UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 115 (LC)
LT Case Number: LP/2/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – unopposed application – restriction limiting plot to one dwellinghouse – modified so as to allow for the demolition of the existing property and its replacement with three detached houses and garages – grounds (a), (aa) and (c)

IN THE MATTER of an APPLICATION under
SECTION 84 of the LAW OF PROPERTY ACT 1925

BY

JOHN JOSEPH HAYES

and

JANET MARY HAYES

Re: 197 Long Lane, Tilehurst, Reading, Berks RG31 6YW

Before: P R Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
12 June 2009

David Halpern QC for the applicants, instructed by Blake Lapthorn, solicitors of Portsmouth

DECISION

1. This is an unopposed application for the modification of a restrictive covenant relating to land at 197 Long Lane, Tilehurst, Reading RG31 6YW (the application land). It lies within a heavily developed residential area to the west of Reading, close to the junction of Long Lane with Dark Lane in the village of Tilehurst, and extends to approximately half an acre. The restriction derives from a transfer of land at Westwood Farm, Tilehurst on 7 September 1945 from Arthur Newbery to Harry Miles Young, and was given "for the remainder of the land comprised in the above title number [P162512] or any parts thereof." The relevant covenant reads:

> "That not more than one detached house of not less prime cost than seven hundred pounds exclusive of outbuildings division walls and fences shall be erected upon the said piece of land."

The plot was subsequently developed, and now contains a large detached bungalow, which is occupied by Mr & Mrs Hayes.

2. The applicants obtained planning permission, on appeal, on 17 February 2005 for the demolition of the existing property, and its replacement with three detached houses and garages off a single, shared entrance drive. The permission was varied on 20 September 2006 and again on 31 December 2007. The applicants originally sought discharge or modification of the restriction to enable these dwellings to be built on grounds (a), (aa) and (c).

3. The land benefiting from the restriction is the land that was retained by the vendor in 1945, however the identity and extent of that retained land was not apparent from the transfer. Due to the uncertainty as to who was entitled to the benefit of the covenants, the applicants, by direction of the Tribunal on 11 March 2008, placed an advertisement in the local newspaper, displayed a notice prominently on the application land and served notices on all properties immediately surrounding the property. Five objections were lodged by the owners of nearby or adjacent properties. The applicants did not accept that two of them were entitled to the benefit of the restriction, and they were thus directed by the Tribunal to serve copies of their title deeds so that the question of entitlement could be determined. They failed to do so, and have not pursued their objections further. The three remaining objectors, Mr & Mrs Chandler of 4 Tilling Close, Mr & Mrs Stokes of 5 Tilling Close and Mrs Carol McLennan of 166 Cotswold Way all have rear gardens backing onto the application land. They withdrew their objections on 5 June 2009, their appointed solicitor saying, in a letter to the Tribunal:

> "...we write to advise you that we have reached agreement with the applicants' solicitors that upon their lodging an Amended Application seeking a modification of the Restrictive Covenant the subject of the Application in the terms of the draft attached hereto and on the basis that the Applicants will no longer seek the complete discharge of the Restrictive Covenant then our clients will withdraw all objections to the said application as amended.

> We confirm, therefore, that on receipt by you of the amended Application that we would ask you to treat the objections to the Application as amended as withdrawn."

That amended application was before me at the hearing, and was for modification only on grounds (a), (aa) and/or (c). On the basis that there were no other outstanding objectors, that I was satisfied that the publicity notice procedure had been satisfactorily completed, and that the amended application was for modification rather than complete discharge, I determined to admit it. The amended application is accordingly, therefore, unopposed.

4. I heard Mr David Halpern QC for the applicants, and have read the expert reports of Malcolm Kempton Dip (Est Man) FRICS of Kempton Carr Croft, Chartered Surveyors of Maidenhead and David Crossley of Siteline, Land Surveyors and Engineers of Ower, Hants. I have also read the witness statement of Mr Hayes and carried out an unaccompanied inspection of the location and surroundings of the application land on 17 June 2009. I am satisfied that that the application should succeed on grounds (a) and (c). Ground (a) permits the discharge or modification where: "by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete."

5. It is clear from the evidence that when the restriction was imposed, the vendor was selling off plots of land for development (in fact the plots upon which the homes of the two objectors who did not proceed – now 10 Hillview Close and 195 Long Lane – were transferred before the transfer of the application land, so they could not, therefore, have been entitled to the benefit in any event), and that apart from some road frontage development, the area in general was rural and undeveloped. Two of the plots that had been sold off to the north subsequently became a small cul-de-sac development (Hillview Close), and land to the south (possibly having not belonged to Mr Newbery) has also been developed and is known as Tilling Close. Further extensive residential development, including Cotswold Way, has occurred in the immediate vicinity, and in the wider area, to the extent that this part of Tilehurst is now an almost fully built-out urban conurbation. The application land is by far the largest site in the area (as clearly evident from the plan adduced at page 66 of the trial bundle) and if developed with three houses rather than the one existing residential unit, the resultant plot sizes will, in my view, be more in line with those properties in the immediate vicinity.

6. There is no doubt in my mind, with the vast majority of development having taken place in the 1960s, 1970's and with some further infilling more recently, the whole area has changed beyond recognition, and in my judgment, there can be no question that due to the changes in the neighbourhood, the restriction is now obsolete. Ground (a) is therefore made out. Although a finding under ground (a) might suggest a discharge of the restriction, the fact is that the applicants only seek modification because of the agreement they came to with the three principal objectors.

7. With regard to ground (c), which permits discharge or modification where: "the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction", the three objectors whose properties abut the application land (but who have since withdrawn)

had expressed concerns that their houses would be overlooked. The plans provided in Mr Crossley's report showed the sightlines from the ground to first floors of each of their properties to the part of the development that would be most visible from them, and showed them also in reverse. It was submitted that those drawings demonstrate that the former objectors properties would not be seriously overlooked and, with the applicants having agreed to maintain the existing very high hedge and also to erect close-boarded fencing, any impact would be minimal. I agree, and therefore conclude that even if those objections had been maintained, the objectors would have suffered no injury as a result of the development.

8. Finally, the application also included ground (aa) – the impeding of a reasonable use, and the question of whether the restriction secures to the persons entitled to the benefit of it any practical benefits of substantial value or advantage. It was submitted that if I do not find the application made out under either of grounds (a) or (c), then reliance would be placed on this ground. Having determined that grounds (a) and (c) are made out, and with this now being an unopposed application, no further reference to ground (aa) is needed.

9. The restriction shall be modified so as to permit, after the removal of the existing dwelling, the erection of not more than three detached houses with garages on the application land in accordance with permission granted on appeal (APP/W0340/A/07/2046740) on 31 December 2007 in respect of Application ref: 06/02907/FULD and amendment to previous approval 1156508.

DATED 29 June 2009

P R Francis FRICS