



LP/13/2007

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – discharge or modification – dwellinghouse – covenant not to use property other than as single dwellinghouse nor to erect any building without vendor’s consent – application to discharge or modify to permit second dwellinghouse – only admitted objection by owner of estate road – application successful – Law of Property Act 1925, S84(1)(a), (aa), (b), (c)

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

B Y

BATHURST LIMITED

**Re: Grasslands
Hollies Hill
Nailsworth
Gloucestershire
GL6 0AW**

Before: N J Rose FRICS

**Sitting at Cheltenham County Court, St Georges Road,
Cheltenham, Gloucestershire, GL50 3PF
on 26 and 27 February 2009**

Malcolm D Warner, instructed by Gregg Latchams WRH, solicitors of Bristol for the applicant Mr V G Munns, with permission of the Tribunal, on behalf of Hollies Hill Residents’ Association, objector.

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The following cases were referred to in argument:

Shephard v Turner [2006] 20 EG 294

Re Truman, Hanbury, Buxton and Co Limited's Application [1956] 1 QB 261

Re Cox's Application (1985) 51 P & CR 335

Re Bass Limited's Application (1973) 26 P & CR 156

Re Burt's Application LP/43/2006, unreported

Gilbert v Spoor [1983] Ch 27

Stockport MBC v Alwiyah Developments (1983) 52 P & CR 278

Winter v Traditional & Contemporary Contracts Ltd [2008] 03 EG 180

DECISION

1. This is an application by Bathurst Limited under section 84(1) of the Law of Property Act 1925 for the discharge or modification of a restrictive covenant affecting freehold land containing a single dwellinghouse and known as Grasslands, Hollies Hill, Nailsworth, Gloucestershire, GL6 0AW, part of which the applicant has an option to purchase, in order to allow the erection of a second dwellinghouse.

2. The restriction was imposed by a conveyance dated 24 September 1987 between Adrian David James Fenner (the Vendor), Business Mortgage Trust Plc (the Mortgagee) and John Alfred Cawkwell and Christine Anne Cawkwell (the Purchaser). The Purchaser covenanted to observe and perform the restrictions and stipulations set out in the Fourth Schedule to the conveyance

“to the intent that this covenant may bind the property and each and every part thereof and to the intent that the benefit of this covenant shall endure for the benefit and protection of the Estate and any part or parts thereof so far as it may be capable of being annexed or assigned with the Estate and any part or parts thereof”.

“The Estate” was defined as the Vendor’s Hollies Estate, being all the land comprised in a conveyance dated 18 June 1986 between Shorlan Homes Ltd and the Vendor.

3. The Fourth Schedule included the following particulars of the covenants to be performed by the Purchaser:

“2. Not to use or permit to be used the property or any buildings thereon for the carrying on of any trade or business whatsoever nor for any purpose other than as a single private dwellinghouse only.

3. Not without the previous consent in writing of the Vendor to alter the external elevations of any building standing upon the property nor without the like permission to erect any building thereon save those erected or in the course of erection at the date hereof such consent not to be unreasonably withheld.”

4. There is an admitted objection to the application from the Hollies Hill Residents’ Association (the Association). The Association was established in July 1988 by householders who had contributed to the cost of completing the estate road to which the application site has frontage. The Association’s objectives included the following:

“1. To acquire Hollies Hill Road.

2. To acquire the adjoining land [at the entrance to the estate] now in Mr Fenner’s possession.

3. To complete the surfacing of the road and make good all faults agreed with the Local Authority, at an agreed financial contribution by the members.

4. To agree, by majority vote, annual subscriptions for road repairs, regular maintenance and other expenses.
 5. To set up regular contracts for the maintenance of gates, road, sewers etc.
 6. To consider other proposals for the benefit of all the estate residents.
 7. No action to be taken by this Association that will interfere with the existing rights of members over their properties.”
5. On 15 December 2008 the Association forwarded to the Tribunal a statement confirming
- “that we object to the application to remove or modify the restrictive covenant preventing the construction of a second house on the Grasslands property and we authorise the Association to pursue matters on our behalf.”

This statement was signed by the following owners of properties fronting Hollies Hill: Mr V and Mrs P Munns (Sticklepath House); Mr J and Mrs J Levis (The Willows); Mr J W and Mrs P E Avison (Woodside); Mr D and Mrs A Jackson (Coombe Rise); Mr G and Mrs A E Williams (Orchard House); Mr N and Dr K McMillan (Highcroft); Mr M and Mrs G Smith (Hollies Cottage); Mr S H and Mrs S C Barrett (Domus Tarda); and Mr S Dermody (Jerusalem Cottage).

6. Witness statements in support of the objection were submitted by Messrs Munns, Avison, Jackson, Williams, McMillan, Smith and Barrett.

7. On 5 January 2009 the applicant’s solicitors wrote as follows to Mr Munns:

“it is unclear whether the residents set out in the schedule attached to your letter are merely confirming that they authorise the Association to pursue its objection as the owners of the road or whether the letter is intended to suggest that the residents are now objecting separately in their own personal capacity. I would be grateful if you would clarify that issue.”

8. Mr Munns replied on 10 January, saying:

“As I have previously pointed out, the Association’s objection to the application is not limited to its ownership of the estate road. It objects as the covenantee in a Deed whose object is to benefit the membership and improve the Estate. Part of the benefit of the Deed to the membership is that the restrictive covenant in the principal Deed prevents the building of an additional house on the Grassland property even if planning permission exists. At present all other residents benefit from the relatively low density of housing on the Estate. This is a substantial benefit which members wish the Association to protect by the enforcement of the covenants.

The purpose of the statement sent to you on 15 December 2008 is to confirm that the signatories wish the Association to do this.”

9. Having read the trial bundle and the parties' skeleton arguments in preparation for the hearing I caused the following letter to be sent to Mr Munns on 23 February 2009:

“There is one objector in this case – the Residents’ Association, which has the benefit of the restrictions as owner of the estate road. None of the owners of houses on the estate have objected. Since the Residents’ Association’s interest is in respect of the estate road its objection needs to be considered in relation to that land. However, it wishes to adduce contentions related to the proposed modification as it would affect the owners of the houses who could have objected but have not done so and to call such owners to give evidence. Since the proceedings are in rem, it cannot be said that the effect of modification on land to which the benefit of the restrictions attaches is rendered irrelevant by the failure of the owners of that land to object. But such owners would have no cause for complaint if the Tribunal were to refuse to entertain evidence related to the effect of the proposed modification on their interests. Nor would the Residents’ Association have any cause for complaint in that respect.

It does not seem to the Member who is to hear the case that it would be right to take up time hearing and considering evidence that is related, not to the effect of the proposed modification on the estate road, but to its effect on the houses of persons who could have objected and have not done so. Subject to any views that the applicant might wish to express the Member would be prepared at this late stage to admit as objectors any of the owners of land on the estate on whose evidence the Residents’ Association wishes to rely. He would not otherwise admit such evidence.

It may be, as the applicant suggests, that owners of houses have not objected in order to avoid the possibility of an award of costs against them. They should note, however, the approach to costs that is set out in the Lands Tribunal Practice Directions at para 22.4; that an unsuccessful objector who had the benefit of a covenant that has been modified or discharged will not normally have to pay any part of the applicant’s costs unless he has acted unreasonably, while a successful objector will normally get all his costs unless he has been in some respect unreasonable.”

10. At the hearing Mr Munns, appearing for the Association with the Tribunal’s permission, applied for Mr Jackson and Mr Williams to be admitted as objectors and give evidence. Counsel for the applicant, Mr Malcolm Warner, accepted that the houseowners’ failure to submit formal objections was due to a misunderstanding of the legal position. He was not prepared to accept, however, that Mr Jackson and Mr Williams had the benefit of the restriction. He said that, under Clause 4 of the relevant conveyance, the Vendor was

“entitled to modify, waive or release any restrictions or stipulations imposed on any part of the Estate (whether similar to those referred to in this Conveyance or not) and nothing in this Conveyance shall be taken as creating a building scheme for the Estate or imposing any restrictions on the manner in which the Vendor may dispose of any other part of the Estate”

11. Mr Warner said that it was clear from the Schedule to the conveyance dated 28 November 1988, transferring the private road to the Association, that the original sales of the

plots belonging to Messrs Jackson and Williams had taken place before the restriction was imposed. Since there was no building scheme, those properties would not have been entitled to the benefit of the restriction unless there was a document imposing a specific covenant to that effect. In the absence of such a document, the applicant was not prepared to agree that Messrs Jackson and Williams were entitled to object.

12. I told Mr Munns that it seemed to me that Mr Warner's submission might well be correct. Nevertheless, I would be prepared to adjourn the hearing to enable Mr Munns to produce further documentation and argument, on terms that the objectors would be responsible for the applicant's costs thereby wasted. After consulting with his fellow residents who were present, Mr Munns stated that he was willing to proceed on the basis that the Association was the sole objector.

Facts

13. Mr Warner called expert evidence on planning and amenity matters from Mr Ronald Shirley BArch (Hons), Dip Arch (Bristol), RIBA of Wotton under Edge and factual evidence from Mr D J Sutlow, development director with the applicant. Mr Munns gave factual evidence for the objector.

14. I visited Hollies Hill and the application site accompanied by representatives of the parties on the afternoon of the first day of the hearing. In the light of the evidence and my inspection I find the following facts. The application site is situated on a small private residential estate on the outskirts of Nailsworth. Hollies Hill contains eight detached houses on substantial plots, developed in two phases, on the lower west facing slope of the Nailsworth Valley and enjoying good views.

15. The estate road is made up and surfaced with tarmacadam. It has not been completed to local authority adopted standards and remains private. The site is located a short distance from Nailsworth town centre. Nailsworth is a small town lying on the A46, four miles to the south of Stroud. Above Hollies Hill to the east is extensive common land vested in the National Trust. The application site is of irregular shape, bounded by the private road to the east and by woodland to the rear. There is no boundary separating the land from the remainder of Grasslands to the west.

16. The site is mostly uncultivated and overgrown, save for a terrace of lawn adjacent to the western boundary. There are indications of past excavation to the site, which drops sharply for the most part from east to west. It has a maximum depth of approximately 55m and a maximum width of approximately 33m. The site area is approximately 0.2 acres.

17. Development of the estate was commenced by the owner of The Hollies, Mr Lloyd, who obtained planning permission in 1971 to build 12 houses in the grounds of the mansion. The first house (plot 1) was built at the entrance to the mansion and the remaining development

fronted a new road which is now known as Hollies Hill. Three houses were built by various builders in the early 1970s. The remainder of the site was then sold to Shorlan Homes Limited. They began work on plots 4, 10, 11 and 12, but were unable to continue because the foundations were inadequate for the ground conditions. The local planning authority has accepted that the planning permission for the proposed development on Unit 10 is still extant, although work never progressed beyond foundation stage.

18. In the 1980s Mr Fenner bought the Hollies mansion from Mr Lloyd. He subsequently acquired the remainder of the estate, which Shorlan Homes had tried and failed to develop. Following receipt of a geological survey in 1986, Mr Fenner sub-divided the available land into five plots instead of eight, so that he could position each house on firm land between Fullers Earth clay slips. The land formerly allocated to plots 4, 10 and 11 was incorporated into Plots 9 and 12, on each of which one house was built with new foundations.

19. The base course for the estate road was laid by Mr Lloyd so far as Domus Tarda (plot 6). Shorlan Homes carried out no work on it. Mr Fenner laid a single track base course to serve plots 7 and 12 and two existing houses outside the estate, Hollies Cottage and Jerusalem Cottage. The Association completed the work. The road varies in width from 3.3m to 5.5m. The upper section is not wide enough to allow two vehicles to pass at the same time.

Grounds of application and conclusions

20. The application is made on grounds (a), (aa), (b) and (c) of section 84(1). I consider each in turn.

Ground (a)

21. Mr Warner submitted that, so far as the application site was concerned, the covenant in para 3 of the Fourth Schedule was obsolete from the moment it was imposed because the foundations of the permitted house were already in place, having been constructed many years earlier in order to keep alive the planning permission granted in 1972. He relied on the wording of para 3, which requires approval of the external elevations of any buildings on the site “save those erected or in the course of erection at the date hereof.” I am unable to accept that submission. It is true that work had commenced on the foundations of the proposed building on the application site, and other buildings, but that work had long since stopped because site problems had been encountered. There is no evidence to suggest that any part of the house was “in course of erection” when the restriction was imposed in September 1987. The application on ground (a) therefore fails.

Ground (aa)

22. The issue under ground (aa) is whether the restriction, in impeding the proposed user of the application site, secures to persons entitled to the benefit of the restriction practical benefits of substantial value or advantage to them.

23. Mr Munns expressed serious concerns about the effect of the construction of the proposed house on Hollies Hill. The Fullers Earth clay slips extended beneath two sections of the road itself. The proposed construction works would result in the need to move heavy equipment up a steep single track road. There would also be congestion caused by unloading materials onto the lower, wider part of the road for transfer to the application site on smaller vehicles. At a meeting of the Association on 16 April 2002 one of the members had suggested imposing a weight limit on vehicles using the road in order to avoid damage to it. It was decided that the difficulties in enforcing such a limit made the proposal impracticable. Nevertheless, the problem was real. The bottom section of the road had been resurfaced three times in the last twenty years. Works involved in constructing a new house would place a greater strain on the road than normal traffic. It was not possible to estimate accurately the costs of any remedial works which might be necessary.

24. Mr Sutlow said that he believed that his company would be able to bring the necessary plant and materials on to the application site without damaging the access road. He envisaged that the use of light weight timber frame techniques would reduce both the amount of traffic on the road and the length of time the development would take. This approach would lead to fewer bulk deliveries and a shorter construction programme.

25. In a letter to Mr Munns dated 9 October 2008 the applicant's solicitors said:

“the applicants are prepared to accept that they will be required to pay their share of the costs of maintaining the road on a pro-rata basis with all the other plot holders rather than just half of what is currently paid by Mr and Mrs Simms [the owners of Grasslands]. Further they would be happy to enter into a formal deed of agreement to that effect and settle the Association's reasonable costs arising therefrom.”

Mr Warner confirmed that the applicant remained willing to enter into such an agreement.

26. Mr Warner placed reliance on clauses 6 and 7 of the conveyance dated 24 September 1987 (which imposed the relevant restrictions). By clause 6 the Vendor covenanted

“with the Purchaser and the persons deriving title under him that the Vendor or his successors in title to the Estate will at his own expense construct and make up the new roads and footpaths on the Estate in a proper and workmanlike manner and will kerb and complete the same according to the requirements of the Local Authority and will repair and keep in good repair the said road and footpath so far as aforesaid until the same is adopted and taken over by the Local Authority or the Vendor gives notice under clause 7 hereto .

Clause 7.1 provided as follows:

“If before the expiration of the period of twenty one years from the date hereof the Vendor (having constructed the new roads and footpaths on the Estate in a proper and workman like manner) shall give to the Purchaser or his successors in title of the property one calendar months notice in writing expiring on a day before the expiration of a period of twenty one years aforesaid of the Vendors desire to have conveyed to the Purchaser or such persons bodies or organisations the legal estate or interest in the said new roads and footpaths on the estate in such case within three months of receipt of such notice aforesaid the Purchaser shall execute the necessary transfer conveyance or other appropriate instrument and the Vendor and the Purchaser bearing their respective legal costs and expenses”.

27. Mr Warner submitted that the notice referred to in clauses 6 and 7.1 was implemented in November 1988 when the road was sold to the Association. It was plain that it was contemplated that the road would be made up to adoptable standard. Since, as successors in title to the Vendor, the Association was responsible for such work, it was not open to it to argue that the road was inadequate.

28. In my judgment the provisions of clauses 6 and 7 are of fundamental importance to the applicant’s case on ground (aa). An estate road that is constructed “in a proper and workmanlike manner” must be capable of taking ordinary construction traffic. If it is not adequate for that purpose the Association has only itself to blame, because it could have insisted on it being constructed to the required standard before it accepted a conveyance of the freehold interest. In those circumstances the restriction, in impeding the proposed development, does not secure any practical benefit to the Association. This is because the Association would not be able, through proceedings for an injunction, to prevent the erection of a house on the application site, when the only ground for seeking the injunction was the damage that the construction traffic would do to the road. The application on ground (aa) has therefore been made out.

29. I have not overlooked the fact that Mr Munns’s main objection to the proposed modification – shared by other residents of Hollies Hill – was that it would set a precedent for further modifications, which would change for ever the character of the Estate. As I have said, however, I am not satisfied that Mr Munns, or his neighbours, is in fact entitled to the benefit of the restriction. Mr Warner conceded that the owner of Greenlands is probably so entitled, but the point is academic since the applicant has acquired its option from that owner.

Ground (b)

30. Mr Warner’s submission on ground (b) was in two parts. Firstly, he said that if the building on the application site had been in course of construction when the covenant was imposed in September 1987, the parties could be assumed to have agreed to the proposed development at that time. For the reason given in paragraph 21 above, I reject that submission as unfounded.

31. Secondly, Mr Warner relied on the failure of any of the other plot owners to object as indicating that they had impliedly agreed to the proposed discharge or modification. He accepted, however, that he could not adopt the same argument in respect of the Association. That concession – which was inevitable – is fatal to the applicant’s case on ground (b), which requires agreement from “the persons ... entitled to the benefit of the restriction”, not just some of those persons.

Ground (c)

32. I have found that the restriction is of no practical benefit to the Association, which would therefore suffer no injury from its modification. The application on ground (c) therefore succeeds.

Conclusion

33. The requirements of grounds (aa) and (c) having been satisfied, I have jurisdiction to modify the restrictions. I am satisfied that there is no reason why I should not exercise my discretion to do so. Accordingly, I modify the restrictions in paragraphs 2 and 3 of the Fourth Schedule to the conveyance dated 24 September 1987 so as to permit the erection of one additional dwelling and private garage on the site of Grasslands in accordance with the planning permission reference S.7426/U granted by Gloucestershire County Council on 7 June 1972, subject to any alterations which may be required in order to comply with current building regulations. A formal order to that effect will be made by the Tribunal in due course.

34. Since I have found that the modification will not injure the Association, I do not award any compensation.

35. A letter on costs accompanies this decision, which will take effect when the question of costs is decided.

Dated: 27 March 2009

N J Rose FRICS