

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 96 (LC)

LC-2022-593

Royal Courts of Justice,  
Strand, London WC2

13 April 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*RESTRICTIVE COVENANT – JURISDICTION – whether a covenant prohibiting registration of a transfer without the consent of the covenantee is a “restriction ... as to the user” of land – whether Upper Tribunal having jurisdiction to discharge such a restriction – s.84(1), Law of Property Act 1925 – application dismissed*

APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY:

YOUNG CAMMIADE

Applicant

Re: 1 Acacia Grove,  
New Malden, Surrey

Martin Rodger KC, Deputy Chamber President

Determination on written representations

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The following cases are referred to in this decision:

*Re Blyth Corporation's Application* (1962) 14 P & CR 56

*Re Milius's Application* (1995) 70 P & CR 427

*Shephard v Turner* [2006] 2 P & CR 28

*Westminster City Council v Duke of Westminster* [1991] 4 All ER 136

1. Does section 84(1) of the Law of Property Act 1925 confer power on the Upper Tribunal to discharge a restriction arising under a covenant prohibiting the registration of a transfer of a registered lease without the consent of the covenantee?
2. That is the question which arises under this application by Ms Young Cammiade to discharge a restriction binding her leasehold interest in a flat at No. 1 Acacia Grove, New Malden.
3. No. 1 Acacia Grove is one of four flats in a two storey block. It is on the first floor, directly above No. 3 Acacia Grove. It has been owned by Ms Cammiade since 2013 under a lease for a term of 999 years granted on 23 March 1960.
4. In 1983 the respective owners of Nos. 1 and 3 entered into a Deed of Covenant which has subsequently been lost. In view of the fact that the flats are each subject to very long leases, it seems likely that the lost Deed contained mutual covenants concerning the occupation, upkeep and management of the building which could be enforced by the two leaseholders without the need to rely on their landlord. But as the only document which might provide a clue to the contents of the Deed are the leases themselves, copies of which have not been provided, that is a matter of speculation.
5. The 1983 Deed was discharged by a Deed of Release and Substitution made between the same parties and the intending purchaser of No.1 on 27 September 1988. By that Deed the purchaser of No. 1 and the then owner of No.3 (referred to in the Deed as “the Lower Lessee”) covenanted to observe and perform the covenants in the 1983 Deed. Unfortunately those covenants were not recited in the 1988 Deed so its effect remains unknown.
6. Presumably to ensure the continuation of the mutual covenants on subsequent disposals, the parties to the 1988 Deed each applied to the Registrar, in terms agreed between them and recorded in the Deed, for the entry of a restriction on their respective registers of title. The restriction entered on the title of No. 1 was in these terms:

“Except under an Order of the Registrar no transfer or lease is to be registered without the consent of the Lower Lessee or other the registered proprietor for the time being of title number SY245193.”
7. The original title number of No. 3 Acacia Grove has since been closed and replaced by a new title number and no restriction requiring the consent of the owner of No. 1 appears on that title. But the restriction quoted above remains on Ms Cammiade’s title and has proved an obstacle to her ability to sell her flat. Terms were agreed with a prospective purchaser last year and Ms Cammiade’s solicitors wrote to the registered proprietors of No. 3 in September and again in October 2023 asking for their consent to the removal of the restriction. No response was received to either of those requests.
8. On 24 November 2022 Ms Cammiade applied to the Tribunal under section 84 for the discharge of the restriction. Section 84(1) is in the following terms:

“The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) 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 discharge or modify any such restriction on being satisfied ... [there then follow the conditions for the exercise of the power]”

9. The power to modify or release restrictions affecting freehold land is extended by section 84(12) to leasehold covenants where the land is subject to a term of forty years or more, of which more than twenty-five years have expired.
10. The Tribunal’s Registrar responded to the application by pointing out to Ms Cammiade’s solicitors that the its jurisdiction to discharge extends only to restrictions “as to the user” of land and he invited submissions addressing whether a restriction limiting the circumstances in which a transfer may be registered was within that power. When these were received the Tribunal directed service of the application on the current owners of No. 3 Acacia Grove at the address given for them by Ms Cammiade’s solicitors. Once again, they have not responded.
11. In *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136 the High Court was asked to consider whether the Lands Tribunal (the statutory predecessor of this Tribunal, in which the power under section 84 was then vested) had power to modify a covenant requiring the Council to use land gifted to it by the Duke as “housing for the working classes”. Harman J interpreted the covenant as one imposing a positive obligation on the Council to use the land for the stated purpose and said, at page 147f, that “the Lands Tribunal can only modify restrictive covenants”. By that he meant a covenant restrictive “as to the user” of land. To the same effect, in *Re Blyth Corporation’s Application* (1962) 14 P & CR 56 the Lands Tribunal dismissed an application to discharge a covenant to erect and maintain a boundary fence on the grounds that it fell outside the jurisdiction.
12. There is no doubt that the Tribunal cannot discharge a positive covenant, one requiring the covenantor to do something. But the restriction in this case is not of that kind. It is entirely negative in form and effect. It prevents the doing of something, namely, registration of a transfer or a lease without the consent of the owner of No. 3.
13. The short question in this case is whether such a restriction is a restriction “as to the user” of land. If it is, the Tribunal will have jurisdiction to discharge the restriction on being satisfied of one of the statutory grounds. If it is not, the Tribunal will have no power to assist Ms Cammiade whether it would like to or not.
14. I am not aware of any reported decision on the question, and none is referred to by Ms Cammiade’s solicitors or mentioned in the leading textbooks.
15. The question did arise directly in *Re Milius’s Application* (1995) 70 P & CR 427 but was dodged by the Lands Tribunal (Judge Marder QC, President). That case concerned a

covenant imposed on the sale of a flat by a local housing authority pursuant to the statutory right to buy conferred by section 157, Housing Act 1985. The covenant prohibited any

disposal of the land without the consent of the authority (which would be given only if the intended disposal was to a person already living or working in the immediate locality). It was said by the applicant that the restriction prevented any prospective purchaser from obtaining a mortgage and he sought its removal under section 84.

16. One point taken on behalf of the local authority in opposing the application was that the covenant “was not a restriction on user but a restriction on disposal”. In his decision, at page 432, the President said that he had entertained “considerable doubt” as to whether the covenant “falls within the jurisdiction conferred by section 84(1) which, he explained, “means that the Tribunal may only consider a covenant which has the effect of imposing a restriction on the user of the land or of the buildings on the land”. Describing the question as “not without difficulty” the President suggested that it was “perhaps arguable that the user of the property may in practice be limited or restricted by the restriction on free disposition of a legal interest.”
17. In the event the application was dismissed as the Tribunal was not satisfied that the grounds relied on were established by the evidence, so it was not necessary to determine the logically prior question whether the covenant was within the scope of section 84(1) at all. The single sentence in which the President suggested a possible argument in favour of the Tribunal having jurisdiction nevertheless represented the high point of the submissions provided by Ms Cammiade’s solicitors.
18. Section 84(1) allows the modification or discharge of a restriction affecting land where the restriction is “as to the user thereof or the building thereon”. The section as a whole is concerned with what may lawfully be done on land, and in that context both “user thereof” and “building thereon” appear to be intended to refer directly to the activity being conducted on the land and for which it is being used. The same focus on physical activity is apparent in *Shephard v Turner* [2006] 2 P & CR 28, at [58], where Carnwath LJ said that the reference in ground (aa) of section 84(1) to “reasonable user” “seems to me to refer naturally to a long-term use of land, rather than the process of transition to such a use”.
19. In my judgment the restriction in this case is clearly not a restriction “as to the user” of No. 1 Acacia Grove. It is concerned only with the completion of a disposition by registration in the register of title. It does not impinge, directly or indirectly, on what the flat may lawfully be used for. I am not persuaded that the effect of such a restriction in limiting who may become the registered proprietor of the flat is relevant or that any possible practical impact which such a limitation may have on the use which may be made of the flat is sufficient to bring the restriction within the Tribunal’s power. Even if, in practice, the effect of the restriction was that the flat could not be sold and was left unoccupied for a time, that would not demonstrate that the restriction itself was a restriction on the use of the land.
20. I regret therefore that the Tribunal cannot assist and that the application must be dismissed.

21. By way of consolation, I would point out that the applicant's advisers appear to have taken an excessively pessimistic view of the meaning and legal effect of the restriction which may have caused them to knock on the wrong judicial door in search of relief. In Ms Cammiade's statement of case, settled by counsel, it is asserted that the restriction gives the owners of No. 3 Acacia Grove "a wholly unfettered ability to refuse consent" to a request to allow a

disposition to be registered. That seems a surprising construction of the covenant. The purpose of the restriction, as I have said, was probably to shore up the mutual covenants in the 1988 Deed (some perhaps positive in nature) by preventing a transfer of title and so providing an opportunity for a replacement deed to be entered into by the proposed transferee. In that context a refusal of consent which was unrelated to that purpose might well be thought to be outside the intention of the covenanting parties. Where a contract confers a discretion on one party (such as to refuse consent for something the other party wants to do), and the exercise of that discretion may adversely affect the interests of the other party, it will usually be implied that the discretion must be exercised honestly and rationally and for the purpose for which it was conferred (see *Lewison: The Interpretation of Contracts*, at para. 14.11). It would be odd for the restriction in this case to be interpreted differently.

22. I would also point out that the three letters sent by Ms Cammiade's solicitors to the registered proprietors of No. 3 (including giving notice of this application) were to the address given for them in the register of title more than twenty years ago. That may still be their address, or it may not, but in any event, as it is not far from her own flat, Ms Cammiade might think it worthwhile to find out and, if possible, to explain to them in person what assistance she would like them to provide.

Martin Rodger KC,  
Deputy Chamber President  
13 April 2023

### **Right of appeal**

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.