UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 93 (LC)
UTLC Case Number: LP/18/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – planning permission for singe storey extension adjacent to neighbours' garden – practical benefit of substantial advantage – application refused

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

BETWEEN:

ANDREW PALMER **Applicants**
LISA PALMER

and

JOHN HARRISON **Objectors**
ROSEMARY SWEETMAN

Re: 30 Harewood Crest,
Brough,
East Riding of Yorkshire,
HU15 1QD

Peter McCrea FRICS FCIArb

22 February 2021
By remote video platform

The applicants and the objectors appeared in person.

Introduction

1. The applicants, Andrew and Lisa Palmer, live at 30 Harewood Crest, Brough in the East Riding of Yorkshire ("the application property"). They bought the property in September 2019, and in December 2019 obtained planning permission to construct a single-storey extension to the side of the property, and to reconfigure a small front lawn into a parking area. However, they learnt that they are prevented from building the extension because of restrictions on the title. Accordingly, they apply to the Tribunal to modify the restrictions, to an extent limited to that which would enable them to implement the planning permission.

2. John Harrison and Rosemary Sweetman ("the objectors") live next door at 28 Harewood Crest, and object to the application; first they believe that any modification would lead to further applications across the estate, and secondly because of the effect on their property of the extension.

3. I heard the application by digital platform on Monday 22 February 2021. Both the applicants and the objectors were unrepresented and appeared in person. All four gave evidence, and subsequently accompanied me on 6 April 2021 when I carried out a site inspection of the application land and the objectors' garden. I then made an unaccompanied inspection of the wider estate.

The restrictions

4. The restrictions which the applicants seek to modify were imposed by a conveyance dated 30 June 2006 between the original developer of the estate, David Wilson Homes Limited ("the Transferor") and the first occupiers of the application property, Steven and Jane Tetley ("the Transferees"). By clause 13.4 of the conveyance the Transferees covenanted:

> "… for the benefit of any parts of the Estate still owned by the Transferor and all purchasers of plots on the estate and so that such covenants shall be enforceable against the Transferee (who will not be liable personally for any which are restrictive in nature after they have disposed of their legal interest in the property) as follows:
>
> ...
>
> 13.4.5 To keep grassed any unenclosed parts of the garden of the Property excluding planted areas and areas of hard surface and to keep all parts of the garden neat and tidy and to maintain in the position as previously existing or erected by the Transferor any Boundary Structure (together with any garden hedges, fences and walls not forming the boundary with an adjoining Plot on the Estate) in good condition repairing or renewing to their original specification as necessary provided that hedges shall be maintained so as not to exceed 3 metres in height.
>
> …

13.4.7. No structure will be erected upon any parking space of the Property or forward of the front elevation of the Building.

5. I shall refer to clause 13.4.5 as the "grassed area restriction", and 13.4.7 as the "parking area restriction".

6. By clause 13.6.3 of the conveyance, the two restrictions are enforceable between the Transferor and the Transferee and also between the purchasers of plots on the Estate.

7. Although by clause 13.6.4, the restrictive covenants ceased to be binding between the Transferor and the Transferee after 30 June 2011, the applicants sought consent for the proposed development from the successor company to the original developer, Barratt David Wilson Yorkshire East, which indicated that consent was granted on the understanding that planning and building control was obtained and that any necessary approvals from immediate/adjacent neighbours was provided. However, as the applicants subsequently realised and confirmed at the hearing, the developer's consent was not required because the Restriction Period expired some years ago. The restrictions continue to be binding between plots, however.

The application property and the proposed development

8. The application property is a three-storey brick and tiled roof house in a cul-de-sac location in the heart of this modern housing estate. When viewed from the front, there is a narrow drive which runs along the right-hand elevation of the house leading to a single detached brick garage towards the rear. To the right-hand side of that drive, there is a close double boarded fence which forms the applicants' boundary with the objectors' property at 28 Harewood Crest. No.28 is a on a large corner plot, with the main garden to the left of the house, thus between it and the drive which forms part of the application land. The view into the garden from the objectors' house is therefore directly towards the fence boundary, and beyond it the Palmers' drive (but not their single garage – that adjoins a separate neighbour's plot).

9. On 6 December 2019, the East Riding of Yorkshire Council granted planning permission under code 19/03306/BLF for the erection of a single-storey extension on the drive, linked to a conversion of the existing garage. The new space would comprise an office, a playroom, utility room and a downstairs shower room. The roof would be mono-pitch, with Velux roof lights. To the front of the property, the existing lawned area would be surfaced to form space for two vehicles.

The application

10. The application is to modify the grassed area restriction and the parking area restriction to enable the applicants to implement the planning permission. They rely upon grounds (a), (aa), and (c) of section 84(1) of the Law of Property Act 1925.

11. Ground (a) applies where the Tribunal is satisfied, that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete.

12. 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. The circumstances in subsection (1A) which must be demonstrated are as follows:

> "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."

13. The Tribunal is required, when considering whether sub-section (1A) is satisfied and arestriction ought to be discharged or modified, to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area as well as the period at which and context in which the restriction was created or imposed and any other material circumstances (section 84(1B)).

14. For an applicant to succeed under ground (c), the Tribunal must be satisfied that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

Evidence

15. Mr and Mrs Palmer both gave evidence, explaining that the reason for the extension was to create additional living space for themselves, their children and possibly to accommodate an elderly relative. Mr Palmer's job had changed; he now worked full-time at home and would be able to do so in the proposed office. The current driveway was very tight, meaning that the Palmers could not get out of both sides of their car at once, whereas the proposed location in the new parking area would be more useable.

16. Mr and Mrs Palmer said that they were aware of the covenants when they purchased the Property but, with hindsight naively, did not pay particular attention to them.

17. They said that they have instructed their architect to design the extension with their neighbours in mind, consequently there were no views from the proposed building across the neighbour's garden and there was an internal parapet gutter. In Mr and Mrs Palmer's view, the development would provide the objectors with more privacy and security; they would not have the noise and disruption of the Palmers' car driving up and down the driveway to the garage.

18. Mr and Mrs Palmer referred to a number of similar changes to houses across the estate which they said demonstrated that the covenants were obsolete.

19. Mr Harrison and Ms Sweetman also gave evidence. Their objections had two main aspects. First, they were concerned that if successful, the application would set a precedent that would then be relied upon by other householders across the estate leading to it being more built up. They considered that the principle of the covenants should be maintained, and that Mr and Mrs Palmer should comply with the covenants which they were aware of when they purchased the property.

20. Secondly, they objected to the application because of the effect the development would have on their property. Whilst they accepted that the extension would not overlook their garden, they objected to the fact that what was currently an open space between their house and No.30, bisected by a fence would be filled in and the building of No.30 would be immediately adjacent to the boundary making their garden feel more enclosed.

21. They said that the examples which the applicants relied upon as to other similar developments were not in fact on the original estate but were further afield.

22. Mr Harrison and Ms Sweetman said that the proposed development would impact the saleability of their property, although they were not able to suggest the extent to which any potential sale price might be affected, nor quantify any potential loss.

23. Following the hearing, but before my site inspection, at my request the parties submitted further written evidence. Mr Harrison and Ms Sweetman submitted some photographs showing the view across to the boundary fence from their house and also some general images of their garden. Mr and Mrs Palmer provided a fuller list of houses where, they said, similar developments had taken place.

Ground (a) – should the restrictions be deemed obsolete?

24. To succeed, the applicants need to demonstrate that both restrictions are obsolete. I shall take them in turn. As regards the grassed area restriction, upon my inspection I noticed some, but by no means all, grassed areas at the front of houses being maintained in good order. There were many instances where the areas had been left to run to weeds, and there were also a number of examples where residents had done what the applicants wish to do and covered the grassed forecourts with gravel or similar hard surfaces to enable parking. I would add at this point that parking around the estate was in relatively short supply, especially around Harewood Crest itself. But these hard surfaces were not in the majority – and not in my judgment sufficient to demonstrate obsolescence. As regards examples where residents had built on parking areas, again there were some examples, one of which was on all fours with the subject application, but these were not plentiful.

25. There has been no change in the character of the property. In my judgment the applicants have failed to demonstrate that there have been changes in the character of the neighbourhood, or other material circumstances such to cause me to consider the restrictions obsolete, and the application under ground (a) therefore fails.

Ground (aa) – practical benefits of substantial value or advantage

26. Since both parties represented themselves, I was not provided with legal submissions on this ground. However, my conclusions are these. First, the proposed use (or "user" in the terminology of the Act), of the application land is clearly reasonable; it has the benefit of planning permission and is simply a residential use in a residential area. Secondly, the restrictions plainly impede the proposed user as they prevent the planning permission from being implemented. Thirdly, holding the benefit of the restrictions, and so preventing the proposed extension from being built, secures to Mr Harrison and Ms Sweetman a practical benefit.

27. The question therefore, as is so often the case, is whether impeding the user secures to the objectors a practical benefit of substantial value or advantage. Taking value first, I did not receive any expert valuation evidence and it is therefore difficult to form a view – and the objectors could not put a figure on any diminution in value themselves. However, value and advantage are alternatives, and to succeed the applicants need to get home on both aspects.

28. Having stood in the objectors' garden and envisaged the proposed extension by reference to the roof line of the existing single storey garage, I was struck by the extent to which it would dominate the objectors' garden. I accept that they would not be overlooked – the Velux roof lights would not give a view into their garden from the proposed extension – but where at the moment the flank wall of the applicants' property is set some way back from the boundary fence, and therefore some distance from the objectors' doors into their garden, if built the extension would be right on the boundary, or within say one foot of it. I accept the objectors' evidence that the extension would create a more enclosed feel – in my opinion significantly so.

29. In my judgment the ability to impede the proposed use, and therefore prevent this effect on their amenity, secures to the objectors a practical benefit of substantial advantage. That being the case, the application under ground (aa) also fails. It follows from this that the ground (c) must also fail, since the applicants cannot demonstrate that the proposed development causes no injury to the objectors. The objectors succeed on their second ground, and it is therefore not necessary for me to determine what is often referred to as the thin end of the wedge argument.

Determination

30. For the reasons set out above, the application is dismissed. This decision is final on all matters other than the costs of the application and the parties may now make submissions on such costs. A letter giving directions for the exchange and service of submissions accompanies this decision. The parties' attention is drawn to paragraphs 15.7 to15.11 of the Tribunal's Practice Directions dated 19 October 2020.

31. I cannot leave this decision without expressing some sympathy for the applicants, who accept that they should have paid more attention to the restrictions before they purchased the property. I have no doubt that they acted in good faith throughout these proceedings, and in their dealings with the objectors and their other neighbours. They represented themselves well and produced a hearing bundle of admirably restrained succinctness.

P D McCrea FRICS FCIArb

22 April 2021