UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – covenant against alterations to new dwelling without consent of developer – covenantee refusing consent to enlargement of garage and creation of additional accommodation – application by original covenantor to modify or discharge covenant to permit enlargement – covenant imposed only three years before application – risk of breaches of other covenant if modification allowed – whether use reasonable – whether discretion should be exercised – s.84(1)(aa), (c), Law of Property Act 1925 – application refused

IN THE MATTER OF AN APPLICATION UNDER SECTION 84(1), LAW OF PROPERTY ACT 1925

BETWEEN

MR NEIL MARTIN O'CALLAGHAN
MRS MAUREEN MARTHA O'CALLAGHAN

Applicants

and

(1) MR GARY MIDDLETON
(2) MR MICHAEL STEVENS AND MRS GILLIAN STEVENS
(3) MR STEPHEN SMITH AND MRS SUSAN SMITH
(4) WAINHOMES (NORTH WEST) LIMITED

Objectors

Re: 5 Illidge Close,
Willaston,
Cheshire CW5 7SR

Martin Rodger QC, Deputy Chamber President

28 February 2020

Manchester Civil Justice Centre

Mr Michael Barrow, instructed by Hall Smith Whittingham LLP, for the applicants
Ms Emily Duckworth, instructed by Brabners, solicitors, for the objectors

The following cases are referred to in this decision:

Re Barter's Application [2017] UKUT 451 (LC)
Cresswell v Proctor [1968] 1 WLR 906
Re Martins' Application (1989) 57 P. & C.R. 119
Ridley v Taylor [1965] 1 W.L.R. 611

Introduction

1. These proceedings are an application for the discharge or modification of a restrictive covenant imposed in a freehold Transfer dated 20th May 2016 made between the applicants, Mr Neil O'Callaghan and Mrs Maureen O'Callaghan as transferees, and Wainhomes (North West) Ltd as transferor. The Transfer was of a newly completed five-bedroom house and detached garage at No. 5 Illidge Close, Willaston, near Nantwich in Cheshire.

2. The applicants would like to enlarge their garage, but the Transfer includes a covenant prohibiting them from making alterations to the property without the consent of Wainhomes, which the company has refused to give.

3. The application is made under grounds (aa) and (c) in section 84(1), Law of Property Act 1925. It is unusual, though not unprecedented, in that it is made by the original covenantors within three years of their first having agreed to be bound by the restriction.

4. The application is objected to by the covenantee, Wainhomes, and by the owners of three neighbouring properties on the new estate: Mr Gary Middleton, the owner of No. 2 Illidge Close; Mr Michael Stevens and Mrs Gillian Stevens, of No. 3 Illidge Close; and Mr Stephen Smith and Mrs Susan Smith, of No. 4 Illidge Close.

5. At the hearing of the application the applicants were represented by Mr Michael Barrow and all of the objectors were represented by Ms Emily Duckworth. I am grateful to them both for their submissions. Oral evidence was given by Mr O'Callaghan, Mr Stevens and Mr Smith, and by Ms Nina Chesworth, who is employed by Wainhomes as its Legal Director.

6. The evidence before the Tribunal also included plans of the estate and recent photographs. Exceptionally, I did not consider that it was necessary in this case for the Tribunal to inspect the application site or the objectors' properties.

The restriction

7. The Transfer to the applicants included various covenants by which Mr and Mrs O'Callaghan, as transferees, covenanted with the Wainhomes, as transferor, and with the owners or occupiers of the other houses on the Estate. It is agreed that the residential objectors have the benefit of those covenants.

8. The critical covenant is at paragraph 1.2, and is in these terms:

> "During the first fifteen years of the Term (but not thereafter) not to erect any other building or buildings or make any external additions or alterations thereto including the erection of a satellite dish or apparatus which shall not as to the entirety thereof be in accordance with such plans and elevations as shall have been previously approved by the Transferor or its Surveyor and the

> Transferee shall pay the reasonable fees of the Transferor or its Surveyor for the approval of such plans and elevations (not being less than Fifty pounds)''.

9. Two preliminary points about the restriction can be noted at this stage.

10. First, although the restriction is expressed to be "for the first fifteen years of the Term", "the Term" is not a defined expression. A proportion of the houses on the estate were sold on long leases (including Mr and Mrs Smith's at No. 4) and it appears that not all necessary alterations were made to a standard form of transfer when it was adapted for use in the sale of freehold properties. The parties agreed that the Transfer was defective. Ms Duckworth suggested that the parties should be taken to have intended "the Term" to have the same meaning as in the long leases on the estate in which it is defined as commencing on 1 January 2016. I think that an unlikely intention, as there is no evidence that freehold purchasers were aware of the terms of the leases of other properties, nor any obvious reason for them to have had access to them. A more likely construction may be to treat the restriction as applying for fifteen years from the date of the Transfer. Neither counsel argued against that interpretation but it is not necessary for me to decide the point. What matters is that Mr Barrow did not suggest that the absence of a definition adversely affected the enforceability of the restriction for the time being.

11. Secondly, it was not suggested by Mr Barrow that the express covenant against the making of alterations without the consent of the original developer or its surveyor was subject to an implied proviso that consent was not to be unreasonably withheld. In fact, as originally formulated the application was for the discharge of the restriction or its modification to include an express proviso that consent to alterations is not to be unreasonably withheld. That is not how the application was presented at the hearing, but the important point is that the parties both interpreted the covenant as giving Wainhomes the right to refuse consent to alterations for whatever reason it chose.

12. It is also relevant to mention paragraph 2.2 of the Transfer, which is a covenant by Mr and Mrs O'Callaghan that they will use the garage at the property "exclusively as a private garage for the keeping therein of a private car or cars or motor cycle or cycles and items of a domestic or horticultural nature".

13. Finally, I note that the while the Transfer also granted the transferees rights of way over the estate roads, it did not grant them any right to park on those roads.

The relevant facts

14. Illidge Close is part of Cheerbrook Gardens, a residential estate of 20 detached houses all of which, with one exception, were completed by Wainhomes in 2016 (the exception is a property to be completed as part of a second phase of development on adjoining land). The houses come in a variety of sizes of between three and five bedrooms and all are to one of nine standard Wainhomes' designs. The photographs I have seen show them to present a homogeneous appearance. The houses are quite closely spaced and generally have small front gardens, with larger gardens to the rear or to the side.

15. The applicants' home, No. 5, is a five-bedroom detached house built close to the plot boundary with No. 3 which lies to the south. To the north it adjoins No. 7. Between Nos. 5 and 7 are their respective driveways and, slightly to the rear, the detached garage of No. 5.

16. The garage itself is a single storey building with a pitched roof, the ridge line running parallel to the street. Mr O'Callaghan explained that the garage has a narrow door which restricts access so that it is not possible to park more than one vehicle inside.

17. The driveway in front of the garage is a confined space between the boundary fence with No.7 and the flank wall of No.5; it narrows towards the road, and is further restricted by the area required to be kept clear to allow the garage door to swing up. The driveway is large enough to accommodate at least two vehicles, and Mr O'Callaghan explained that he could squeeze on a third small car.

18. To the north of the estate lies another area of land which was shown on the estate sales brochure (which Mr O'Callaghan confirmed he had seen) marked as "possible future development". Wainhomes is currently constructing phase two of the Cheerbrook Gardens development on this land. Phase two which will be much larger than phase one, with 100 new homes. Access for construction traffic, and for the new homes themselves once they are sold, is along the estate road running directly in front of No.5.

19. In October 2017 the applicants applied for planning permission for a "garage extension and conversion" and permission was granted by Cheshire East Council by a delegated decision the following month.

20. Although in their grounds of application to the Tribunal the applicants suggested that their proposal did not involve the construction of an extension to the existing garage but merely the alteration of the front drive and the "reconstitution of the garage to enable additional parking", and although Mr O'Callaghan repeated that description in his witness statement, Mr Barrow acknowledged that the reverse is the case. The proposal is for an extension of the garage towards the front and the addition of an upper storey within a new roof space. The existing pitched roof is to be removed, the walls raised, and a new roof added with the ridge line now parallel to the flank walls of the adjoining houses and the gable now facing the street. The building footprint is to be enlarged by approximately 3 metres towards the front by incorporating into it part of the current drive. The ridge line will be significantly higher than the original design, though not quite as high as the ridge lines of the houses on either side.

21. The plans approved as part of the applicants' planning permission show that the building will have a new window at first floor level, facing west (and therefore not overlooking neighbouring property to the south), and three skylights in the roof, all facing south. The plans describe the new upper floor as a "granny flat" and show it as self-contained studio-style living accommodation with a bedroom, shower room, and kitchenette reached by an internal staircase from ground level. Mr O'Callaghan explained that the couple's architect had advised that the space should not be shown as vacant on the plans, but that they had

not yet decided how it would be arranged. He said it was not currently their intention to fit it out as living accommodation and it was likely that it would be used instead as a gym.

22. The applicants own five motor cars and three motor cycles (which are insured on terms that they be parked in a locked garage). For at least part of 2019, and possibly before that, Mr O'Callaghan also drove a sixth car provided by his employer. It was his practice until December 2019 to park two of his vehicles on the estate road immediately in front of his house. He ignored requests by Wainhomes' solicitors not to park there because it obstructed access for construction traffic to the second phase of the development, and instead argued that he had a right to do so (he does not). He also ignored complaints from neighbours that access to their properties was made more difficult by his parking arrangements and that damage was being caused to the kerb and footway on the opposite side of the road by heavy vehicles mounting the pavement to negotiate their way past his parked cars.

23. In his evidence to the Tribunal Mr O'Callaghan denied that any obstruction had been caused and suggested that the complaints of his neighbours were malicious and part of a campaign of harassment against him. At least one photograph I was shown, of a heavy vehicle (possibly a refuse lorry) mounting the pavement beside Mr O'Callaghan's two parked vehicles, suggests there is more substance to the complaints than he is prepared to recognise.

24. It is not necessary for me to resolve the dispute over the extent of any obstruction caused to estate roads and access to neighbouring properties. In December 2019 Mr and Mrs O'Callaghan gave undertakings to Wainhomes' solicitors, under threat of proceedings for an injunction, that they would not park on the estate road outside their home. The drafting of that undertaking may have left something to be desired, as Mr O'Callaghan has now taken to parking his fifth vehicle on the space reserved for visitors to the show home on phase 2 of the development. That land belongs to Wainhomes and Mr O'Callaghan has no right to park there. He has been asked to stop, but, as before, he has ignored that request.

25. A parking plan submitted as part of the applicants' planning application shows two car parking spaces within the proposed new garage and another two spaces on the drive. Mr O'Callaghan considered that he would still be able to accommodate three cars on the drive, and that the proposed garage extension would increase the available parking from four vehicles to five, making it unnecessary for him to park on the estate roads. No plan showing that arrangement was produced and it appeared to me to be unrealistic. I appreciate that, as Mr O'Callaghan explained, the new garage will have a larger internal area and wider doors to allow two vehicles to be parked inside, and that the doors will be of a design which does not require any space to be kept free on the drive, but the fact remains that the space available for parking will remain more or less the same as at present. Mr O'Callaghan referred to his having an option to acquire land at the front of his house, onto which he would be able to extend his drive, but he was mistaken about that. The true position is that Wainhomes have an option to require the O'Callaghans to take a transfer of what is currently part of the footway in front of their house if Wainhomes so choose, but any such transfer will require the area to be maintained unobstructed and available for access. Mr O'Callaghan's calculation that he would be able to park all five of his vehicles within his own boundaries is therefore based on a false assumption.

26. In December 2017 the applicants first applied to Wainhomes for their consent to the proposed garage extension and to the replacement of the tarmac drive at the property with block paving. This request was refused in February 2018. It was repeated in a letter of 7 June 2018 from their solicitors to Wainhomes, but was again refused. The applicants consider that refusal unreasonable and contrast it with the consent given to their neighbours at No.3 to extend their property at the rear by constructing a conservatory. No.7 has also been granted planning permission to extend at the rear in a similar way, but the planning permission appears not yet to have been implemented and the consent of Wainhomes has not been sought.

27. The applicants' applied to Tribunal for the modification or discharge of the restriction in paragraph 2.1 of the Transfer on 3rd April 2019, a little less than three years from the date on which they had agreed to the restriction by completing the Transfer.

The statutory provisions

28. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify restrictive covenants affecting land, where certain grounds in section 84(1) are made out. Mr and Mrs O'Callaghan rely on grounds (aa) and (c).

29. The application formally seeks the discharge of clause 2.1 of the Transfer in its entirety, with modification to introduce a requirement that consent to a proposed alteration may not be withheld unreasonably as an alternative. At the start of the hearing Mr Barrow explained that the applicants' primary objective was to secure the right to implement their planning permission for construction of the new garage, and the application as argued before the Tribunal was for a modification of the covenant authorising that building alone.

30. So far as is material, ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction impedes some reasonable use of the land for public or private purposes. Subsection (1A) introduces these additional considerations:

> (1A) 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.

31. The Tribunal is also required, when considering whether sub-section (1A) is satisfied and a restriction 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 (section 84(1B)). To succeed in their alternative case under ground (c), the

applicants must demonstrate that the proposed modification of the restriction would not cause injury to those entitled to the benefit of them.

The issues

32. On behalf of the objectors Ms Duckworth acknowledged that the restriction impeded the proposed use of No. 5 for the construction of the extended garage. It was agreed that there were five remaining issues, of which the first three relate to ground (aa), the fourth to ground (c), and the fifth to both grounds:

(1) Whether the proposed use of No. 5 for the extended garage is a reasonable use.

(2) Whether, in impeding that use, the restriction secures for the objectors any practical benefit of substantial value or advantage.

(3) If not, whether money will be adequate compensation for any loss or disadvantage the objectors will experience as a result of the modification or discharge of the restriction.

(4) Whether the proposed modification would cause no injury to the objectors.

(5) Whether, if otherwise satisfied that the requirements of either ground are made out, the Tribunal ought to exercise its discretion to discharge or modify the restriction.

Issue 1: Reasonable use

33. The use of land within the curtilage of a domestic property for parking private vehicles is a perfectly reasonable use. The same would usually be said of the construction or extension of a garage to accommodate such vehicles. In this case there is no reason to doubt that the extension will be well constructed and will match the existing style of No.7, although as it will have an upper floor and will be much larger, it will not be consistent with the detached garages elsewhere on the estate.

34. As the Tribunal has often said, the fact that planning permission has been granted for a proposed use of land, while not conclusive, is an important factor in favour of regarding that use as reasonable (see, for example, *Re Martins' Application* (1989) 57 P. & C.R. 119).

35. Ms Duckworth submitted that in this case the proposed use was unreasonable because the construction of a "granny flat", capable of being occupied separately, would be liable to exacerbate the problems neighbours have experienced over inconsiderate parking. That is possible, but in the short term unlikely. Although they have an unusually large number of motor cars the applicants have only one child, who is of school age. For the foreseeable future they will have no particular need to accommodate visitors on the upper floor of their new garage, and I see no reason to doubt Mr O'Callaghan's evidence that the upper floor will not (in the short term at least) be equipped as a self-contained flat. It is of course possible that future occupiers of the house may have a larger family and enough visitors to make additional residential accommodation attractive to them. But for the time being, while I accept that visitors who arrive by car will add to the parking problem, I do not think the new garage itself will make any real difference to that problem.

36. The relevant use in this case, i.e. the use which is impeded by the restriction, is not the parking of vehicles, but is the use of the land for the construction of a larger garage, with a first-floor level. If the proposal had simply been for the enlargement of the garage without the addition of an upper storey I would have agreed with Mr Barrow's submission that it was a perfectly reasonable use of the land. But the proposal is not so limited. It includes the upper floor for which planning permission has been granted on the basis that it will be used as living accommodation. It may be that the upper floor is used for some other purpose, such as a gym, but unless it is used exclusively for storage of household or garden items it will not be used "exclusively as a private garage for the keeping therein of a private car or cars or motor cycle or cycles and items of a domestic or horticultural nature" as clause 2.2 of the Transfer requires.

37. The proposed new garage is a substantial building, and it is to be expected that it will cost much more to erect than a simple extension which retained the single storey design of the existing structure. It is reasonable to assume that Mr and Mrs O'Callaghan, or a purchaser from them, will want to make use of the upper floor in some way. Both of the uses which have been mentioned, self-contained residential accommodation or gym, would involve a breach of clause 2.2 of the Transfer. No application has been made to modify clause 2.2 to permit alternative uses of the upper floor. If the space was used as a gym, or a residential annex, or as a self-contained flat for visitors or paying guests, such a breach would be difficult to detect and to police.

38. By his behaviour in relation to parking, and his disregard of the requests of Wainhomes and his neighbours, Mr O'Callaghan has demonstrated that he does not always behave in a reasonable way. He is inclined to take advantage, and to disregard his own obligations. When his obligations have been pointed out to him, and he has been compelled by the threat of proceedings to comply with them, he has sought the opportunity to inconvenience Wainhomes and cock a snook at them by parking on the driveway of their show home. I am satisfied that, by virtue of its design, the proposed new building is a breach of covenant in the making. There is a significant risk that it will give rise to future disputes between Wainhomes and Mr O'Callaghan, or between him and his neighbours. I have therefore concluded that, despite the grant of planning permission, it would be an unreasonable use of the land for the proposed new garage to be erected.

Issue 2: Practical benefits

39. The practical benefits which Ms Duckworth submitted were secured for the residential occupiers of the estate by the restriction on alterations being made without consent were: first, the preservation of the character and ethos of a recently built and carefully designed estate; secondly, the preservation of the existing population density and the avoidance of an increase in noise, traffic and parking on the road likely to result if the proposed work is carried out; and thirdly, the preservation of the integrity of the scheme of covenants.

40. Ms Duckworth also submitted that the prevention of the proposed works at No.5 secured a practical benefit to Wainhomes by protecting its business interests whilst it develops the 100 further houses on phase 2 of its development. The risk that the additional accommodation would result in additional vehicles on estate roads, and the prospect that

access would be blocked for construction traffic, was one aspect of this benefit. Another was the preservation of the visual appearance and uniformity of the estate which was likely to be an attraction to prospective purchasers.

41. Before considering these submissions, it is necessary to point out that the modification the Tribunal is being asked to make is now significantly narrower than was originally being sought. The Tribunal is not being asked to discharge the restriction, and the only modification requested is one sufficient to enable the planning permission to be implemented.

42. I have already explained why I do not think the construction of the proposed building will exacerbate the problems of parking on the estate roads, at least while the applicants remain owners of No.5. The restriction has a further eleven years to run and I regard any benefit the covenant secures in preventing the number of residents from increasing in that period as being of very little significance. The same is true of suggested increases in noise or other consequences of more intensive occupation. These are unlikely to be meaningful and, in any event, their avoidance is not secured to any real extent by the prevention of the O'Callaghans' new garage. No. 5 is not occupied to the fullest extent possible and the levels of noise and disturbance feared by neighbours could easily be generated from a five-bedroom house which was fully occupied.

43. I place no weight on the suggested benefit of preserving the "ethos" of the estate. It was not explained what that was intended to refer to or how it was secured by impeding the construction of the new garage.

44. Of more significance is the suggestion that preventing the construction of the new garage secures a benefit to residents and to Wainhomes by preserving a uniform style on the estate, thereby adding to its visual amenity. The proposal would leave the garage of No.5 different in appearance from any other property on phase one, but several features of the estate serve to minimise the significance of that difference. First, the new garage has been designed in the same style as No.5 itself and the only visual difference will be that it will be a significantly taller building than other detached garages. Secondly, because of its position between Nos. 5 and 7, and its location towards the back of the plot on which it stands, it will only become visible to someone entering or leaving the estate by car, or walking around it, when the viewer is directly opposite the new building. Thirdly, although it is designed to be homogeneous, the estate is not intended to be entirely uniform; there are nine different standard designs of property, some with integral garages, some with detached, and in a variety of sizes. Nor are the plots of standard size, or the houses on them built to consistent building lines. Within this patchwork, the presence of a non-standard garage is unlikely to be apparent to the casual observer. Fourthly, and finally, I bear in mind that the restriction is not permanent, and will become spent in 2031, so any benefit secured is relatively short term.

45. Had the application been pursued for the release of the restriction in its entirety I would have given much greater weight to the developer's desire to ensure a consistency of appearance on the estate. Had the covenant been perpetual, rather than limited to a short period only, I would have been concerned about the precedent effect of permitting a large

garage with upper floor accommodation. The potential for the same alteration to be proposed in other locations would be quite substantial, and permitting one such building would, in this case, make it much more difficult to resist other requests. But given the narrowness of the modification sought, and the limited life expectancy of the restriction, neither of these factors is really of any significance. For the reasons given in the last paragraph I am satisfied that by impeding the construction of the proposed garage the restriction does not secure practical benefits of substantial value or advantage to any of the objectors.

Issue 3: The adequacy of financial compensation

46. The circumstances in which money will not be capable adequately of compensating the person entitled to the benefit of a restriction for the loss of that benefit are quite limited. In a case relying on ground (aa) where the release or modification of the restriction is not justified on public interest grounds, the adequacy of financial compensation only arises where the Tribunal has already found that the restriction does not secure a practical benefit of substantial value or advantage. Some unusual circumstance is likely to be involved before it can be said that the less than substantial value or advantage cannot be measured adequately in financial terms (for example because it involve a small additional pressure on a local planning authority to grant planning permission contrary to its own policy: see *Re Quartleys' Application* (1989) 58 P & CR 518).

47. The suggested practical benefits to the residential occupiers, so far as they might be felt to have an effect on the enjoyment of neighbouring owners of their own properties, would be capable of being measured in financial terms. In principle the differences between two houses on a residential estate are capable of being assessed by reference to evidence of sale prices, and by the application of valuation judgment. Any change in the value of the same house, before and after some change of circumstances (such as an alteration in its immediate surroundings) are also capable, in principle, of being measured in financial terms.

48. In different circumstances the weakening of the scheme of covenants (a concern for residential occupiers), and the possible adverse effects on the sale of properties on Wainhomes' phase two estate, might be much more difficult to measure in financial terms. In this case, for the reasons I have already given relating to the short duration of the covenant, the very limited modification which is now sought, and the very restricted views of the proposed new building which would be available to passers-by, if it were necessary to do so I am satisfied that the loss or disadvantage sustained by the objectors as a result of the modification would be capable of being adequately compensated by a very modest award.

Issue 4: No injury

49. To succeed on ground (c) the applicants must show that the objectors would sustain no injury if the restriction was modified. In *Ridley v Taylor* [1965] 1 W.L.R. 611 Russell LJ referred to this ground as a ''long stop against vexatious objections … designed to cover the case of the proprietarily speaking, frivolous objection".

50. Although I am satisfied that the injury which would be caused to the objectors by the proposed modification of the restriction would be likely to be small, I am far from satisfied that there would be no injury at all.

51. Wainhomes and the immediate neighbours of No. 5 would be put at risk of breaches of the absolute prohibition in clause 2.2 of the Transfer on the use of the garage for other purposes. Their ability to enforce that restriction would be made legally more complex if a building designed to be used in a way which would amount to a breach had been permitted by this Tribunal; at the very least the decision would be relevant to the exercise by a court of the discretion to grant an injunction prohibiting such use. A claim for an injunction would also be factually more complex, as it would be necessary to prove that such use as was being made of the upper floor was not within the scope of "the keeping therein of … items of a domestic or horticultural nature". An insistence by Mr O'Callaghan that he was simply using the upper floor to store furniture or keep-fit equipment, rather than using the space as a guest suite or a gym, might be difficult to disprove. Having considered Mr O'Callaghan's evidence in this case, including his justification of his unauthorised parking on Wainhomes' land, I do not regard the risk of a breach of clause 2.2, followed by a resistance to its enforcement, as remote or fanciful possibilities.

52. The general weakening of the scheme of covenants would represent a further injury to the objectors which makes it impossible to say that ground (c) has been established in this case.

Issue 5: Discretion

53. Section 84 provides that "the Upper Tribunal shall have power" to discharge or modify restrictions on being satisfied of the statutory grounds and the parties agreed that once the necessary grounds have been made out the Tribunal has a discretion, which must be exercised judicially, whether to make an order or not. There are two aspects of this case which, if I was otherwise satisfied that the grounds of application had been made out, would nevertheless lead me to refuse to make the requested modification of the restriction.

54. I have already explained the first aspect at paragraphs 37 to 39 above, where I concluded that the construction of a garage with an upper floor which could not be used except in breach of a separate covenant, was not a reasonable use of the land. The same considerations would cause me to refuse the modification as an exercise of the Tribunal's discretion. To permit the modification would be to set the scene for future breaches of covenant and further neighbour disputes.

55. The second consideration is independent of the first. I mentioned at the start of this decision that this application is unusual in that it is has been brought by the original covenantors, Mr and Mrs O'Callaghan, within three years of their first having agreed to be bound by the restriction. Both the fact that the applicants seek release from their own bargain, and the fact that they do so soon after making that bargain without any change of circumstances having occurred, are powerful considerations against the exercise of the Tribunal's discretion.

56. In *Re Barter's Application* [2017] UKUT 451 (LC), some of the authorities on the exercise of the Tribunal's discretion were reviewed. These included the decision of the Court of Appeal in *Cresswell v Proctor* [1968] 1 WLR 906 where an application by an original covenantor for the release of a covenant entered into only three years earlier was described by Danckwerts LJ as "startlingly prompt". He suggested that the exercise of the power in those circumstances was "not within the true intention of section 84"; Harman LJ said that in the absence of a material change of circumstances to grant the application would be "quite out of the question."

57. The authorities on "prompt" applications establish that the shortness of the time since the imposition of a covenant and the closeness of the applicants' connection to the original covenantor are factors which can be taken into account as justifying a refusal of an application. In this case there is no suggestion that there has been any relevant change of circumstance. The applicants are themselves the original covenantors. The ink is dry on their Transfer, but only just.

58. As Ms Chesworth explained, part of Wainhomes' reason for including an absolute prohibition on alterations without its consent on freehold sales of houses on its new estate, was to ensure that the appearance of the estate remained in accordance with its designs during the initial sales period for both phase one and phase two of the development. That purpose is still being achieved (in the one instance where an extension has been permitted, it was for a conservatory at the rear of the property, which would not be seen from the road). To permit modification of the covenant to allow an alteration to be made to No. 5, where the original covenantee, Wainhomes, has refused its consent, would be to deprive it of a significant part of the time-limited protection it so recently bargained for.

59. In my judgment each of these considerations would have been sufficiently powerful, on its own, to make it inappropriate for the Tribunal to have exercised its discretion in the applicants' favour if grounds (aa) or (c) had otherwise been made out. As it is, for the reasons I have explained, the application fails before the discretion stage is reached, and is accordingly dismissed.

Martin Rodger QC

Deputy Chamber President

19 March 2020