IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 321 (LC)
Case No: LP/35/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge - modification – proposed replacement of workshop buildings with new detached house – whether restrictions obsolete – whether practical benefits of substantial value or advantage – application allowed in part - Section 84(1)(a) and (aa) Law of Property Act 1925

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

By:

PAUL EVANS **Applicant**

Re: 32 Eastheath Avenue, Wokingham, RG41 2PJ

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- -

Application determined on the papers
- -

No cases are referred to in this Decision:

DECISION

Introduction

1. This is an application made on 15 September 2017 under section 84(1)(a) and (aa) of the Law of Property Act 1925 ("the 1925 Act") by Paul Evans ("the applicant") who is co-owner (with his sister Claire Evans) of 32 Eastheath Avenue, Wokingham, Berks RG41 2PJ ("the application land"). It seeks the discharge or, alternatively, the modification of three restrictive covenants burdening the application land so as to allow the construction of a new detached residential dwelling in accordance with a detailed planning consent granted by Wokingham District Council on 26 July 2017 (reference No: 170497).

2. The application land is registered at the Land Registry under No. BK187950, and currently consists of a former builder's workshop/store and office on a long, narrow plot having a frontage of about 7.3m and a depth of about 96m. Although historically in commercial use, it is located in an otherwise mature residential area on the southern outskirts of Wokingham.

3. The proposed development is said by the applicant to be impeded by one or more of three restrictions contained in separate conveyances of 1900, 1901 and 1916 which I refer to below as Restriction 1, 2 and 3 respectively.

Restriction 1, for which either discharge or modification is sought, is contained within a conveyance dated 11 October 1900 of the land tinted pink on the filed plan (which includes part of the application land) made between (1) Henry Edgar Hall and (2) Herbert Ernest Bennett where the Charges Register reads:

> "COVENANT by said Herbert Ernest Bennett with said Henry Edgar Hall his heirs etc that said Herbert Ernest Bennett would within 6 months from date of abstracting presents erect and for ever thereafter maintain substantial boundary fences on sides of piece or parcel of land thereby conveyed marked T on the said plan **And also that no house or other building should be erected in advance of or project beyond building line shown on the said plan** And also that no messuage or dwellinghouse should be erected on said piece or parcel of land thereby conveyed of less value than £150.
>
> NOTE 1: The T mark affects the western boundary of the land tinted pink on the filed plan.….
>
> NOTE 2: **The building line is set back 35 feet from the road**."

Restriction 2, for which discharge is sought, is contained within a conveyance dated 20 August 1901 of the land tinted yellow on the filed plan (which again includes part of the application land) made between (1) Henry Edgar Hall, (2) John Frederick Sargeant and (3) Arthur James Bennett. Although referred to in the Charges Register, neither the

original conveyance nor a certified copy or examined extract were produced on first registration and, despite concerted efforts by the Land Registry and the applicant, no documentation has been traced and the effect of that restriction is therefore unknown.

Restriction 3: for which discharge is also sought, is contained within a conveyance of 3 November 1916 of land coloured blue on the plan (comprising a further part of the application land) made between (1) Herbert Ernest Bennett, (2) Arthur James Bennett and (3) George Cole. The entry in the Charges Register states:

> "WITNESSED that in present of said agreement and in consideration of £15 paid to the said Herbert Ernest Bennett by said Arthur James Bennett (receipt etc) the said Herbert Ernest Bennett with intent to bind not only himself his heirs etc but also the land coloured blue on said plan and all persons in whom the same for time being be vested and so that benefit of this covenant by him might enure and belong to said George Cole and other the persons for the time being entitled to or intended in said piece of land coloured green on said plan **doth hereby covenant for himself his heirs etc with said George Cole his heirs etc that the said Herbert Ernest Bennett his heirs etc would not at any time thereafter erect or make any building or other obstruction other than a fence or wall not exceeding 6 feet in height on any part of the strip of land 3 feet in width and 6 feet in length being part of and on the west side of the said piece of land coloured blue on said plan and lying immediately in front of said windows opened on east side of said messuage known as Bramfield** the position of which strip of land is shown approximately on said plan and thereon hatched red."

[relevant sections for the purposes of this determination in bold]

4. The objectors are Mr CJ and Mrs R Ralphs, the freehold owners of 34 Eastheath Avenue, the adjacent property to the west of the application land (the property referred to as Bramfield in Restriction 3). Their objection was filed on 25 January 2018.

5. The applicant and the objectors have each filed witness statements and have agreed that this matter should be determined on the papers without a hearing. In doing so, I have considered those statements and the relevant documentation as filed. I also carried out an accompanied inspection of the application land on 2 August 2018.

Statutory provisions

LAW OF PROPERTY ACT 1925 Section 84:

> "84(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) that in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being entitled to the benefit of the restriction, whether in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed either expressly or by implication, by their acts or omissions, to the same being discharged or modified …

(c) …

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say either –

(i) a sum to make up for the loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time, when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of the 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.

(1B) In determining whether a case falling within section (1A) above, and in determining whether (in any such case or otherwise) 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 the restriction without some such addition."

The parties' positions

6. In his witness statement Mr Evans set out the background to his family's ownership of the application land, his father having purchased it in 1981, later conveying it to himself, Mr Evans and his sister as co-owners. He said that the buildings currently on the land were believed to have been constructed in the late 19th Century as a workshop and storage facility for the builders who were constructing the surrounding houses and others in Eastheath Avenue. Having then acquired their father's interest in 2014, Mr Evans and his sister set about obtaining planning consent for residential development on the land, which was granted in July 2017.

7. Before construction of the proposed detached house could proceed, Mr Evans said he wished to obtain "clean title" for the land and was therefore now attempting to obtain a discharge (or modification) of the three restrictions set out above. As to Restriction 1, the Local Planning Authority was insistent that the front elevation of the new house should be in line with the neighbouring property, No. 34 (the objectors' house), a distance from the front boundary onto the footpath of only 29'6" whereas the restriction required a minimum of 35'. The planners' reasoning was to follow the general "two by two" formation of plot positions that has developed in Eastheath Avenue over the years. Thus, it was argued that the building line part of the restriction was now clearly obsolete, as siting the property so as to comply with the 35' building line would be inappropriate and out of character with the area.

8. As to the part of Restriction 1 that referred to fencing obligations, Mr Evans said that there was no issue regarding these and they had been complied with. It was therefore only the reference to the building line which needed to be discharged. In any event, since the fencing covenant imposes a positive obligation rather than a restriction on the use of the application land, the Tribunal has no power to discharge or modify it.

9. The objectors said that they have no objection to Restriction 1 being discharged or modified – their only concern being with Restriction 3.

10. In my judgment, the part of Restriction 1 referring to the building line is clearly now obsolete for the reasons given by the applicant and, there being no objection from the only party to have the benefit of the restriction, I am satisfied that it should be modified in the terms set out in paragraph 22 below.

11. As to Restriction 2, Mr Evans said that despite extensive and thorough investigations, it had not been possible to find the relevant documentation, and he therefore sought discharge. As stated above, the objectors have no issue with this restriction, whatever it might contain.

12. I am satisfied that all reasonable steps have been taken to establish specifically what the restrictions are, but in my judgment it would be wrong for the Tribunal to discharge them without knowledge of their effect. However, in light of the fact that it is now over 100 years since it was applied, and no evidence has been produced to suggest that the objectors or anyone else has raised issues on the matter during the 36 years that the land has been in the applicant's family, I am confident that the restrictions are obsolete, to the extent that they might impede the proposed development. I therefore determine that the restriction should be modified to the extent that nothing in it shall prevent the development for which the applicant has received planning consent from proceeding. The modification is set out below.

13. It is the application to discharge Restriction 3 that is of concern to the objectors. The small area of land referred to in the restriction is directly in front of the only two windows that exist in the east flank wall of their property, directly abutting the boundary between it and the application land. It was imposed when No. 34 was sold by the then owners of the application land to George Cole in 1916 to protect those windows from loss of natural light.

14. Whilst the objectors accept that the plans as approved by the Local Planning Authority indicate that the new building will not encroach onto that area (none of its west flank wall being nearer than 1m to the boundary line – to include eaves and guttering), if the covenant were to be discharged, there would be nothing to prevent a future owner from applying for permission to undertake reconstruction or extensions that would encroach into that protected area. This would further reduce natural light into the hallway, stairwell and landing that the windows serve, over and above the loss of light that would already occur when the building is constructed in accordance with the approved plans. There is no need, the objectors say, for the applicant to have the restriction discharged because, having obtained planning consent for what he wants, he is not being prevented from making reasonable use of the land.

15. The applicant acknowledged that his proposals were not affected by this restriction, but removal of it was required (along with the other two) to give the land clean title. He said he had every intention of complying with the local authority's regulations as set out in the Local Planning Authority's planning notes as to the height of fences.

16. There was, at the site inspection, some animated discussion between the parties about the removal of this restriction. I indicated that, upon the evidence and from what I had seen on site, I would not be inclined to discharge the restriction despite the knowledge, gleaned from the planning officer's report, that the 1 metre gap between the new dwelling and the boundary accorded with the Borough Design Guide.

17. In my view, there is no more than an absolutely minimal risk of any form of development being permitted on the restricted land, but I could in a worst-case scenario envisage a situation where a shed or lean to might be erected by an inconsiderate owner under permitted development rights. In such a case, removal of the restriction that currently exists would have taken away some of the little ammunition that the objectors or their successors might have to get it removed.

18. As I have said, such a risk is miniscule, but that risk is sufficient to persuade me that (1) the restriction is not obsolete (section 1(a)) as it continues to provide protection for the objectors from a possible interference with light or outlook, and (2) it does not in any event impede some reasonable user of the land (section 1(aa)) as the applicant is able to build to the full extent he wishes without infringing the covenant. The development for which planning consent has been obtained does not, it is accepted, encroach onto the small area of land to which the restriction applies, and retention of it will therefore have no detrimental effect upon the applicant. For these reasons, I determine that the application for discharge must fail.

19. It is a fact that that whilst preventing development on the restricted area, the restriction allows the erection of a fence on the boundary line of "no more than six feet in height". At the time of my site inspection there was no fence along this short six-foot section of boundary and thus the ground floor window serving a hallway in the objectors' property is completely unobscured. The sill of that window is little more than three feet above ground level, and therefore if a fence to the permitted height were erected on the boundary line that is only some nine inches or so from the flank wall, the effect would be seriously detrimental. The objectors indicated that they would support a simple modification that restricted any future boundary wall or fence along the west side of the restricted area to no higher above ground level than the ground floor window sill.

20. I gained the impression from the applicant that this would be acceptable, and I have jurisdiction under section 84(1) partially to discharge or modify a restriction on any of the statutory grounds, including by the consent of the parties with the benefit of the restriction (under ground (c)). A modification to reduce the maximum permitted height of a wall or fence was not mentioned in the application but that need not be an obstacle to a modification if the only party with the benefit of the restriction does not object.

21. Therefore, in accordance with the Tribunal's overriding objective, subject to receiving written confirmation from both the applicant and the objectors within 14 days of the date of this decision that such modification as drafted in paragraph 24 below is mutually acceptable, the appropriate order will be incorporated alongside those relating to Restrictions 1 & 2.

Disposal

22. The restriction in the conveyance dated 11 October 1900 made between (1) Henry Edgar Hall and (2) Herbert Ernest Bennett (Restriction 1) shall be modified to include the additional words shown in italics below:

> "COVENANT by said Herbert Ernest Bennett with said Henry Edgar Hall his heirs etc that said Herbert Ernest Bennett would within 6 months from date of abstracting presents erect and for ever thereafter maintain substantial boundary fences on sides of piece or parcel of land thereby conveyed marked T on the said plan And also that no house or other building should be erected in advance of or project beyond building line shown on the said plan *provided that the development permitted under*

planning permission reference number 170497 granted by Wokingham District Council on 26 July 2017 (or any subsequent planning permission that is a renewal thereof and any other matters approved in satisfaction of the conditions attached to such permission) may lawfully be implemented notwithstanding this restriction And also that no messuage or dwellinghouse should be erected on said piece or parcel of land thereby conveyed of less value than £150.

NOTE 1: The T mark affects the western boundary of the land tinted pink on the filed plan.

NOTE 2: The building line is set back 35 feet from the road."

23. The restriction referred to in the Charges Register relating to a conveyance dated 20 August 1901 made between (1) Henry Edgar Hall, (2) John Frederick Sargeant and (3) Arthur James Bennett (Restriction 2) shall be modified by the addition of the following words:

"...Nothing within this restriction shall prevent the implementation of the development permitted under planning permission reference number 170497 granted by Wokingham District Council on 26 July 2017 or any subsequent planning permission that is a renewal thereof and any other matters approved in satisfaction of the conditions attached to such permission."

24. Subject to the agreement of the parties, the restriction contained in the conveyance dated 3 November 1916 made between (1) Herbert Ernes Bennett, (2) Arthur James Bennett and (3) George Cole (Restriction 3) shall be modified by the deletion of the reference to a maximum height of 6 feet and the substitution of the words in italics as follows:

"…. doth hereby covenant for himself his heirs etc with said George Cole his heirs etc that the said Herbert Ernest Bennett his heirs etc would not at any time thereafter erect or make any building or other obstruction other than a fence or wall *no higher above ground level than the base of the sill to the adjacent ground floor window in the east flank wall of No. 34 Eastheath Avenue (formerly known as Bramfield)* on any part of the strip of land 3 feet in width and 6 feet in length being part of and on the west side of the said piece of land coloured blue on said plan and lying immediately in front of said windows opened on east side of said messuage known as Bramfield the position of which strip of land is shown approximately on said plan and thereon hatched red."

25. There has been no application by the objectors for compensation (nor would any be appropriate in this case). It is not the practice of the Tribunal to make orders for costs in applications determined under the written representations procedure, and this decision is therefore final on all matters.

Dated: 26 September 2018
Paul Francis FRICS