



LP/43/2006

**LANDS TRIBUNAL ACT 1949**

***RESTRICTIVE COVENANT – modification – dwellinghouse – covenant not to erect more than one dwellinghouse and garage – application to modify to permit one additional dwelling – whether restriction obsolete – whether proposed use reasonable – whether practical benefits of substantial value or advantage secured by restriction – whether modification would cause injury – application granted subject to payment of compensation totalling £1,000 – Law of Property Act 1925, s84(1)(a), (aa),(c)***

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

by

**MR AND MRS A P BURT**

**Re: Land adjacent to  
46 The Ridings  
Burgess Hill  
West Sussex  
RH15 OPL**

**Before: N J Rose FRICS**

**Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL  
on 13 November 2008**

*Stephanie Tozer*, instructed by Castles, solicitors of Hurstpierpoint, for the applicants.  
Mr Richard Cassidy, with permission of the Tribunal, for the objectors.

The following case is referred to in this decision:  
*Re Bass Ltd* (1973) 26 P & CR 156

The following case, although not referred to in this decision, was cited:  
*Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 WLR 2409

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## DECISION

### Introduction

1. This is an application by Mr and Mrs A P Burt under section 84(1) of the Law of Property Act 1925 for the modification of a restrictive covenant affecting freehold land containing a dwellinghouse and garage and known as 46 The Ridings, Burgess Hill, West Sussex, RH15 OPL so as to permit the erection of an additional dwellinghouse on the said land (the application site).

2. The restriction was imposed by a conveyance dated 7 September 1979 between South Bank Homes Limited (the Transferor) and Michael Edward Weston and Dawn Julia Weston (the Transferee). Clause 1 of the conveyance stated that:

“The said land is transferred subject also to and with the benefit of the restrictive stipulations hereinafter contained subject to and with the benefit of which the said land is intended to be held by virtue of its forming part of the Transferor’s building estate at Birchwood Grove Road aforesaid in accordance with the scheme of building development on the Transferor’s said estate which estate is shown and bounded by a blue line on the plan annexed hereto.”

3. By Clause 2 the Transferee covenanted with the Transferor

“for the benefit of the remainder of the land affected by the said scheme shown and bounded by a blue line on the plan annexed hereto and also as a separate covenant with every other person who is now the owner of any part of the said land with intent to bind the land hereby transferred into whosoever hands the same may come that he the Transferee and the persons deriving title under him will observe and perform the stipulations to which all the land comprised in the said scheme is subject particulars of which are set out in the Third Schedule hereto.”

4. By paragraph 1 of the Third Schedule the Transferee covenanted as follows:

“Not to erect or permit to be erected more than one dwellinghouse and garage upon the land hereby transferred or any part thereof or to use or permit the said land to be used other than in connection with one dwellinghouse and garage as aforesaid and not to allow any trade business manufacture or club to be set up or carried on in or upon the land hereby transferred and not to use the said land or any building thereon for any purpose which may be or become a nuisance or cause annoyance to the Transferor or to the owners or occupiers of any part of the Transferor’s said estate or for the purpose of any road footpath or access way intended for use in common.”

5. On 20 January 2006 planning permission was granted by Mid Sussex District Council for the erection of one dwelling adjacent to the existing dwelling on the application site. The

approved plans showed a detached house on two storeys, with two on-site car parking spaces and two cycle spaces. The applicants now seek the modification of the covenant to permit such development on grounds (a), (aa) and (c) of section 84(1) of the Act.

6. There are outstanding objections from the following residents of The Ridings: Mrs D Cotton (No.18), Mr and Mrs R Morley (No.19), Mr and Mrs R F Russell (No.20), Mr and Mrs H D Dowling (No.21), Mr D Howe (No.22), Mr and Mrs J Hooper (No.23), Mrs L Foster (No.24), Mr I Lucas (No.29), Mr C D Bowers (No.39) and Mr M Smith (No.51). It is agreed that all the objectors are entitled to the benefit of the covenant.

7. At the hearing Ms Stephanie Tozer of counsel appeared for the applicants. She called Mr Burt to give factual evidence and Mr Adrian Moore BA(Hons), DipUP, MRTPI, a partner in Messrs Parker Dann, chartered town planning consultants of Lewes, as expert witness. Mr Richard Cassidy appeared on behalf of the objectors with permission of the Tribunal. He did not call any expert evidence but three of the objectors, namely Mrs Dowling, Mr Bowers and Mr Hooper, gave evidence of fact. On the afternoon of 17 November 2008 I inspected the application site, the interior of certain objectors' houses and the exterior of the remaining properties in The Ridings. My visit was timed to coincide with the departure of children from the adjoining school at the end of the school day.

## **Facts**

8. The Ridings forms part of the Kingway Estate, a residential area towards the south east of Burgess Hill, which was developed at a fairly high density in the late 1970s with a mixture of detached and semi detached dwellings. It is bounded by Folders Lane (B2113) to the south and to the east by Wheelwright Lane and the cul-de-sacs which lead off it. The Ridings is situated at the north western corner of the estate.

9. The Ridings is a horse shoe shaped cul-de-sac, having two main arms which run in an east west direction for most of their length and contain a total of 64 houses. There are vehicle turning heads at the western extremities of each arm. The two arms meet at the eastern end and lead into Drovers Way. There is a primary school (Birchwood Grove Community School) to the west and a pedestrian footpath runs from north to south between the school and the western ends of the cul-de-sac. The footpath is separated from the school by a row of deciduous trees.

10. The proposed plot will be situated at the end of and be the last property fronting the southern side of the northern arm of the cul-de-sac. Its western boundary abuts the public footpath. The site of the proposed new house is currently the side garden of the existing house known as No.46, which lies immediately to the east. It is enclosed by a hedge fronting the highway to the north and a two metre close boarded fence to the side (west) and rear (south) boundaries. The rear garden to No.21 shares a common rear boundary with the application site. The proposed new dwelling would be six metres wide (0.1 metre less than No.46) and the same depth as No.46. A kitchen and wc are proposed at ground floor level at the front of the

property with a lounge/dining area to the rear. Three bedrooms and a bathroom are proposed at first floor level.

### **Preliminary matter**

11. The application was listed for hearing on 13 November 2008. On 10 November the applicants' solicitors wrote to the Tribunal. They said that, on a closer reading of the terms of the conveyance dated 7 September 1979, it appeared that modifications to paragraphs (2), (5) and (7) of the Third Schedule would also be required. Those paragraphs read as follows:

- “(2) No additional building or any external addition or alterations to any existing building shall be erected or made on any part of the land hereby transferred unless the plans drawings and specifications thereof shall have first been submitted to and approved in writing by the Transferor and the Transferor's surveyor's fees of £10.00 plus any value added tax or any other tax for the inspection thereof paid ...
- (5) Not without the previous consent in writing of the Transferor to cut down destroy or injure any tree or trees now standing upon the land hereby transferred nor without such previous consent cut lop or top any such tree or trees nor to destroy or remove any shrub or shrubs or hedge or hedges now standing growing or being upon the said land ...
- (7) In order to preserve an open aspect no fence wall gate or hedge shall be or be allowed or suffered to be erected placed or planted on either of the side or front boundaries or (sic) the land hereby transferred or elsewhere between the said front boundary and the line of the front elevation of the house erected on the land hereby transferred.”

12. At the hearing Ms Tozer formally applied to amend the application so that, if the covenant in paragraph 1 were modified, the existence of the other three covenants would not prevent the development thereby permitted. She pointed out that none of the residents who had objected to the modification of paragraph 1 objected to the proposed amendment. Moreover, South Bank Homes Limited was in creditors' voluntary liquidation and likely to be dissolved shortly. At that time that paragraphs (2) and (5) would probably lapse. Meanwhile, the joint liquidator had indicated that he took no view on the proposed modification of paragraph 1.

13. I indicated that my preliminary view was that it was not appropriate to permit an application to be amended at such a late stage, when it was not possible adequately to advertise the amendments before the commencement of the hearing. I said that I would defer a final decision on the matter until later, given that similar evidence was likely to be required whether or not the application was granted. Having given the matter further consideration, I am satisfied that it would be wrong to agree to the proposed amendment. Sixty-four properties have the benefit of the restrictions imposed by the 1979 conveyance and, apart from the applicants, only 10 of them have been advised of the latest proposal. It is not possible totally to discount the possibility that the owner or owners of one or more of the remaining 53 houses

might object or that they may only have decided not to object to the original application because implementation of the proposed development would be prevented in any event by other restrictions, including paragraph 7, which does not depend for its survival on the continuing existence of South Bank Homes Limited.

## **Grounds for the application and conclusions**

### Ground (a)

14. The applicants submit that the restriction is obsolete as a result of changes in the character of the neighbourhood. They contend that the original purpose of the covenants was to maintain the ethos of The Ridings as an estate with density and other building restrictions in order to secure a uniform appearance of properties on the estate. That purpose can no longer be achieved, they say, because a significant number of extensions have been added to houses, increasing the development density and changing the character of the estate. Some of the extensions are extremely large and have had just as much of an impact on density as the proposed development would. The number of extensions built in breach of the covenants in the building scheme points towards the scheme having lapsed. Furthermore, planning policies are different now from what they were when the covenants were imposed. Greater densities are now acceptable. Other developments (two housing estates within a mile of the application site and development of the adjoining school) have changed the character of the neighbourhood and are indicative of changing social attitudes towards density.

15. For the objectors Mr Cassidy denies that there have been any changes in the character of The Ridings or indeed of the Kingsway Estate of which it has formed part since 1979. No new properties have been built on the estate. All conservatories and the majority of extensions have been erected at the rear of the houses and have not altered the views from the street. The limited number of side (as opposed to rear) extensions are located at the western extremities of The Ridings and do not encroach upon or overlook neighbouring houses. The original purpose of the covenant was to prevent any increase in the number of dwellings and to prevent the erection of a greater number of houses or flats on the original building plots. That purpose can still be achieved.

16. I am satisfied that the restriction is not obsolete. Each of the original plots on The Ridings still contains a single dwellinghouse. In my judgment the reasons for imposing the restriction included a wish to prevent overdevelopment of the cul-de-sac. Notwithstanding the numerous alterations which have been made since 1979, the density of development, expressed in terms of the number of dwellings per plot, remains unaltered. To that extent, the original purpose of the restriction is still capable of fulfilment and the restriction is not obsolete.

## Ground (aa)

17. The applicants also rely on ground (aa). They submit that the building of an additional house on the application site would be a reasonable user of the land for a private purpose. The objectors disagree, on the basis that it would represent a breach of an absolute prohibition imposed by the restrictive covenant.

18. I consider that the objectors' argument on this issue is invalid. As the Member (J Stuart Daniel QC) said in *Re Bass Limited* (1973) 26 P & CR 156 at 158, when considering whether a proposed user is a reasonable one

“it is right, I think, to consider the question on the assumption that the covenants do not exist, otherwise the question is begged.”

I respectfully agree with that view. I have no doubt that the proposed user is a reasonable one. It is located in a residential area and has been approved by the local planning authority in accordance with a recommendation from the District Planning Officer.

19. The applicants do not suggest that the covenant, in impeding the proposed user, is contrary to the public interest. The issues under ground (aa), therefore, are whether the restriction secures to the objectors any practical benefit of substantial value or advantage to them and, if it does not, whether money would be an adequate compensation for any loss or disadvantage which the objectors would suffer from the proposed modification.

20. Mr Burt said that he had spoken to the residents of all houses in The Ridings except the five neighbours who had submitted letters of objection to the planning application for the proposed development. Thirty-four confirmed in writing that they had no objection. Eighteen verbally expressed no wish to object although they did not confirm this in writing. The owners of No.47, immediately opposite the application site, had written to confirm that they had “no concerns or objections” and the owner of No.49, two doors to the east of No.47, had written in similar terms. Mr Burt pointed out that many of the objectors lived considerably further away from the application site than many of those who had not objected.

21. In his expert report Mr Moore commented on the various matters which had been raised by the five residents of The Ridings who had objected to the planning application. The objections related to the impact on light to 21 The Ridings; parking, particularly with reference to the dropping and collection of children from the neighbouring school; overcrowding; loss of privacy; the impact on sewerage and water supply and the suggestion that the proposed development would be out of keeping with the street. Mr Moore did not consider that any of these objections were justified. He did not agree with any of the amenity objections. On parking he pointed out that the highway authority had raised no objection to the proposal.

22. Other matters raised by the objectors in response to the section 84 application were that the proposed development would interfere with the rear view from No.21, would cause an

increase in noise; reduce the artificial light to the adjacent footpath and destroy the integrity of the estate by creating a precedent for the erection of further houses. Mr Cassidy accepted that, in the light of the evidence, the objections on the grounds of light and lack of privacy were of little or no concern and that there was no expert evidence to suggest that there would be an adverse effect on drainage.

23. In the light of the evidence and my site inspection I am satisfied that, subject to two minor qualifications, the objections which have been raised to the proposed development are unfounded. The exceptions relate to the possible impact on the view from the properties at the rear and the risk that the proposed modification might lead to further houses being erected on the estate. No.21 is owned by Mrs Dowling and her husband. They purchased the property in 1983 and subsequently made substantial additions to it. Mrs Dowling said that she would have had no objection if the proposal had been to add an extension comparable in size to her own. It was pointed out that such an extension would also have interfered with her rear views, but she insisted that the effect of the development proposed by the applicants would be worse. In the light of my site inspection I find that the effect of erecting the proposed dwellinghouse on the view from the rear of No.21 would be slightly greater than the effect of erecting an extension. Since the latter would have no material effect on the amenities of No.21, any adverse effect on the view resulting from the proposed development would be minimal. In the light of my site visit I consider that the only other property whose view might conceivably be affected by the proposed development is No.22. The owner of that property, Mr Howe, prepared a witness statement but did not give evidence because of ill-health. I note that he did not refer to the view from his property either in his objection to the planning application or in his witness statement and I infer that any loss of view would be immaterial to him.

24. The remaining objection to which I should refer relates to the suggestion that approval of the proposed modification would constitute the thin end of the wedge. Only one other site was identified as a possible candidate for the construction of an additional dwelling, namely the rear garden of Nos.1 and 2 The Ridings. Mr Moore considered it unlikely that planning permission would be granted for such back land (or tandem) development, which would be contrary to current planning policy. He accepted, however, that some forms of backland development are deemed to be acceptable and, as the objectors pointed out, planning policy can change over time. I find that there is a slight risk that the proposed modification could lead eventually to one additional house being constructed on the estate. Even if such development were to take place, however, its effect on the character of The Ridings would in my view be slight. I therefore conclude that, in impeding the proposed development, the restriction does not secure to the objectors any practical benefit of substantial value or advantage to them. The applicants have therefore succeeded in establishing that paragraph (aa) applies.

#### Ground (c)

25. Given my finding on the objectors' thin end of the wedge argument, I am unable to find that the proposed discharge would cause absolutely no injury and the application on ground (c) therefore fails.

## **Compensation**

26. I turn to the question of whether money would be adequate compensation for the loss or disadvantage that the objectors would suffer from the proposed modification. I consider that a nominal award of compensation to each of the objectors will be an adequate compensation for such slight precedent as might be set. In my view the sum of £100 would be an appropriate payment to the owner or owners of each of the ten properties in respect of which an objection has been submitted to the Tribunal, making a total payment of £1,000.

27. The requirements of ground (aa) having been satisfied, I have jurisdiction to modify the restriction. I have considered whether it would be appropriate to do so, bearing in mind in particular the fact that the proposed development would breach further restrictions which do not form the subject of the present application. I am satisfied that I should exercise my discretion to modify the restriction, given my view that an application to modify the other restrictions could well succeed or, at the lowest, would not be certain to fail and indeed might not be objected to.

28. Accordingly, I order that the restrictive covenant in paragraph 1 of the Third Schedule to the conveyance dated 7 September 1979 be modified so as to permit the erection of an additional detached dwelling on the application site in accordance with the planning permission reference BH/05/02689/FUL, granted by Mid Sussex District Council on 20 January 2006, or any subsequent permissions which are the renewal of that permission and in accordance with details submitted to and approved by the local planning authority pursuant to such permission. An order to that effect will be made by the Tribunal provided, within three months of the date of this decision, the applicants shall have paid the said sums of compensation to the owner or owners of each of the objectors' properties.

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

Dated 21 November 2008

N J Rose FRICS