IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 21 (LC)
Case No: LP/5/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – Discharge – residential garage converted and used as a dog-grooming parlour – restrictions preventing business use and advertising – whether restrictions obsolete – whether any injury to beneficiaries – Tribunal's discretion to order modification with conditions – s84, Law of Property Act 1925

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

BY:

MR PAUL HOLDEN **Applicant**

Ash Lodge
School Lane
Old Leake
Lincolnshire
PE22 9NJ

DECISION ON WRITTEN REPRESENTATIONS

P D McCREA FRICS

The following cases are referred to in this decision:

Re: Truman, Hanbury, Buxton and Co Ltd's Application [1956] 1 QB 261

Millgate Developments Ltd v Smith [2016] UKUT 515 (LC)

DECISION

Introduction

1. This is an unopposed application to discharge restrictions which prevent a domestic garage being used as premises for a dog grooming business. The applicant, Mr Paul Holden, purchased Ash House, School Lane, Old Leake, Lincolnshire, PE22 9NJ, on 5 March 2012. Old Leake is a village approximately eight miles north east of Boston, and two miles west of The Wash, having a population of around 2,000.

2. Approximately eight years ago, Broadgate Homes carried out a development of around 30 dwellings in the centre of the village. Ash House is the southernmost property in the development, and is one of a small number of detached houses; the majority are linked or terraced houses. It has a detached double garage, which has been converted by Mr Holden for use as a dog grooming parlour. The front drive is laid out to accommodate 5-6 cars. The plot appears to be one of the largest on the development.

3. On 16 September 2015, Boston Borough Council granted planning permission (B/15/0263), expiring on 16 September 2020, for a 1m by 1m non-illuminated advertising sign at Ash House. On 16 November 2015 the Council granted planning permission (B/15/0381) for a change of use of the garage from domestic (class C3) to a dog grooming parlour (a *sui generis* use), restricted to the hours of 9am to 6pm, Monday to Friday, and 10am to 4pm on Saturdays, and at no time on Sundays or Bank Holidays.

4. There is an obstacle to the use of the garage as a dog grooming parlour. When Ash House was sold to Mr Holden by Broadgate Homes, the Transfer, dated 5 March 2012, included several restrictions. Those relevant to this application are:

> "12.4 Restrictive Covenants by the Transferee
>
> The Transferee so as to bind the Property covenants separately with each of the Transferor and every other person who is now the owner of any land forming part of the Estate (subject to the right of the Transferor to vary and release the covenants set out below) for the benefit of the whole and every part of the Estate to observe and perform the Restrictions set out below
>
> 12.4.1 The Restrictions mentioned in clause 4 are the following:
>
> …
>
> (c) not to carry on any trade or business or manufacture upon the Property
>
> (d) not to use any dwellinghouse constructed thereon other than as a private dwellinghouse with garage(s) if appropriate for use and occupation by a single family only

…

(i) not to park or leave on the Estate or upon any dwelling or roadway within the Estate any commercial vehicles (save those that are variants of normal saloon or hatchback cars and without signwriting and save those delivering goods to or removing things from the Estate or insofar as required for the repair and maintenance of the Property)

…

(p) no posters, advertisements, signs, hoardings or notice boards shall be erected or displayed on the Estate or any part thereof and no temporary builders signs or "For Sale" boards shall be erected on the property within five years of the date of Transfer without the prior written permission of the Transferor, such approval not to be unreasonably withheld or delayed."

5. The Applicant now applies for the restrictions to be discharged, relying on grounds (a) and (c) of section 84(1) of the Law of Property Act 1925 ("the Act").

Statutory Provisions

6. In so far as relevant to the application, the Act provides as follows:

"84. Power to discharge or modify restrictive covenants affecting land.

(1) 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 to discharge or modify any such restriction on being satisfied—

(a) 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, or

(aa) …

(b)…

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

…

1B) In determining whether … a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition."

Brief history of the application

7. The application was received by the Tribunal on 15 February 2016. Correspondence with the Registrar ensued in the normal way, including requests from the Tribunal for a correct title plan, and approval of a draft publicity notice. On 28 October 2016, Mr Holden submitted a copy of a letter which he had sent to the properties whose owners were the beneficiaries of the restrictions (in essence, the owners of houses on the remainder of the new estate). This letter included the following statement:

> "The removal of these covenants will benefit you as these will also be removed from your own [title], allowing you to run a business such as Avon etc."

8. The Registrar, rightly in my judgment, considered this statement to be misleading, and required the notices to be re-served with the paragraph removed. Further correspondence ensued, in which the Tribunal requested proof of service of the corrected notices, which was eventually received, and confirmed as satisfactory on 6 March 2017.

9. None of those given notice of the application has chosen to object. The application has therefore been dealt with under the Tribunal's written representations procedure. On 8 January 2018, I conducted an unaccompanied external inspection of Ash House and the surrounding development.

Submissions

10. Mr Holden's submissions were sufficiently succinct that I can repeat verbatim the elements that are relevant to the application:

> "I believe the covenants to be obsolete and do not adversely affect the people whom own the land that has the benefit of the covenant, regarding the properties sold by Broadgate Homes on this Estate, these have been sold, therefore causing no form of loss to Broadgate themselves, the plots have continued to resell easily and some owners have experienced a profit, as they are selling successfully on the Estate.
>
> I wrote to Broadgate to use the garage for business purposes and was informed of the covenant, the house has been designed with a study/office and people whom are self-employed and run a business from home will be breaking covenants unknowingly by

running Avon or similar businesses from their home, this leads to a disadvantage when the government are encouraging people to run businesses from home.

Homeowners use commercial vehicles with signwriting and are parked on the Estate. Home owners on the Estate are not parking in allocated bays and parking on the road outside of their homes. A caravan was parked in car parking space by previous owner, for sales and sold signs are currently in use. Bins are stored in unallocated areas, sky dishes are positioned at the front of houses, these are also stated in the contract to be upheld or to have permission in writing to do so, I am unaware if permission regarding these matters has been granted and feel that there can be no issues regarding the consent of the removal of these covenants.

Since living in the area for the past four years, I have gained many friendships and clients within the village, I have had no official or voiced complaints regarding the business from neighbours. I am complimented not only for the high standards and customer service, but also the locality and convenience of the business. Having one of the largest parking areas on the Estate I am able to offer off road parking to clients and staff, working within sociable hours.

The village is currently having a brand new large convenience store built with two/three rented premises to provide and improve services, along with an extension to the Doctors surgery and a new housing development estate. This alone will be bringing more people to the village and I am able to provide a service within the village to help improve the village's economy. There is also an Academy which will possibly provide future employees for my business."

Discussion and Conclusions

11. To succeed under ground (a) of section 84(1) of the Act, the Applicant must be able to demonstrate that there have been material changes in the character of the land that is the subject of the application, or changes in the character of the neighbourhood, or that there has been some other change in material circumstances. The Applicant says that the restrictions are obsolete. What does this mean? Guidance was provided by Romer LJ in *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261 as follows:

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84(1)(a)."

12. The difficulty for Mr Holden's application under ground (a) is that the restrictions have been entered into, by him, in a transfer document completed less than four years before the application to the Tribunal – which, for such an application, is astonishingly recently. Other

than the Applicant operating in breach of the restrictions, there can have been little significant change in the character of the land. I am not satisfied that the opening of the local supermarket and retail units constitute a relevant change to the neighbourhood, and there appear to have been no other attempts on the Estate to convert garages to commercial use.

13. Even if the Transfer had been older, the question would still have been whether the purpose of the restrictions can still be achieved. There is no doubt in my mind that it can. Putting aside the restriction on For Sale boards (time limited to five years, which has now expired), the main purpose of the restrictions when considered together is to prevent what is a purely residential estate from becoming a mixed-use area, by the conversion of houses or garages wholly or partially to commercial use. With the exception of Mr Holden's venture, it is not apparent to a visitor to the estate that there is any other commercial use. In my judgment the restrictions cannot be considered obsolete, and the application under ground (a) is refused.

14. Potentially of more merit is ground (c) – that the proposed discharge will not injury the persons entitled to the benefit of the restrictions. When I carried out my inspection the dog-grooming business was not open, and I was therefore unable to physically assess whether the business generates noise, smells etc. However, Mr Holden has said that he operates an appointment-only service, and no dogs stay overnight. I saw no evidence that would lead me to believe that the use causes annoyance to the owners of nearby properties.

15. I am mindful that there have been no objections to the application, and that the use that underpins the application has planning permission. An absence of objections is not the same as consent, but it does suggest that none of Mr Holden's neighbours is concerned about the effect that his application, or the continued use of his property as a dog grooming parlour, will have on their own enjoyment of their homes. Mr Holden has been carrying on his business for a number of years now, and his neighbours on the estate are better placed than the Tribunal to assess its effect, if any, on them. The absence of any objection is a significant indicator of an absence of injury, which confirms my own impression, having visited the estate, that the discharge of the restrictions to permit the continued use of Mr Holden's property for his current business would not injure those with the benefit of the covenants.

16. But those points in themselves are not necessarily enough for the application to succeed.

17. Even if ground (c) is made out, there is also the fact that the Applicant is knowingly using the application land in breach of the restrictions. In *Millgate Developments Ltd v Smith* [2016] UKUT 0515 (LC), at [114-117] the Tribunal (Martin Rodger QC, Deputy President, and Mr P Francis FRICS) reminded developers that they must appreciate that, in order to discourage abuse, those commencing development in breach of restrictions before the Tribunal has considered an application for discharge are likely to find that the Tribunal treats their pre-emptive action as a reason for refusing to exercise its discretion. This case is very different and there is no suggestion that the applicant was seeking to gain a tactical advantage by beginning his use before making the application.

18. I am mindful that Mr Holden has submitted the application himself, without legal advice, and whilst the Tribunal does not reward parties that flout their legal obligations, nor should he be punished for making a retrospective application to regularise the situation. In the circumstances, and particularly bearing in mind the absence of objection, I do not regard the breach of covenants as an obstacle to the success of the application.

19. One of the common reasons for an application under ground (c) to fail is the risk that discharge of the restriction might set a precedent that may encourage further applications for discharge, while at the same time making them more difficult for objectors to resist (the so-called "thin end of the wedge"). In his original notice advertising the application, Mr Holden positively suggested that, if his succeeded, other applications might also be successful. I cannot wholly put out of my mind the possibility that this original notice, even though amended by a further notice, is at the root of the lack of objections. In any event, the absence of objections suggests that there is no serious concern and I am satisfied that the sort of moderate intensity business use conducted by Mr Holden need not represent a threat to the scheme of protection afforded by the covenants.

20. Mr Holden has asked for the restrictions to be discharged, but the Tribunal's power to discharge or modify is a discretionary one, and as section 84(1C) confirms, it is open to me to modify rather than discharge, and make any modifications subject to further conditions as are reasonable. I do not consider that grounds for a discharge have been made out, since to give the applicant or his successors *carte blanche* for any business use would be much more likely to cause injury or disturbance to neighbouring owners.

21. But a limited modification of the restrictions is justified. In the Applicant's favour there are the planning permissions, the lack of objection to the application, and the fact that the application land is unusual, in that it is at the entrance to the estate, on probably the largest plot, with a generous parking provision. There are only a handful of other houses on the Estate with similar detached garages. In my judgment, the risk that acceding to the application will lead to the disintegration of the protection afforded by the covenants can be avoided in two ways. First, by modifying the restrictions only to the extent required to enable the Applicant's current use to continue. Secondly, by making the modification of the restrictions personal to the Applicant. In his application letter, Mr Holden said that when Ash House is sold, the garage would revert to domestic use – so be it.

22. It is unnecessary in my view for restriction (i) to be modified, as even the largest dog can be accommodated in a vehicle which would not breach the restriction.

23. I consider that the appropriate modification of the restrictions is by the addition to the Transfer dated 5 March 2012, of a new clause 12.4.2 as follows:

> 12.4.2 (a) Notwithstanding clauses 12.4.1(c) and 12.4.1(d), for so long as the freehold interest in the property is vested in Mr Paul Holden, the original double garage may be used for the business of a dog-grooming parlour only, in

accordance with planning permission granted by Boston Borough Council on 16 November 2015 under code B/15/0381 but not otherwise.

12.4.2 (b) Notwithstanding clause 12.4.1(p), for so long as the freehold interest in the property is vested in Mr Paul Holden, the advertising sign for which planning permission was granted by Boston Borough Council on 16 November 2015 under code B/15/0381 may be displayed, but no other sign. Reference to the said planning permission shall include any subsequent planning permission that is a renewal of that permission and any other matters approved in satisfaction of the conditions attached to that permission.

24. An order to that effect shall be made by the Tribunal provided, within three months of the date of this decision, the Applicant confirms his acceptance of the proposed modifications.

Dated: 19 January 2018

P D McCrea FRICS