IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 127 (LC)
Case No: LP/3/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – proposed construction of additional house in existing terrace – restriction against development of application land without vendors' approval – whether restriction obsolete – whether restriction secured substantial practical benefits – possible interference with right of way to rear of objectors' properties – worsening of on-street car parking – application for discharge or modification – restriction modified under ground (aa) – s84 Law of Property Act 1925

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

BY

JOHN HUGH SAMSON

Re: **41 Newcombe Street**
Elland
Halifax
HX5 OEG

Before: A J Trott FRICS

Sitting at: Employment Tribunal, City Exchange, 11 Albion Street, Leeds LS1 5ES
on
30 November 2016

Dominic Crossley, instructed by Holroyd & Co, solicitors, for the appeared for the Applicant
Mr Philip Stevenson and Mrs Stacey Stevenson in person

The following cases are referred to in this decision:

Re Truman, Hanbury and Buxton & Co Ltd's Application [1956] 1 QB 261
Re Surana's Application [2016] UKUT 368 (LC)
Re Havering College of Further and Higher Education's Application [2006] LP/89/2004 (unreported, BAILII: [2006] EWLands LP_89_2004)
Crest Nicholson Residential (South) Ltd v McAllister [2002] EWHC 2443
Elliston v Reacher [1908] 2 Ch 374
Martin v David Wilson Homes Limited [2004] EWCA Civ 1027

DECISION

Introduction

1. Mr John Samson is the freehold owner of 41 Newcombe Street, Elland, Halifax HX5 OEG, a 1960s end of terrace house. On 28 June 2013 Mr Samson obtained planning permission to extend the terrace by constructing a house adjoining the northern flank wall of No. 41. At the same time Mr Samson proposed to construct a single storey kitchen extension at the rear of No. 41 under permitted development rights. Mr Samson renewed the planning permission in substantially the same form on 25 November 2016.

2. Under a conveyance dated 14 August 1964 the purchasers of No. 41 (then known as Plot 1) covenanted to observe and perform the stipulations contained in the Third Schedule. Paragraph 2 of that Schedule states:

> "… not to erect upon the said plot of land any buildings (either temporary or permanent) of any kind whatsoever without previously obtaining the written consent of the Vendors to the erection of such buildings and the previous approval of the plans for the same."

3. Part of Mr Samson's property, between the northern boundary of the proposed house and the adjoining properties known as Fern Bank and Fern Place, is the route of a vehicular and pedestrian right of way extending to the rear of the six terraced houses comprising 41 to 51 Newcombe Street. Each freeholder is apparently entitled to pass and re-pass "in any manner" over this right of way (known as the "brown land") with each paying one sixth of the cost of keeping all of the "said driveway in good repair and condition".

4. Mr Samson wants to implement the planning permission and to enable him to do so he applied under section 84 of the Law of Property Act 1925 on 22 January 2016 for the discharge, or modification in the alternative, of restriction 2 of the 1964 conveyance.

5. It appears that the conveyances of the other plots in the terrace were in like form to that of Plot 1. The section 84 application was served on the owners of the other terraced houses and three objections to the application have been received from the following, whose entitlement to the benefit of the restriction is admitted by the applicant:

(i) Adele Ibbotson (No.47)

(ii) Philip and Stacey Stevenson (No.49)

(iii) Alison and Simon Ibbotson (No. 51)

6. Mr Dominic Crossley of Counsel appeared for the applicant and called Mr Samson as a witness of fact.

7. Mr and Mrs Stevenson appeared as litigants in person. Neither Ms Ibbotson nor Mr and Mrs Ibbotson appeared or were represented, but their written objections have been taken into account.

8. No expert evidence was called by either the applicant or the objectors.

9. I made an accompanied visit to see the application land and the surrounding area on 30 November 2016.

Statutory provisions

10. Mr Samson relies upon grounds (a), (aa) and (c) of section 84 of the 1925 Act.

11. Ground (a) permits the Tribunal to modify or discharge a restriction on the use of land if by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which it considers material, the restriction ought to be deemed obsolete.

12. Ground (aa) requires that, unless it is modified, the continued existence of the restriction will impede some reasonable use of the land for public or private purposes and, in impeding that use either (a) will not secure to those entitled to the benefit of the covenant any practical benefits of substantial value or advantage to them; or (b) is contrary to the public interest; and that in either case a payment of money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

13. Ground (c) is applicable where the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

The case for the applicant

Ground (a)

14. Mr Crossley submitted that the test of obsolescence was whether the original object of the restriction could still be achieved (per Romer LJ in *Re Truman, Hanbury and Buxton & Co Ltd's Application* [1956] 1 QB 261 at 272). He accepted that "in a narrow sense" the original object of the restrictive covenants in this case could still be achieved, i.e. to prevent the construction of another house on the application land, but argued that the "real object" of the covenants was to ensure that the houses in the terrace retained a uniform appearance by preventing the erection of further buildings without the vendors' consent. That purpose could no longer be achieved because over the years the houses in the terrace had been extended, e.g. a porch at No. 45, a conservatory at No. 47, a kitchen extension at No. 51, and various outbuildings constructed, for instance, at No. 49.

15. Restriction 2 in the Third Schedule required the written consent of the vendors to the construction of any buildings. The vendors were Keith Bradley and John Crabtree, trading as Bradley & Crabtree. Mr Samson said that he thought the vendors' business went into liquidation at "some time in the 1970s" and did not know what became of them after that. He said they may well now be deceased. Mr Crossley submitted that in those circumstances the covenant was effectively spent since it was only the vendors who could give the necessary permission and not their successors in title.

Ground (aa)

16. Mr Crossley submitted that the covenants impede a reasonable user of the land, namely the construction of a further dwelling for which planning permission had been granted and recently renewed.

17. Mr Crossley relied upon the recent decision in *Re Surana's Application* [2016] UKUT 0368 (LC) which he said modified a covenant with similar wording to that in the subject case in circumstances where the overall integrity of a building scheme would not be jeopardised by allowing the modification. He said that in the present application the overall integrity of the building scheme could no longer be compromised by the proposed construction of another house because numerous buildings had already been constructed in the terrace in breach of restriction 2.

18. Mr Crossley noted that unlike *Surana*:

(i) There was no possibility of the proposed development being the "thin end of the wedge" because the opportunity to construct another house only existed on Mr Samson's plot.

(ii) There would be no interference with the rights of third parties over the application land. The right of way that the other house owners in Newcombe Street had over the brown land was not affected by Mr Samson's proposed development. Subject to the restriction Mr Samson was free to develop his land outside the brown land as he wished.

(iii) The system of restrictive covenants had not generally been observed. The other house owners had breached the covenant by building extensions and outbuildings without the necessary consent.

19. Furthermore the proposed development, like that in *Surana*, was in keeping with the type, size, style and density of the existing houses in the street.

20. Mr Crossley submitted that there was no evidence that the restrictions secured to the objectors any practical benefits of substantial value or advantage. This was not a dispute about the construction of a new house so much as a dispute of fact about the position of the fence that marked the edge of the right of way over the brown land. There was evidence to show the position of the original boundary wall and of the former garage on the application land. The objectors' claim that the boundary had been moved outwards was an unsupported assertion. The objectors would continue to have the same benefit of access across the brown land that they had

always had: the proposed development would not interfere with that. In any event Mr and Mrs Stevenson at No. 49 had constructed a two metre high wooden fence across the brown land which denied Mr and Mrs Ibbotson at No. 51 any access to their property along the right of way.

21. Mr Crossley argued that it was contrary to the public interest to allow the restrictions to impede the proposed development at a time when there was a need for more housing. The planning officer's report said the proposal was compliant with National Planning Policy Framework policies on sustainable development and with the replacement Calderdale Unitary Development Plan. The planning officer said the proposal satisfied Policy BE2 (privacy, daylighting and amenity space) and this finding about the protection of residential amenity was not challenged by the objectors.

22. Mr Crossley also submitted that the area where construction is proposed is currently unsightly and would be improved by the proposed development.

Ground (c)

23. Mr Crossley submitted that the proposed discharge of the restrictions would not injure the objectors. The main objection to the proposal was the effect the objectors thought it would have on the access of residents over the brown land. But the brown land would not be affected because the footprint of the proposed house would not touch it. Any existing alleged interference with rights of access had no bearing on the application and was separately actionable.

24. There was no evidence that the proposal would adversely affect the amenity of the objectors. The new house would not overlook the other houses in the terrace and would not affect their outlook.

25. Nor was there evidence to suggest that the value of the objectors' houses would be diminished as a result of the proposal. It might well have a positive effect. The owner of the new house would be likely to contribute towards the upkeep of the brown land thereby reducing the cost to the other residents.

26. The objectors had expressed concern that the proposed development would exacerbate problems of on-street car parking but both the new house and No. 41 would be provided with two off-street parking spaces.

The case for the objectors

27. The objectors' main concerns were the prospect of the new development encroaching onto the brown land and its likely adverse effect on on-street car parking. Both Mr and Mrs Stevenson said that the proposed house would not be an issue if it "stayed in the boundary".

28. Mr and Mrs Stevenson said that the position of the current boundary fence meant that the right of way had been reduced in width. This had caused particular problems for Mr and Mrs

Stevenson when they wanted to park a skip at the rear of their property (No.49) and had generally stopped residents driving vehicles over the brown land and gaining access to the garages located at the rear of the terrace. Emergency vehicles were currently prevented from gaining access to the rear of the properties. Furthermore the proposed development site had been unkempt for six years and broken glass had been spilled onto the brown land.

29. The on-street car parking in Newcombe Street was already difficult and the construction of another house would make the situation worse. Mr Stevenson doubted that it would be possible to accommodate two cars on the proposed off-street parking areas in front of No.41 and the new house.

30. Mr and Mrs Stevenson also said that there was an underground stream running under the brown land which made the ground soft and would lead to flooding problems if a new house was constructed on it.

31. In their written submissions the other objectors reiterated the present difficulties they had in gaining access to their properties due to the reduction in the size of the brown land and emphasised the inability of emergency vehicles to drive down it. The development site had been "a horrific eyesore for years" and Mr Samson had shown a lack of respect to the other residents which was likely to continue if the development proceeded and would diminish the value of their properties.

Discussion

Ground (a)

32. For ground (a) to be established the Tribunal must be satisfied that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete. A restriction is obsolete if its original object can no longer be achieved. Mr Crossley accepted that "in the narrow sense" the purpose of restricting the development of each plot to one house could still be achieved. Mr Crossley invited the Tribunal to look at the "real object" of the restriction which he said was to maintain a uniform appearance for the terrace of houses but I see no basis for adopting this extended object which in any event is still achieved in my opinion. What one sees when visiting the site is still a short terrace of six 1960s houses. Its fundamental uniformity has not been diminished by the addition of a porch here or a conservatory there and the construction of garages to the rear of the terrace was anticipated on the conveyance plan. In my opinion there are no changes in the character of the property or the neighbourhood which would give rise to a finding that restriction 2 is obsolete. I do not regard those modest alterations as buildings in their own right, and assuming them to have been constructed without the consent of the vendors they were still not in breach of covenant and do not indicate that the covenant has been disregarded.

33. Mr Crossley submitted that restriction 2 of the Third Schedule was spent because the named vendors were either dead or no longer contactable. In *Re Havering College of Further and Higher Education's Application* [2006] LP/89/2004 (unreported) the Tribunal, George Bartlett QC, President, and Mr N J Rose FRICS considered whether a restrictive covenant against the

erection of dwelling houses without the approval of plans by the vendor or his surveyor was obsolete where the vendor had died. The Tribunal relied on *Crest Nicholson Residential (South) Ltd v McAllister* [2002] EWHC 2443 (Ch) where a restriction on land sold for residential development prevented the erection of any house without the approval of "the Company" of plans and drawings. Neuberger J held that, if the company ceased to exist, the restriction was discharged. The Court of Appeal expressed agreement with this conclusion ([2004] 2409 at 2430H to 2431C).

34. In the present application there was no evidence that the vendors are both dead and no evidence of their age at the date of the covenant. Although it is obviously possible that both are dead no attempt was made to prove that and in those circumstances I am not prepared to assume it simply from the passage of time. I therefore do not consider that ground (a) is satisfied.

Ground (aa)

35. Mr Crossley, in comparing the present application to that of *Surana*, appears to assume that the development of the six terraced houses in Newcombe Street in the 1960s constituted a building scheme. The evidence to support that assumption comprises the similarity between the conveyance of No.41 (Plot No.1) on 14 August 1964 and No.49 (Plot No.5) on 3 July 1964. The title was derived from a common vendor and the estate was laid out for sale in lots but there is insufficient information to conclude that both parties purchased from the common vendor on the footing that the restrictions subject to which the purchases were made were to inure for the benefit of other lots whether or not they inured for the benefit of other lands retained by the vendor (see Parker J in *Elliston v Reacher* [1908] 2 Ch 374 at 384). Indeed clause 4 of both conveyances states:

> "…the covenant by the Purchasers hereinbefore contained [to observe and perform the stipulations in the Third Schedule] shall not …. be deemed to create a building scheme."

36. I therefore do not accept that the current application is directly comparable to *Surana* which was concerned with a building scheme. In any event each application under section 84 must be determined on its own facts, and there is nothing to be gained by considering the facts of other cases.

37. The objectors' primary concern is to maintain the integrity of the brown land as a vehicular access to the rear of the other houses in the terrace. Their right to use the brown land is contained in the First Schedule to the respective conveyances (assuming that all the houses have the same right as Nos. 41 and 49). Mr Crossley submitted that this had nothing to do with the restriction and any interference with this right was separately actionable. Provided the proposed development did not encroach upon the brown land the restriction did not secure any practical benefit in terms of access to the objectors.

38. It is difficult to determine from the evidence whether the proposed development encroaches upon the brown land. The conveyance plan shows a differently shaped northern boundary of the site to that shown on the Office Copy Plan of Mr Samson's freehold interest. The boundaries shown on the land certificate are, of course, only general boundaries. The brown land curves as it goes around the right angle between the northern and eastern sections of the access.

The existing access has no such curve but instead there is a sharply angular turn demarcated by temporary metal fencing. It seems from the objectors' representations that it is the erection of this temporary fencing that has caused difficulty gaining vehicular access to the rear of their properties. There does not appear to have been a problem with the boundary of No.41 as shown on the Office Copy Plan even though, in my opinion, that too probably encroached onto the brown land. Having examined the plans carefully and following my site inspection I consider that the proposed rear garden of the new house extends beyond the existing garden shown on the Office Copy Plan and onto the brown land.

39. In my opinion the restriction, by impeding the proposed development, would prevent such encroachment and would secure to the objectors a practical benefit of substantial advantage, namely unimpeded access to the rear of their properties. The possibility that any existing encroachment may be separately actionable does not, it seems to me, vitiate such a benefit.

40. Apart from the question of access over the brown land I do not think the proposed development would adversely affect the amenity of any of the other houses in the terrace. The proposed dwelling would not affect the outlook from any of the other houses and, in turn, it would not overlook them. I did not understand Mr and Mrs Stevenson to suggest otherwise at the hearing.

41. Mr Crossley's submission that the unkempt appearance of the application land would be improved by enabling the redevelopment of the site is, as I noted at the hearing, a bad point since Mr Samson is responsible for the application land and should not be allowed to benefit from his failure to keep it reasonably tidy.

42. The objectors also raised the question of on-street parking. There are obvious difficulties with on-street parking in Newcombe Street. However the proposed development provides two off-street car parking spaces at the front of the new house and condition 5 of the planning permission dated 25 November 2016 requires the approval of the provision of a surfaced car park for the occupiers of No.41 to accommodate two vehicles before development of the new house begins. I share the objectors' scepticism about whether this can be achieved physically on a frontage which is only 4.6 metres wide, a metre less than the width of the proposed parking area at the new house. But it would be possible to park at least one car off-street at the front of No.41 and, on balance, I do not consider that the amount of on-street parking will be materially affected by the proposed development.

43. Section 84(1)(C) of the 1925 Act provides that the power of the Tribunal to modify a restriction includes the power to add further provisions restricting the use of, or the building on, the application land as may appear to the Tribunal to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicant.

44. In my opinion the protection of the access way over the brown land is a practical benefit of substantial advantage that will continue to be secured to the objectors by the addition of a further provision to restriction 2; namely that the boundary of the proposed development, as constituted by both the flank wall of the proposed house and the facing brickwork boundary wall, shall not extend beyond the boundary of No.41 as it is shown to the south and west of the access way on the Office Copy Plan of Title No. WYK679515 and, in any event, shall not be less at any point

than 3.8 metres from the boundary of the neighbouring property to the north, nor less than 6 metres from the factory building wall to the east.

45. Subject to this additional provision, and its acceptance by the applicant who shall produce a revised plan to scale reflecting the restrictions proposed and which must be approved by the Tribunal, I am satisfied that ground (aa) has been established and I modify the application on that basis by way of proviso to restriction 2. I am not prepared to discharge the restriction as to do so would jeopardise the integrity of the access way serving the residents of the terrace.

46. I received no evidence about whether money would be an adequate compensation for any loss or damage suffered by the objectors nor about whether there should be payment of a sum under either section 84(i) or (ii) of the 1925 Act. None of the objectors made a claim for compensation and I make no award.

Ground (c)

47. Since I have found that Ground (aa) has been established it is not necessary for me to consider Ground (c) in detail. In my judgment the proposed development would, without the additional provisions referred to above, injure the objectors and I am not satisfied that this ground has been established.

Restriction 1 in the First Schedule

48. At the hearing I queried whether restriction 1 would impede the development of an additional house on the application land. The application was not for the modification or discharge of this restriction but only restriction 2. Restriction 1 states:

> "Not to use buildings erected or to be erected upon the land hereby conveyed surrounded by a red line on the said plan for any purpose other than as a private dwelling-house but so that the profession of a doctor dentist or solicitor may be carried on thereon."

49. In *Martin v David Wilson Homes Limited* [2004] EWCA Civ 1027 Buxton LJ said at 22 to 23:

> "… I do not think that the expression "a" does carry any necessary implication of a singularity. "A" is an article not a number. When, as here, one is concerned with how any particular building shall be used, a natural way of expressing that is "use as a private dwelling house.
>
> If the draftsman had wanted to say, 'build one dwelling house and one dwelling house only', he would have needed to take at least the following steps. First, unless he was going to produce a draft that was extremely confusing, it should put that clause separately in the covenants from the user clauses. Secondly, he would have to refer to the erection of one dwelling house only, not the use of buildings, extant or to be built. Third, it would not refer to the use of buildings in the plural."

50. As Buxton LJ went on to say at paragraph 44 the expression "a private dwelling house" takes it nature from its context and does not have any fixed connotation of singularity. In the context of the Third Schedule in the conveyance I am satisfied that reference to a private dwelling house in restriction 1 does not mean a single dwelling house but means that any building erected or to be erected on the land shall only be used as a private dwelling house (including, in my opinion, ancillary buildings or structures such as a garage, shed or conservatory). Restriction 1 does not prevent the proposed development since that is to be used as a private dwelling house.

Determination

51. I am satisfied that the applicant has established ground (aa) subject to the additional provision set out in paragraph 44 above. There are no reasons why I should not exercise my discretion to grant the application to modify the covenants.

52. The following order will accordingly be made:

> "The Third Schedule to the conveyance of the application land dated 14 August 1964 shall be modified on ground (aa) by the insertion of the following words at the end of paragraph (restriction) 2:
>
> 'Provided that the development permitted under planning permission reference 16/01056/FUL WARD: 03 granted by Calderdale Metropolitan Borough Council on 25 November 2016 and the proposed development of a kitchen extension to 41 Newcombe Street by way of permitted development may be implemented in accordance with the terms, details, conditions and approved plans referred to therein but subject to the boundary of the proposed development, as constituted by both the flank wall of the proposed house and the facing brickwork boundary wall, not extending beyond the boundary of No.41 as it is shown to the south and west of the access way on the Office Copy Plan of Title No. WYK679515 and, in any event, being not less at any point than 3.8 metres from the boundary of the neighbouring property to the north, nor less than 6 metres from the factory building wall to the east.
>
> Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached to such permission.' "

53. An order modifying restriction 2 in accordance with the above wording shall be made by the Tribunal provided, within three months of the date hereof, the applicant shall have signified his acceptance of the proposed modification and subject to the Tribunal having approved the applicant's plan of the revised boundary treatment.

Costs

54. At the hearing Mr Crossley submitted that the applicant should be awarded his costs due to the unreasonable conduct of the objectors in pursuing objections which were irrelevant to the issues and were, as he described them, "neighbourhood gripes". They had raised no valid objections to the proposed house being constructed within the current boundary of No. 41.

55. I do not consider the conduct of the objectors, who were not professionally represented, to have been unreasonable. They had genuine concerns about the effect of the application on their amenity in terms of on-street car parking and the availability of their access rights given the difficulties they had experienced with the temporary fencing erected by the applicant and which they considered to be indicative of future problems if the application succeeded.

56. Direction 12.5(3) of the Tribunal's Practice Directions (November 2010) states that:

> "… because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicants' costs."

57. I do not consider that the objectors acted unreasonably and therefore I make no order as to costs.

Dated: 27 March 2017

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)