UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge or modification – dwellinghouse – covenants not to erect more than one dwellinghouse set back to building line – application to discharge or modify to permit two additional dwellinghouses – one objection – application refused – 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

EDWARD ALBERT PRYOR

Re: 54 Nelmes Way
Hornchurch
Essex
RM11 2QZ

Before: N J Rose FRICS

Sitting at Office of Adjudicator to HM Land Registry, Victory House, 34 Kingsway, London, WC2B 6EX on 31 March 2009

Edmund Robb instructed by Hunt and Hunt, solicitors, of Romford for the applicant.
Mr John Burke, objector, in person.

The following cases are referred to in this decision:

Re Truman, Hanbury, Buxton & Co Ltd's Application [1955] 3 All ER 559
Re Havering College of Further and Higher Education's Application, LPA/89/2004, unreported

The following cases were referred to in argument:

Re Wards Construction (Medway) Limited's Application (1994) 67 P & CR 379
Re Kennet Properties' Application (1996) 72 P & CR 353
Re Bass Limited's Application (1973) 26 P & CR 156

DECISION

1. This is an application by Mr Edward Alan Pryor under section 84(1) of the Law of Property Act 1925 for the discharge or modification of restrictive covenants affecting freehold land containing a single dwellinghouse and garage and known as 54 Nelmes Way, Hornchurch, Essex, RM11 2QZ in order to allow the erection of two additional dwellinghouses.

2. The restrictions were imposed by two conveyances. The first was dated 30 June 1934 and made between Barwal Estates Limited and the Midland Bank Executor Trustees Co. Limited. The Purchasers covenanted

> "for the benefit and protection of all other parts of the Great Nelmes Estate and of every part thereof " that they "and their successors in title will at all times thereafter in relation to the lands and premises thereby assured observe and perform the stipulations and regulations contained in the Second Schedule thereto."

3. The Second Schedule included the following stipulation:

> "5(a). On plots fronting Nelmes Way Sylvan Avenue and the extension of Sylvan Avenue only one detached dwellinghouse with or without garage and outbuildings of the value or selling price of not less than eight hundred and fifty pounds to be erected (for the purpose of calculation no Purchaser's legal costs mortgage costs and stamp duties to be included)."

4. The second conveyance was dated 1 May 1953 and made between Thomas Bates and Son Limited (Vendors) and Albert Edward Callow (Purchaser). The Purchaser covenanted that he "and the persons deriving title under him will at all times hereafter observe and perform the stipulations contained in the First Schedule hereto."

5. The First Schedule included the following stipulations:

> "1. No buildings other than one private detached or semi-detached dwellinghouse with the usual outbuildings thereto shall be erected upon any part of the said land and until the plans and elevations thereof have been submitted to and approved by the Surveyor for the time being of the Vendors and such dwellinghouse shall have such roof covering the quality and colour of which shall be approved by the said Surveyor as aforesaid and the Purchaser shall upon submitting such plans pay to the Vendors' Surveyor a fee of one guinea for each of such plans submitted for approval as aforesaid And such dwellinghouse shall not be of less value than eight hundred and fifty pounds at the least including the value of the site but excluding the value of any grant or subsidy which the Purchaser may receive from any Local or Central Authority in respect of such dwellinghouse and excluding the value of any garage cycle house summer house or greenhouse ...
>
> 3. No house nor building shall be erected on the said piece of land hereby conveyed unless fronting to the said road and set back to the building line as shown

upon the said plan and nothing shall be erected between such building line and the frontage line except bay windows verandahs porches and side division of front fences which fences shall not be of greater dimensions or constructed of different materials than are provided in clause 4 hereof."

6. On 27 January 2009 outline planning permission was granted by the London Borough of Havering for the "erection of 2 No. 5 bedroom, two storey dwellinghouses and associated garages in part of the existing garden of 54 Nelmes Way. Previously, in 2003 and 2006, outline planning permission had been granted for residential development on the plot, with a similar footprint and layout to that approved in 2009. The application site has a return frontage to the north side of Brookside. The sole objector to the application, Mr John Burke, lives at 74 Brookside, which has a substantial frontage to the south side of that road opposite the existing rear garden of 54 Nelmes Way. It is agreed that Mr Burke is entitled to the benefit of the restrictions.

7. Mr Edmund Robb of counsel appeared for the applicant, who gave factual evidence. Expert evidence was given on behalf of the applicant by Mr Denis Tyson, chartered town planner and development consultant of Harold Wood. Mr Burke appeared in person and called expert evidence from Mr Bob Bennett MRTPI of Chingford. I inspected the application site and the surrounding area, accompanied by representatives of the parties, shortly after the hearing.

Facts

8. From the evidence and my inspection I find the following facts. The application site is prominent, situated at the junction of Nelmes Way and Brookside. The frontage to the west side of Nelmes Way is approximately double those of the adjoining plots to the north. The southern half of the site, with a return frontage to the north side of Brookside, is in garden use, save for a single garage at the western end of the Brookside frontage. The house known as 54 Nelmes Way is situated on the northern half of the site and fronts onto Nelmes Way. It comprises a substantial detached two-storey dwellinghouse in white render and slate. The garden is mature, with a number of trees which are the subject of tree preservation orders. The immediate area contains predominantly large houses with substantial gardens.

9. Although the planning permission dated 27 January 2009 was in outline only, the submitted plans showed a further dwelling to the south of the existing house fronting Nelmes Way (plot 2) and a further dwelling to the west fronting Brookside (plot 1). New double garages were shown, serving 54 Nelmes Way and plot 2. Access to these garages was to be via a new driveway off Brookside, immediately opposite No.74. The double garage serving plot 1 would be approached by a separate driveway off Brookside, in the same position as that serving the existing garage building, which was to be demolished.

Grounds for the application and conclusions

10. Modification or discharge of the restrictions is sought on grounds (a), (aa) and (c) of section 84(1) of the Act.

11. Under ground (a) the issue is whether, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete. The applicant pointed out that there has been an important change to the neighbourhood since the covenants were imposed, namely the development in the 1990s of the large plot opposite the application site, with a return frontage to the south side of Brookside and known as 60 Nelmes Way. Like the current application, this development involved the retention of the main dwelling, with the infilling of a further dwelling fronting Nelmes Way (No.58) and one dwelling fronting Brookside (No.74).

12. The applicant also referred to changes which had taken place in the protection of the area since the imposition of the covenants. By 1971 the local planning authority had become concerned at the scale of a number of redeveloped housing sites taking place in the area. They introduced a policy to address those concerns and to prevent further large scale redevelopment. The council subsequently incorporated the Emerson Park policy into the Unitary Development Plan, which guides development throughout the borough. A specific policy, ENV21, dealt with the Emerson Park area, which includes the application site. The prime objective was to establish a policy that retained the character of the various parts of the Emerson Park area. Six sectors were defined. The application site fell within sector 2. In this area

> "all developments will be required to be of detached single family individually designed dwellings."

13. Mr Tyson pointed out that, when it granted planning approval for the development of the application site, the local planning authority was required to have due regard to the development plan. The determination must be made in accordance with the plan (in this case UDP Policy ENV21) unless material considerations indicated otherwise. Mr Tyson added that the planning authority had recently embarked upon a number of development control policies in a document which would shortly be adopted. Once adopted it would completely remove the influence of the UDP. New policy DC69 stated, in relation to the Emerson Park Policy Area, that

> "planning permission will only be granted if it maintains or enhances the special character of the Emerson Park Policy Area which is typified by large and varied dwellings set in spacious, mature, well landscaped grounds ... Detailed criteria for dealing with planning applications [in the Emerson Park and two other policy areas] will be contained within three separate planning documents."

14. Mr Robb said that the latest planning permission for the proposed development had been considered in the light of policy criteria which were much more specific than the wording of the restrictive covenants. He submitted that, in cases where the relevant policies – which relate

to the amenities and character of the area – were far more intricate and detailed than a restrictive covenant, the latter ought to be deemed obsolete.

15. I am unable to accept that submission. As Mr Bennett pointed out,

> "Covenants are intended to provide protection to individual property owners or groups of property owners over and above that provided by the planning system. If this was not the case there would be no benefit in placing covenants on land and property."

The relevant restrictions were imposed in order to safeguard the amenities of those entitled to the benefit of the covenants. In the course of his submissions Mr Robb conceded that the restrictions were still capable of safeguarding those amenities. A covenant cannot be described as obsolete when its object is still capable of fulfilment (*Re Truman, Hanbury, Buxton & Co Limited's Applications* [1955] 3 All ER 559). Mr Robb's concession, which was inevitable in the light of the evidence, was therefore fatal to the applicant's case on ground (a), which accordingly fails.

16. The applicant also relies on ground (aa). Mr Burke accepted that the building of two more houses on the application site would be a reasonable user of the land for a private purpose. The applicant submitted that the covenant, in impeding that user, was contrary to the public interest, because there was a shortfall of family sized accommodation in the area. In support of this submission Mr Robb referred to criterion (h) under policy ENV21, namely that, in the area which includes the application site, all developments are required to be of detached single family individually designed dwellings. The fact, however, that an area might only be suitable for a particular type of dwellinghouse does not, in my view, prove that there is a shortage of such accommodation. Even if it did, a restrictive covenant, by impeding the construction of such accommodation, is not thereby contrary to the public interest. A similar argument was rejected by the Tribunal (George Bartlett QC, President and N J Rose FRICS) in *Re Havering College of Further and Higher Education* (LPA/89/2004, unreported) for the following reasons:

> "28. We are quite unable to conclude on the evidence before us that maintenance of the restrictions would be contrary to the public interest. It certainly does not follow simply from the fact that there are general policies encouraging higher densities and affordable housing and that the restriction would impede development that accorded with such policies. All planning policies are defined in terms of what the policy-making bodies see as the public interest, but the process of development control recognises the need to balance conflicting considerations both of policy and other matters. In the present case PPG3 Housing seeks development at higher densities, while UDP policy HSG5 identifies a need, among other housing types, for large executive houses and ENV1 seeks high standards of design and layout. The appropriateness of any particular housing development on a site that is suitable for housing is essentially a matter of planning judgment, weighing together the relevant policies and other material considerations. It is not possible in the light of this to conclude that, in preventing this one particular form of development that has been permitted, the restriction is contrary to the public interest, and indeed, if that had been

the conclusion, few restrictive covenants limiting the density of housing development in residential areas would be now free from potential modification or discharge."

17. The remaining issues under ground (aa) are whether the restrictions secure to Mr Burke any practical benefit of substantial value of advantage to him and, if they do not, whether money would be an adequate compensation for the loss or disadvantage which he would suffer from the proposed discharge or modification.

18. Mr Tyson said that the proposed development would result in the presence of three substantial detached houses on the application site. This was entirely comparable to the development which had taken place on the site opposite, 60 Nelmes Way. Both proposals involved the retention of the main house and the infilling of two houses, one fronting Nelmes Way and one fronting Brookside. Building lines and garden depths would be consistent with others in the surrounding area. The provision of two more dwellings on the application site would have no effect on the character of other parts of the Emerson Park area.

19. Turning to Mr Burke's property, 74 Brookside, Mr Tyson said that it would not be overlooked by the proposed development. The proposed plot 1, directly opposite No.74, would have a view of the front to front elevation. All the other dwellings in the area had exactly the same relationship, with the exception of those on corner plots. Privacy and overlooking were usually of concern only to rear garden areas. The rear garden at No.74 would suffer from no overlooking or loss of privacy. The proposed garage and forecourt parking facilities meant that there would be no kerbside car parking. Although some additional car movements would be generated, the impact would be minimal. The proposed development would not set a precedent for Emerson Park, since development policy in the area already allowed for infill plots.

20. The prime objective of the local planning authority's policy ENV21 was to retain the character of the various areas in Emerson Park. When considering the planning application for the proposed development, the authority had concluded that it complied with that policy. The planning officer's report had stated that the proposed development could be built without resulting in any loss of amenity for the occupiers of neighbouring properties. Mr Tyson shared that view.

21. Mr Bennett considered that the amenities of the occupiers of 74 Brookside would be adversely affected by the lifting of the covenant in three ways. Firstly, the amount of built development and hard surfaces on the application site would increase considerably. The area of the site was 2,725m^2, of which 8% was currently occupied by built development. If the proposed development were implemented, the area of built development would increase to 27% of the site. Since much of this would be located on the Brookside frontage, Mr Burke's outlook would change from trees, bushes and open land to buildings and hard surfaces.

22. Secondly, there would inevitably be a loss of trees and shrubs along the Brookside frontage. Although a number of the trees were protected by tree preservation orders, these

would need to be pruned and other smaller trees and bushes removed to provide access onto the site both during and after the construction period.

23. Thirdly, at present there was only a single vehicle access to one garage from that part of Brookside which was located opposite Mr Burke's property. By comparison the proposed development would make provision for twelve vehicles to be parked within the site. The garages to two of the properties would be accessed by means of a shared drive off Brookside, which was not in keeping with the area. The arrangement would also be unworkable, since there was insufficient space for manoeuvring up to eight vehicles. There would be a considerable increase in vehicle activity causing disturbance from vehicles manoeuvring, doors slamming, headlights etc. Since the manoeuvring space into the garages was sub-standard the occupiers of the properties were likely to prefer to park on the street, causing further inconvenience to Mr Burke.

24. Mr Bennett did not agree that a true comparison could be made between the proposed development and that which had taken place on the site of 60 Nelmes Way. The application site tapered from front to rear. This meant that the rear part of the site was more constrained along Brookside opposite No.74. In consequence all the proposed dwellings would have smaller gardens than those at 58 and 60 Nelmes Way and 74 Brookside. The average size of the latter properties' rear gardens was 427m^2 compared to 320m^2 on the proposed development site. The garden of the proposed dwelling on the corner of Nelmes Way and Brookside (plot 2) would be particularly cramped and poorly shaped.

25. Mr Burke said that, before he moved to his present address, he had for 19 years lived at nearby Newman Close, where the houses were quite close together. In that time the area had deteriorated. He and his wife had decided to move to No.74 because, in contrast to Newman Close, they wanted to be in a location where their property would not be affected by neighbouring houses. They wished to be in a quiet location and not overlooked. After a lot of searching they chose No.74. At that time they noted the covenants and relied upon them to protect the situation. Brookside was a tranquil location. The houses had substantial frontages and so the street was not obstructed by parking. Many of the trees were the subject of TPOs. They provided privacy and enhanced the area.

26. Mr Burke is not opposed in principle to any alterations to the existing restrictions. He would be prepared to agree to a modification permitting the erection of one additional dwelling on the application site, provided it fronted Nelmes Way and the rear section, fronting Brookside opposite No.74, remained in garden use. His principal concerns are to prevent, firstly, the proposed house being erected on plot 1 and, secondly, the proposed crossover, leading to two sets of double garages, being constructed immediately opposite the entrance to his house. Those concerns are, in my judgment, entirely understandable. At present No.74, although situated in a suburb of London, is in a secluded location. As they look to the north, the occupiers of No. 74 can see trees and bushes in front of the existing garden on the application site. Looking east they can see the rear gardens of 58 and 60 Nelmes Way and, to the south, the garden of 62 Nelmes Way. The house at 72 Brookside lies immediately to the west, but it is screened by the large garage of No.74. If the proposed modification were

granted, there is a real risk that the nature of the view to the north would be significantly altered. At present, Mr Burke's view of the application site is obscured by large mature trees and shrubs. Mr Bennett said, and I accept, that the occupier of the proposed house on plot 1 would be likely to remove the existing shrubs along the Brookside frontage. Otherwise his garden would enjoy little sunlight during the summer months. For the same reason it was probable that consent would be sought from the local planning authority to remove the lower branches of the protected trees fronting Brookside. Such works, if carried out, would transform the nature of the outlook from the front of No.74 from semi-rural to suburban. The nature of this change would be reinforced by the construction of the shared driveway to the new garages. Although I think Mr Bennett has over-estimated the number of vehicles that would be parked on the application site, it is clear that a shared driveway would be out of character with the housing in the immediate area. I am in no doubt that the existing restrictions, by preventing these changes to the outlook from No.74, secure to Mr Burke a practical benefit of substantial value or advantage to him. The application on grounds (aa) therefore fails.

27. For the reasons I have given in relation to ground (aa), I consider that the proposed modification would cause injury to Mr Burke. Ground (c), therefore, has not been made out.

28. As the applicant has not succeeded in establishing any of the grounds relied upon, the application is dismissed. A letter relating to costs accompanies this decision, which will become final when the question of costs has been determined.

Dated 15 July 2009

N J Rose FRICS