

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 145 (LC)
UTLC Case Number: LC-2019-000396

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – covenant preventing more than one house per plot – no injury to sole objector – lack of planning permission – the Tribunal’s discretion to modify – application to discharge refused – application to modify granted conditionally – Law of Property Act 1925 S.84(1)(c)

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

BETWEEN:

JOHN SMITH AND SYLVIA SMITH

Applicants

and

CHRISTOPHER GOODWIN

Objector

**Re: Land adjoining 17 Victoria Road
Wooler
Northumberland
NE71 6DX**

Peter D McCrea FRICS FCI Arb

Hearing by Remote Video Platform

19 March 2021

Simon Goldberg, instructed by Hardington Hogg Solicitors LLP for the applicants
Chris Hegarty, instructed by direct access, for the objector

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Introduction

1. Wooler is a small town at the foot of the Cheviot hills. Located only ten or so miles from the Scottish border, it lies at the farthest outreaches of the area under the Tribunal's jurisdiction. This decision concerns an application to discharge or modify restrictive covenants attached to a plot of land in Victoria Road, just to the north of the town centre. The applicants, Mr John and Sylvia Smith, used to own a house called Sheileen at 17 Victoria Road, which had a large side garden. They sold Sheileen, relocating to the East Midlands, but retained the side garden ("the application land"). They wish to sell it for development, but the market for it is limited because any development is prevented by the covenants. The sole objector to the application is Mr Christopher Goodwin, who lives at 3 Victoria Road.

2. I heard the application on 19 March 2021 by digital platform. The applicants were represented by Mr Simon Goldberg of counsel, who called Mrs Smith to give evidence of fact, and Mr Andrew Entwistle FRICS FAAV to give expert evidence. Mr Goodwin was represented by Mr Chris Hegarty of counsel (stepping in at commendably short notice for a colleague). Mr Goodwin also gave evidence of fact. I am grateful to all of them.

3. I made an unaccompanied inspection of the application land and its immediate surroundings on 16 June 2021.

The restrictions

4. The relevant covenants were imposed by a conveyance dated 10th August 1937 between (1) James Redpath and Robert Redpath as Vendors and (2) Henry Armstrong and Linda Kathleen Armstrong as Purchasers ("the conveyance") and are in the following terms:

"the Purchasers for themselves and the person deriving title under them hereby covenant with the Vendors and their successors in title with the intent to bind the property hereby conveyed into the hands of whomsoever it may come and to benefit and protect the Vendors' land lying at the North South and East sides of the property hereby conveyed and so much therefore as shall hereafter be sold and conveyed with the benefit of the covenants that they the purchasers and the persons deriving title under them shall at all times hereafter observe and perform the restrictions and stipulations expressed or contained in the Schedule hereunder written.

THE Vendors shall be at liberty to vary alter or abandon any of the restrictions contained in the Schedule hereto at the request of the Purchasers or the persons deriving title under them and nothing herein contained shall operate to impose any restrictions on the Vendors on the manner in which they may deal with the whole or any part of the adjoining land belonging to them or be otherwise deemed to create a building scheme.

The Schedule

1. No buildings or erections other than a dwellinghouse outbuildings and garage shall be erected on the piece or parcel of land first hereinbefore described which shall be used solely for the purposes of a dwellinghouse.

...

4. No buildings or erections other than a Summerhouse or other similar erections shall be erected on the piece or parcel of land thirdly hereinbefore described Such Summerhouse or other erections to be approved of by the vendors before erection.”

5. The original conveyance could not be found, which had several repercussions. First, in the absence of confirmation as to which land benefitted from the restrictions, the applicants denied that Mr Goodwin had the benefit of the restrictions. However, by way of an Order dated 25 September 2020, Judge Cooke ordered that Mr Goodwin be admitted as an objector, giving the following reasons:

“Understandably the objector has not presented any legal argument [Mr Goodwin was unrepresented at that stage] as to why he is entitled to the benefit of the covenant sought to be discharged or modified. However, he has shown that he is the registered proprietor of 3 Victoria Road, which lies to the south of the applicants’ property. His title derives, like theirs, from a 1937 conveyance by James and Thomas Redpath, and number 3 was conveyed on 29 August 1937 and therefore subsequently to the sale of number 17 and its adjoining land. It too is subject to covenants imposed by a 1937 conveyance. The covenant sought to be discharged or modified was annexed to the land to the north, south and east of the applicants’ property. Accordingly since the objector’s land appears to have been part of the same estate as the applicants’, and conveyed later than theirs with the benefit annexed to it, on the balance of probabilities I find that the objector’s land has the benefit of the covenant. There is no need for that benefit to be shown on the register of title or for any express words of transmission of the benefit of the covenant to have been used in any transfer of number 3.”

6. Secondly, in the absence of the conveyance, the applicants take the terms of the restrictions from the charges register, and the objector takes no issue with that as an approach.

7. Thirdly, while the land subject to the covenant at paragraph 1 of the schedule to the conveyance is readily identifiable from the relevant entry on the register and the title plan (where it is edged pink), the land subject to the covenant at paragraph 4 of the schedule is not readily identifiable in the absence of the conveyance. The applications therefore seek discharge of the paragraph 4 covenant (in so far as it may affect the application land) out of an abundance of caution.

The application

8. The application is to discharge, or alternatively to modify, the restrictions to allow residential development on the application land. The applicants accept that Sheileen having been built, a second house on the side garden would breach the restriction in paragraph 1, and potentially that in paragraph 4, of the schedule to the conveyance.

9. Unusually for an application of this nature, no planning permission is in place for the proposed development. The former owners of Sheileen obtained outline planning consent in 1994 for the erection of a dwellinghouse. More recently, in response to a pre-planning enquiry made by the applicants, proposing the erection of a dwellinghouse, garage and outhouse on the application

land, the local planning authority (Northumberland County Council) confirmed on 11 June 2013 that the principle of a new dwelling was considered to be generally acceptable and would result in a sustainable form of development having regard to the National Planning Policy Framework (March 2012) and the saved April 1999 Berwick-upon-Tweed Borough Local Plan policies.

10. The application relies on grounds (a) and (c) of section 84(1) of the Law of Property Act 1925 (“the Act”). 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.

11. 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

12. Mrs Smith explained that she and her husband bought Sheileen in 2003 and lived there for 11 years. When they decided to downsize, they put the property on the market and received numerous offers but owing to the restrictions potential purchasers either reduced their offers or withdrew. In 2013 they decided to split the property in two, putting the application land under a separate title. In 2014, owing to family circumstances, they had urgently to relocate to Leicestershire, and they sold the house in April 2014, retaining the application land. Due to the Covid pandemic and ill health they have been unable to return to Northumberland, and have the annual expenses of maintaining the land, with ongoing concerns about fly tipping and illegal access. Mrs Smith said that she was 80, and Mr Smith was 77. They wanted to get their affairs in order, and the whole process has been extremely stressful. Had they known that Sheileen would have brought this sort of problem, they would never have bought the property.

13. Mr Smith provided a brief written statement agreeing with that of Mrs Smith but owing to health conditions did not give oral evidence.

14. Mr Goodwin objected to the application. In his witness statement, he said that a house being built on the application land would affect his ‘house amenity’, and that it would also be just the start of development on the plots and would allow multi-developments within Victoria Road. The application land was not of such a unique size that others would not follow. His belief was that the covenant was put in place to protect the land along Victoria Road against further building. When he bought number 3 in September 2015, the benefit of the covenant was a big selling point – it provided peace of mind and security and protected his investment. In oral evidence, he said that Mrs Ruth Redpath showed him documents containing the covenants and explained that they affected numbers 1, 3 and 5. He was not aware at that stage they also affected number 17.

15. In her skeleton argument, which Mr Hegarty adopted, Mr Goodwin’s former counsel said this:

“In his notice of objection, [Mr Goodwin] refers to a potential loss of value to his property or difficulties selling it should the Covenants be discharged. In the absence of any evidence

to support this, [he] will not pursue this argument. Similarly, [he] accepts that it is unlikely that development on the Property *alone* would cause much injury to him.

However, [Mr Goodwin] does engage the “thin end of the wedge” argument. This is an issue of fact and the burden is on the Apps to show that relaxation of the Covenants will not constitute a real risk as a precedent...”

16. Mr Goodwin accepted that of the houses on the west side of Victoria Road, where both his own and the application land are located, only the application land forms a gap in what otherwise would be a continuous row of plots containing semi-detached or detached houses. On the east side of Victoria Road, opposite Mr Goodwin’s house, there is a wide plot of land on which development started but has since been paused. Mr Goodwin said that he objected to that application when it was made.

17. In cross examination Mr Goodwin introduced a new ground of objection. He said that Victoria Road lies on a slope (the application land being down the hill from his house) and he was concerned that the erection of any further houses would lead to subsidence and damage to his property. He hadn’t mentioned this in his notice of objection or his witness statement, but it was one of the reasons that he objected to the planning application on the land opposite.

18. For the reasons I give below, it is unnecessary for me to outline the expert evidence of Mr Entwistle, helpful though it was.

Discussion

19. The application is brought under grounds (a) – obsolescence, and (c) – no injury. While I received expert evidence and counsels’ submissions on whether the restrictions were obsolete, it is not necessary for me to repeat them.

20. When I inspected Victoria Road, I noted that Mr Goodwin’s house is sufficiently distant from the application land - I would estimate some 80 or 90 metres away - that the building of a single house on the application land would make no difference at all to him. The notion that a house being built there would lead to subsidence of his house is in my view entirely implausible. In fairness to Mr Goodwin, his objection was not only that the development of the application land would cause subsidence, but it would lead to other applications for other developments and the cumulative effect of this would do so. But there was no evidence in support of this late basis, expert or otherwise.

21. In any event, the application land is unique in Victoria Road. None of the other properties on that western side have sufficiently wide plots to accommodate a second house. On the other side of the road, the plot of number 18 might, when viewed on a plan, seem to be sufficiently wide to be able to do so, but from my site inspection I agree with Mr Entwistle that the topography of that site would prevent it, as the ‘extra’ land slopes steeply and is taken up by the drive to the property. The remaining land, opposite Mr Goodwin’s house, is not fettered by the same covenant. Accordingly I do not consider that there is a thin end of the wedge aspect to this application. I note, in passing that the conveyance stated specifically that there was no building scheme was intended.

22. Accordingly, in what the Supreme Court refers to as the Tribunal's jurisdictional stage, I am satisfied that the application under ground (c) is made out. I must then consider whether to exercise my discretion. The application is for discharge or modification. I indicated at the start of the hearing the discharge element of the application struck me as optimistic. I remain of that view, and do not consider it would be appropriate to discharge the restrictions entirely.

23. That leaves modification – but for what? The lack of a planning permission has in some cases been fatal to a successful application, and I am conscious that in this application it is the Smiths' intention to sell the application land, leaving the residents liable to the proposals of any purchaser. But I also have in mind that the applicants now live hundreds of miles from the application land, and I have sympathy for Mrs Smith's evidence that managing the land remotely is difficult. I can easily envisage the land becoming something of an eyesore to local residents.

24. For the applicants, Mr Goldberg submitted in closing that while they did not abandon the application in so far as discharge, his clients would be content to restrict the application to modify the covenants such to allow the erection of one (further) house, garage and an outbuilding.

25. On balance, therefore, I am satisfied that it would be appropriate, in the circumstances of this particular application, to modify the restrictions to allow the erection of one further house, plus garage and outbuilding. The Tribunal has the power under s.84(1C) to add such further restrictions as appear reasonable in view of the relaxation of the existing provisions. In my judgment, it would be appropriate to restrict any new house to two storeys, not exceeding the height of 17 Victoria Road, and that such two-storey element shall not be located to the west of a line which could be plotted from the two storey elements of numbers 17 to 19 Victoria Road. Any garage and outbuilding will be single storey only.

26. The application for discharge is therefore refused. The application for modification is allowed on the above terms, and the applicants are now invited to submit to the Tribunal within 21 days proposed wording to modify or add to paragraphs 1 and 4 of the schedule to the conveyance to put this into effect.

27. Otherwise, this decision is final on all other aspects except costs. The parties are invited to make submissions on costs and a letter with directions accompanies this decision.

P D McCrea FRICS FCI Arb

18 June 2021