 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 the loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time, when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of the land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify the restriction without some such addition."

21. Mr McCreath has explained that the applicant accepts that ground (c) does not add anything to its case, and accordingly we will look only at ground (aa). Section 84(1A)(b) is not relied on. Accordingly we have to decide:

1) Whether the proposed use of Oldways is reasonable;

2) Whether the covenant impedes that use;

3) Whether the impeding of the proposed use secures practical benefits to the objectors;

4) Whether, if so, those benefits are of substantial value or advantage;

5) If they are not, whether money would be an adequate compensation.

The evidence

The witnesses of fact

22. We heard evidence of fact from Mr John Woods for the applicant, and from both the objectors.

23. Mr Woods takes the view that the proposed new building would not cause a lack of privacy or amenity; that of course is a matter of opinion and he relies on his expert witness on those points. He says that he offered to discuss with the objectors the possibility of further restrictions or obligations by way of screening and landscaping that would meet their concerns but that his offer was not taken up. He points out that the objectors' security would be improved by having a home lived in next door rather than an empty plot.

24. Mr Woods says that in 2010 the then owner of Oldways, Howard Homes Ltd, sought the release of the restrictive covenant so that it could build in accordance with the 2008 planning permission or sell with the benefit of that permission. The building that would then have been built would, he says, have had substantially the same footprint as the one the applicant now seeks to build. He says that the objectors were willing to accept a payment of £100,000 from Howard Homes Ltd in return for the release, and refers to a draft deed (produced by the objectors), marked with the objectors' handwritten amendments, which indicates that a settlement was in prospect. Accordingly he does not believe that the objection to the present proposal is genuine.

25. In cross-examination Mr Woods criticised the objectors on three further counts:

    a. First, he says that when they sought a modification of the covenant in order to build their playroom in 2002 they took proceedings without seeking to negotiate first.

    b. Second, he said that the hedge had been less leafy than it might have been in winter because it had been trimmed too late in the year. It should have been trimmed in July, he said, so that it could grow back, but had been cut back hard in October so that it could not recover.

    c. Third, he said, or at least strongly implied, that the objectors had thinned the beech hedge. In 2018, he said, you could not see through the hedge and now you can; he said that the hedge had become thinner since he made his application to the Tribunal and that it "has been attacked from the other side". He added that all the beech hedges on his properties grow back when trimmed except this one, which has grown back and then disappeared again. "One minute we have a solid hedge, then the hedge is a lot thinner".

    That third point was not put to the objectors in cross examination and they therefore had no opportunity to answer it. We reject the suggestion that the hedge has been deliberately thinned. The first and second points, as we shall see, were denied by the objectors.

26. Mr Deninson's witness statement simply confirmed that he agreed with Mrs Deninson's evidence. Mrs Deninson gave a detailed statement. She sets out her concerns about the effect of the new building on her property; she acknowledges the applicant's offer to enter into new restrictions but is not interested, because the applicant has no intention of changing its plans to build the new house whose bulk, mass and height "would appear obtrusive and unduly overbearing to Severalls".

27. Mrs Deninson explained why their back garden is not usable. Mr and Mrs Woods own the fields behind Severalls. In 1997 there was a boundary issue and the objectors agreed a small variation in the boundary. Until that point they had had a post and rail fence along the rear boundary through which the fields could be seen. After that Mr and Mrs Woods replaced that fence with a 2m-high close boarded fence. As a result the back garden is enclosed, lacking light, and damp, and cannot be enjoyed as a garden. Mrs Deninson's evidence about this was not challenged, and Mr Woods agreed in cross-examination that he put up the fence; on the site visit we noted that the enclosure of the rear garden by the fence, which stands on elevated ground above the garden, leaves it very shaded and dingy. The importance of the front garden to the objectors is understandable.

28. Mrs Deninson explained in cross-examination that she and Mr Deninson have the beech hedge professionally trimmed every year, usually in September but sometimes later. She denied that it had ever been as late as November, and insisted that it had been trimmed at the time when the professionals advised it should be.

29. As to the modification of the restrictive covenant in 2002, Mrs Deninson explained that Mr and Mrs Woods failed to respond to an offer made to them at the outset, before proceedings were taken, to provide additional screening. They objected to the application to modify the restrictive covenant and claimed compensation of £100,000; she says they claimed to be concerned about screening in front of the extension and that the restrictive covenant, in preventing the extension in the planned dimensions, secured real benefits of substantial value or advantage to them. In the end, she says, they offered no expert evidence to the Tribunal in support of their position and the covenant was modified, by agreement, in return for provisions requiring screening. In cross-examination Mrs Deninson denied that she and her husband had taken proceedings without seeking agreement first.

30. As to the negotiations with Howard Homes Ltd, Mrs Deninson acknowledges in her witness statement that negotiations took place. She says that whilst the draft includes terms that accept the building in accordance with the planning permission, it was never executed. She explained in cross-examination that there was negotiation about other terms, but the objectors never accepted that the new building could go ahead and Howard Homes Ltd never modified its plans. Therefore the draft remained a draft.

31. We accept Mrs Deninson's evidence both on the 2002 modification proceedings and on the negotiations with Howard Homes Ltd. It is inherently unlikely that the objectors would have gone straight to a Tribunal application without approaching Mr and Mrs Woods first. And the fact that no deal was reached with Howard Homes Ltd (who were obviously very keen to make a deal and were offering a lot of money) indicates that the objectors were

truly unwilling to have the property overlooked by a large house in front of the building line.

32. Mrs Deninson is understandably aggrieved, first by the boundary dispute and Mr and Mrs Woods fencing which makes their back garden damp and dingy and has deprived them of their view of the fields, and then by Mr Wood's claim that the covenant is of no benefit to Severalls after his own insistence on its value to Highfield House when the playroom was built. His witness statement in those proceedings was produced and it is evident that he expressed, at that time, the very concerns – about a relatively small encroachment – that he so belittles when expressed now by the objectors. Mrs Deninson's anger was apparent when she gave evidence and we find that understandable. We do not think the negotiations that took place with Howard Homes Ltd, or any other aspect of the dealings between the parties over the years, cast any doubt on the genuineness of the objectors' position in the present application.

33. Mrs Deninson expressed concern about the possibility that the conditions currently attached to the planning permission will not be a long-term safeguard. Essentially she does not trust the local planning authority not to relax the conditions about obscure glazing and non-opening windows, and the prohibition on additional windows. She is concerned also about the three large ground-floor windows on the north-east side of the house, which she says will look directly into Severalls' garden – unlike the first floor windows they do not have to be obscure-glazed.

34. Mr Deninson was cross-examined briefly. He confirmed that the hedge had not been cut as late as November. He was pressed as to his view about light and shade; he expressed the view that because the hedge is not solid, shadow from the new building would be cast over the objectors' garden. As we said above, no expert evidence was offered in support of the objectors' views about overshadowing and we disregard those views in reaching our decision.

The expert evidence for the applicant

35. Mr Michael Derbyshire, MRTPI gave evidence for the applicant. He is a planning expert. He has been a planning officer in a number of local planning authorities, has been the Chief Development Control Officer at Three Rivers District Council, and is now a partner in Bidwells LLP. He is leading a number of large strategic development projects, and is an experienced expert witness in planning cases and in section 84 applications. His instructions were to give his opinion as to whether the proposed development is a reasonable use of the land, and as to what injury (within the meaning of section 84(1)(c)) or loss of practical benefits of substantial value or advantage (section 84(1)(aa)) will be suffered by the owners of Severalls if the covenant is discharged or modified so as to permit the development.

36. Mr Derbyshire accepted that the restrictive covenant was not a relevant consideration for the local planning authority when granting planning permission, but he pointed out the planning officers' views (in 2016 and 2019) that the proposed development would be in keeping with the character of the neighbourhood and would not injure the "street scene".

He took the view that the effect of the development on Severalls had been "robustly considered" by the planning officers and that their conclusion was the development was acceptable from that point of view.

37. In Mr Derbyshire's view, the distance of the main house at Oldways from the boundary of Severalls would mean that it would not be over-bearing or visually intrusive. He does not believe the ground-floor or first-floor windows of the house would visually intrude on Severalls, by which we take it he means that Severalls would not be visible from them. He thinks that the trees on the Oldways plot, and in particular the beech hedge and the Douglas Fir, will play an important role in screening the new house, and having visited in winter says that the beech hedge provides substantial screening in winter.

38. Mr Derbyshire was sceptical of any adverse effect on security and felt that there would be no effect on daylight and sunlight to the Severalls house and garden.

39. Mr Derbyshire's report focuses on planning and relies heavily on the conclusions of the planning officers. Beyond that, it is a subjective view; essentially Mr Derbyshire has confidence in the planning officers' views about the effect of the new house on the amenity of Severalls and does not himself think there will be any problem.

The expert evidence for the objectors

40. Mr Peter Smith MRICS MCIArb RICS Registered Valuer gave evidence for the objectors. His report was primarily about valuation, but he was also instructed to give his opinion on whether the building line covenant confers practical benefits of substantial value on Severalls.

41. Mr Smith says that the beech hedge does not provide adequate screening. He says the lower part of the hedge has been "irreparably damaged" by a fence put up on the Oldways side, and says that there does not appear to have been any attempt by the owners of Oldways to improve the hedge. He produced (as a supplemental report, to which no objection was made) photographs of the hedge at different times of the year. They show, as one would expect, that the hedge provides substantially less screening in winter. The pictures taken in January and early April indicate that the hedge is pretty much see-through at those times, with the garden at Oldways visible beyond.

42. At Appendix 1 of his report Mr Smith expresses the view that the covenant is as relevant and useful now as it was when it was imposed. That is irrelevant because the applicant is not suggesting the restriction is obsolete and accepts that its original purpose can still be fulfilled. At Appendix 2 he assesses whether the covenant impedes a reasonable use of Oldways, expressing the view that it does not because an alternative house could be built behind the building line. That is of course not the issue before the Tribunal; the question to be asked pursuant to section 84 is whether the covenant impedes "some reasonable user" of the land, namely the proposed house if it is a reasonable use; see paragraph 51 below.

43. The rest of Mr Smith's report comprised a number of valuations on different bases. Firstly, he valued Severalls with the benefit of the restriction at £1.75m. In doing so he referred to

the sale of a property known as Oakendell for £2m in 2018. Oakendell adjoins Oldways to the west but, unlike Severalls, does not have the benefit of the restrictive covenant; at the date of sale of Oakendell, Oldways had the benefit of the 2016 planning permission.

44. Secondly, Mr Smith considered the value of Oldways if the restriction were modified to allow the implementation of the 2019 planning permission. He did not value the site in terms but instead said that "the extra profit from the development would be of the order of £1.5m".

45. Thirdly, he said that in his opinion the modification of the restriction would reduce the value of Severalls from £1.75m to £1.5m. If the beech hedge was removed and replaced by a 2m high wooden fence he thought the value would be reduced by a further £200,000 to £1.3m.

46. Finally, Mr Smith claimed to address the question of whether the loss suffered by Severalls as a result of modifying the covenant could be compensated in money. He answered this affirmatively by assessing the said loss at £250,000. But unlike his previous valuation he derived this figure by reducing the value of Severalls with the benefit of the restriction by a "mid-range" figure of 12.5%. He applied this not to his valuation of £1.75m but to the higher figure of £2m which he said included stamp duty and costs.

The experts' joint statement

47. The expert witnesses prepared a joint statement in accordance with the Tribunal's directions recording areas of agreement and disagreement. The statement does not really add anything to the evidence of either expert but it does highlight the essentially subjective nature of their evidence. Mr Derbyshire does not think the new house will be visually overbearing. Mr Smith does. Mr Derbyshire thinks the hedge will provide adequate screening, Mr Smith thinks it will do so only in late spring and in summer. The experts do agree that the new house will be visible from the swing chair in front of Severalls. They agree there will be no adverse effect on security. Mr Derbyshire says there will be no adverse effect on light, while Mr Smith says it is difficult to predict.

Discussion

48. It will be apparent from our summary of the evidence that it did not give us a great deal of assistance. Naturally the objectors are upset about the proposed breach of covenant and are troubled by the potential effect on their property; equally naturally the applicant's case is that there will be little or no effect. As we said above, we are unimpressed by Mr Wood's allegations of bad faith on the objectors' part; we accept that their objection is genuine. We observed the anger felt by the objectors and we are unsurprised, in view of the fact that Mr and Mrs Woods apparently did not hesitate to claim the benefit of the covenant when the objectors proposed what might be regarded as a de minimis breach. However, we take the view that the extent of the proposed breach is such that even absent the history of bad relations between the objectors and Mr Wood, the objectors would be likely to be concerned about the substantial breach of the covenant now proposed.

49. We turn to the questions we set out at paragraph 21 above.

Is the proposed use of Oldways reasonable?

50. The building of a house on Oldways is obviously reasonable and indeed desirable. This particular proposed house is large and could be regarded as overbearing but it has planning permission and we regard its construction as a reasonable use of the land.

Does the covenant impede that use?

51. The objectors' Statement of Case says that the covenant does not impede a reasonable use of the land because it is open to the applicant to build a house behind the building line; in other words, there are reasonable uses that are not prevented by the covenant. Mr Smith, as we saw, took the same approach. However, Mr Sawtell in his skeleton argument states correctly that ground (aa) requires that "the proposed use will be a 'reasonable user'" and "the restrictive covenant impedes *that user*" (our emphasis).

52. It is not in dispute that the building of the proposed house will be a breach of the covenant; accordingly the covenant impedes that reasonable use of the land.

Does the impeding of the proposed use secure for the objectors practical benefits of substantial value or advantage?

53. We consider questions three and four together.

54. The substance of the objectors' concerns were summarised at paragraph 19 above. At their heart is an objection both to what will be seen of Oldways from Severalls (outlook), and to what will be seen of Severalls from Oldways (overlooking).

55. There was also a mention of security. This was not pursued at the hearing; we agree with the applicant that having a house built and lived in at Oldways will if anything increase the security of Severalls, by contrast with the position where there is an empty plot.

56. There is also concern about overshadowing. Mrs Deninson in her witness statement said that the position of the new house would mean that the front garden of Severalls would lose the sun earlier in the day than at present. Overshadowing was mentioned in the objectors' statement of case only in the context of section 84(1)(c), and therefore Mr McCreath argued that it should not be possible for them to rely upon it in the context of section 84(1)(aa). If they wanted to rely upon it, he said, they should apply to amend their pleading; and the applicant should then be allowed to rely upon the evidence of a rights of light expert (which it had commissioned for that purpose). We think that is an unduly technical pleading point; and we were not minded to accede to a late application to admit evidence from an additional expert in view of the fact that it was not an important part of the objectors' case. Indeed, they chose not to seek to adduce expert evidence about light. Mr Smith mentioned light only very briefly and with the disclaimer that he was not an expert. Our impression from the site visit was that the front garden of Severalls is already

partially shaded by the hedge, as far as the middle of the drive in the middle of the afternoon in mid summer. We do not think that light will be a problem and we think that the objectors were right not to pursue the point. We say no more about it.

57. The main issues are the view from Severalls and the loss of amenity as a result, and the view into Severalls with the resulting loss of privacy.

58. This was a case where a great deal turned on the site visit. We had the advantage of seeing the properties on a sunny summer afternoon. As we have already mentioned, Severalls looks out on its own front garden; Highfield House is not visible. A house built on Oldways behind the building line would be visible in the absence of the hedge, but as things are it would be almost invisible through the hedge in summer. At other times of year it may well be visible through the hedge (which we expect will be thinner in winter, to some extent, whatever time it is trimmed).

59. We were most grateful to Mr Derbyshire and Mr Smith who managed to arrange for a pole, the height of the proposed new house, to be placed on the existing concrete slab in the approximate location of the highest part of the new house. We were able therefore at least to see whether it would be visible at all (in the current state of the hedge), although without a sense of the bulk and breadth of the house.

60. The top of the pole was visible from the swing chair, and therefore generally from the front garden of Severalls looking west except for the short distance where the hedge is at its highest.

61. The objectors kindly allowed us to enter their property, and we looked out through all the windows on the first floor. We do not think that in the current state of the hedge the new house will be visible from inside, at least in summer.

62. But everything turns on the current state of the hedge. We accept that it is not in the interests of the owners of Oldways to remove it. But it belongs to Oldways, and it is possible that it will be neglected in the future; the owners of Severalls have no control over that. More seriously, the effect of age on the hedge cannot be predicted. The effect of the seasons, and of trimming, can: the hedge provided a thick leafy barrier when we saw it only because it was mid-summer, and only because it has encroached so far on to Severalls that the drive is unusable.

63. The restrictive covenant produces a design for the three adjacent properties that ensures a leafy outlook to the south without sight of buildings. It does not restrict the size of the houses on the plots, and it does not need to because it places a tight restriction on position. The discharge or modification of the covenant to enable the proposed new house on Oldways would thoroughly spoil that design, and the layout and rural aspect that the objectors bought, but for the current state of the hedge which, in summer and in its current untrimmed state, would substantially mitigate the problem by obscuring the new house.

64. But only the hedge in its current state secures that mitigation. We do not accept that it will offer adequate screening in winter. And the mitigation measures imposed as planning

conditions, in particular the obscured glass on the first floor of the new house which would prevent direct overlooking, would not go far enough to make up for the lack of protection afforded by the hedge in winter or in the future if the hedge deteriorates or is removed. The only real protection the objectors have from the visual intrusion of a bulky three-storey building visible from their garden is the hedge, in its current state. And that state is too precarious to be relied upon because of the age of the hedge, the necessity for trimming to open up the drive, and the uncertain future of any organic barrier.

65. We agree that the maintenance of the hedge is in the interests of the inhabitants of Oldways as much as that of the objectors. But that does not mean that future owners of Oldways can be relied upon to maintain it. Among the provisions Mr Woods offered as a way of meeting the objectors' concerns (see paragraph 23 above) was a positive obligation to keep the hedge in place, but positive obligations cannot reliably be made to run with the land and such an obligation may be very difficult to meet if the hedge partially dies or a replacement hedge fails to take root.

66. Accordingly the restrictive covenant, in preventing the building of the proposed new house in front of the building line, secures a practical benefit to the objectors; we regard that practical benefit as being of substantial advantage to them. The rural leafy outlook of these properties, in which buildings do not intrude, is a big attraction and we think the whole character of Severalls would be changed if the view in front of the house included the building next door in front of the building line – of whatever size, and especially one so tall and bulky as is now proposed. This is not a "de minimis" intrusion in front of the line. It is a very large house indeed, most of which is in front of the line. It will certainly be visible at times of the year when the hedge is thin, and that view will completely change the outlook from the front garden of Severalls and the character of Severalls as a property.

67. Because of that conclusion we do not need to consider the further question of whether by impeding the proposed use the restriction secures to the objectors practical benefits of substantial value. But we feel it necessary to comment briefly on Mr Smith's evidence which we found to be largely irrelevant and directed at the wrong questions. For instance, his reference to the amount by which the value of Oldways would increase if the restriction were to be modified was of no assistance in the absence of an argument that the objectors should be compensated by reference to a share in such development value (which Mr Sawtell, rightly, did not make). Mr Smith's assessment of the diminution in the value of Severalls at between £250,000 and £450,000 seemed to us to be arbitrary; the only explanation he offered was his asserted skill and judgment as a valuer. He also relied as his main comparable upon the sale in 2018 of Oakendell, a property adjoining Oldways but without the benefit of the covenant and therefore likely to have been reduced in price because of the prospect of the 2016 planning permission being implemented next door. Mr Smith did not think the adverse effect upon Oakendell would be as great as that on Severalls, but the main part of the proposed house would have been closer to Oakendell than to Severalls and there would, in our judgment, have been some adverse effect on value. Mr Smith does not appear to have considered the benefit of the restriction to Severalls when analysing the sale of Oakendell for use as a comparable. Indeed, Mr Smith did not give a breakdown of any of the adjustments he made to the sale price of Oakendell to derive the value of Severalls save to say that he made a discount for size, Severalls being smaller. And Mr Smith's application of a discount of 12.5% to the price plus stamp duty

and costs is obviously wrong. Such a discount should have been applied to the base figure of £1.75m.

Conclusion

68. Accordingly the application fails. This decision is final on all matters except costs. The parties are now invited to make submissions on costs, and a letter giving further 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.

Judge Elizabeth Cooke **Andrew Trott FRICS**

11 September 2020