



LP/36/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – grazing land – restriction prohibiting erection of residence or manufactory – application to discharge or modify to permit construction of bungalow – whether restriction obsolete – whether practical benefits secured by restriction of substantial value or advantage – application refused – Law of Property Act 1925, s84(1)(a) and (aa).

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

BY

**ANDREW JOHN RICHARD DUFFIELD
and
HELEN AMANDA DUFFIELD**

**Re: Land at Riversview
Physic Lane
Thropton
Northumberland
NE65 7HU**

Before: N J Rose FRICS

**Sitting at South Tyneside Law Courts
on 23 and 24 May 2007**

Bryan Riley of Watson Burton, solicitors, of Newcastle upon Tyne for the Applicants
Tom Lisgo of Blackett Hart and Pratt LLP, solicitors, of Newcastle upon Tyne for Mrs Winifred Ann Gandy, objector
Mr M W Gowland on behalf of himself and Mrs J B Gowland, objectors.

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The following cases were referred to in argument:

Re Truman, Hansbury, Buxton & Co Ltd's Application [1955] 3 All ER 559

Chatsworth Estates Co v Fewell [1931] 1 Ch 224

Re Ghey and Galton's Application [1957] 3 All ER 164

Re Bass Ltd's Application (1973) 26 P & CR 156

Gilbert v Spoor [1983] Ch 27

DECISION

Introduction

1. This is an application by Mr Andrew John Richard Duffield and Mrs Helen Amanda Duffield under section 84 of the Law of Property Act 1925, seeking the discharge or modification of a restrictive covenant. The covenant affects freehold land adjoining a detached dwelling house known as “Riversview”, Physic Lane, Thropton, Northumberland, NE65 7HU.

2. The restriction in question was imposed in a conveyance dated 2 March 1936 by Henry Birkett Buckland (“the Vendor”) to James Coltman (“the Purchaser”). The land included in the conveyance abuts the north western boundary of the application land and is currently the site of two detached dwelling houses, known as “Overweigh” and “The Briars”. The conveyance contained, among others, the following covenant by the Purchaser:

“2. For the benefit of the land hereby conveyed and so as to bind the Vendor’s adjoining land on the south east thereof the Vendor covenants with the Purchaser and the persons deriving title under him that the Vendor will not at any time hereafter erect or allow to be erected any residence or manufactory on the Vendor’s said adjoining land on the south east but this shall not preclude the erection of a private garage, henhouses or other erections of a similar character”.

3. The applicants obtained outline planning permission, on appeal, for the erection of two dwellings on the application site in 2000. They subsequently obtained detailed permission for the construction of two two-storey dwellings on the site on 29 July 2003. Following discussions with their neighbours, the applicants submitted a further application for a detached bungalow, having a gross external area of approximately 272 m² (2936 ft²) and a separate detached garage. Planning permission was granted subject to conditions on 29 March 2005. The applicants now seek the discharge of the restriction, or alternatively its modification so as to permit the erection of the approved bungalow.

4. It is agreed that the objectors represented at the hearing are entitled to the benefit of the restriction. They are Mrs Winifred Ann Gandy, who lives at “Overweigh”, immediately to the north west of the application site and Mr M W and Mrs J B Gowland, of “The Briars”, which in turn abuts the north western boundary of “Overweigh”.

5. At the hearing Mr Bryan Riley of Watson Burton, solicitors, appeared on behalf of the applicants. He called Mr Duffield to give evidence of fact and one expert witness, Mr S C Rowarth, MA FRICS, a partner in Youngs, chartered surveyors, of Hexham. Mr Tom Lisgo of Blackett Hart and Pratt LLP, solicitors, appeared for Mrs Gandy, who gave evidence of fact. Mr Lisgo called expert evidence from Mr C G Robinson, BSc FRICS, residential sales director with Rickard, chartered surveyors of Newcastle upon Tyne. Mr Gowland appeared in person on behalf of himself and his wife. Following closing submissions on the second day of the

hearing, I made an accompanied inspection of the application site, the objectors' houses and the surrounding area.

Facts

6. The property known as Riversview is situated on the eastern side of the village of Thropton, approximately 3 miles west of Rothbury and 17 miles north west of Morpeth. It comprises a traditional two-storey stone house with an adjoining holiday cottage. The application site, which extends to approximately 0.227ha (0.56 acres), is situated on the north east side of the house and is currently used for grazing sheep.

7. Both the application site and the objectors' properties are situated on a steep hillside. There is a fall of approximately 10 metres over a distance of 47 metres between the south eastern boundary of the application land adjacent to Physic Lane and the boundary with Overweigh. As a result, if one stands on the site looking in a north westerly direction, one looks over the rooftops of the objectors' houses in the foreground to the village of Thropton and beyond to the Cheviot Hills.

8. The boundaries of the application site are marked with old thorn/holly hedging on the north and east sides. This has not been well-maintained and fencing materials have had to be inserted in a random fashion to make the boundary stock-proof. The boundary closest to Riversview is a post and netting fence, in good order. The boundary adjoining Overweigh is a well-maintained Leylandii hedge. It varies in height from approximately 2.25m opposite the kitchen window of Overweigh to 1.75m at the south western corner of the site. The hedge shown on the approved drawing attached to the planning consent was wrongly drawn at a height of approximately 3m.

9. Assuming the hedge remains at its present height, it is likely that certain parts of the proposed bungalow will be visible from the kitchen, main bedroom and sitting room at the rear of Overweigh, namely the slate roof and a section of stone gable above the new kitchen window on the north western elevation including a small section of the top of the windows on this elevation. The applicants are prepared to accept a condition requiring them to screen the proposed development along the north western boundary of their land at a maintained height of at least 3m. On this basis it is possible that only 1.2m of the bungalow will be visible, although the uncertainties involved with a development built into the hillside mean that this estimate might be exceeded. The bungalow will also be visible from the garden areas to the rear of Overweigh and on its southern and western sides and from part of its approach drive and front garden. It is probable that there will be a view from the new bungalow into parts of the garden of Overweigh, particularly to the south and west, together with an area on the north east side where the drive approaches the property. There is a history of problems with the drainage of surface and spring water from the application site.

10. The proposed bungalow will be approximately 6.5m high. It will include four bedrooms (each with en suite facilities), dining room, lounge and kitchen, plus a detached garage.

Overweigh is a detached bungalow, constructed of brick and tile in the early 1980s and with a gross external area of approximately 172m² (1856 ft²) including a garage. Its curtilage includes a steep driveway giving access to the public highway to the north west. It was purchased by Mrs Gandy and her late husband in December 1996 and its current market value is approximately £315,000. The Briars is a detached bungalow of stone and tile construction, similar in age and style to Overweigh. Its external area is approximately 198m² (2130 ft²) including a garage but excluding a conservatory. It fronts directly onto the highway, being lower down the hill than Overweigh. It was purchased by Mr and Mrs Gowland in March 2004 and its current market value is approximately £335,000. Both properties and their gardens have been well maintained. There are a number of detached dwellings occupying the land immediately to the north east and south west of the objectors' properties. The proposed bungalow will be approximately 15 yards from the boundary with Overweigh. The space between the bungalow and the boundary hedge will form the rear garden of the bungalow.

11. In August 2000 the applicants offered to pay Mr and Mrs Gandy twenty per cent of the development value of the application site in exchange for a voluntary release of the covenant. At the time the applicants estimated the development value to be £100,000. The offer was rejected.

12. If the restriction remains unmodified, it is likely that part of the application site will at some time in the future accommodate a double garage, used in connection with Riversview.

Grounds of the application

13. The application was made under paragraphs (a), (aa) and (c) of subsection 84(1) of the Act. Ground (c) was withdrawn shortly before the hearing. I consider the remaining grounds in turn, starting with paragraph (aa).

Para (aa)

14. It is agreed that the proposed user of the application land is reasonable, that the covenant impedes that user, that impeding the proposed user secures practical benefits to the objectors and that the covenant is not contrary to the public interest. The issues between the parties are whether the practical benefits secured by the restriction are of substantial value or advantage and, if they are not, whether money would be an adequate compensation.

15. Mr Rowarth considered that the covenant secured some practical benefit to Mrs Gandy as the owner of Overweigh, because it prevented the creation of views from her property to the proposed bungalow and vice versa. This practical benefit, however, was of only limited value for the following reasons: Overweigh was already overlooked by other properties including Riversview and the properties on the south east side of Physic Lane; the development that had taken place in recent years in the vicinity had changed the character of the neighbourhood and this had had an impact on Overweigh itself; the principal aspect of Overweigh, and the other

properties on the hillside, was north westerly towards the attractive views of the Cheviot Hills – the proposed development would not interfere with that view in any way; the boundary hedge between Overweigh and the application site reduced the impact of the proposed development, particularly in terms of visibility to and from Overweigh – the effect would be further reduced if a 3m hedge were erected by the applicants within the application site itself; the proposal to sink the new bungalow into the hillside would significantly reduced its impact; the positioning of the windows and the associated floor heights in the new bungalow had been designed to limit the degree of overlooking; the garage of the proposed development would not conflict with the restriction and should be disregarded.

16. So far as The Briars was concerned, Mr Rowarth thought that the benefit of the covenant was of even less value in view of its location further from the application site, further down the hillside and directly below Overweigh. In his opinion, the money which would adequately compensate the objectors for the loss or disadvantage they would suffer was £18,000 in the case of Mrs Gandy (including £5,000 for temporary disturbance) and £3,500 (including £1,000 temporary disturbance) for Mr and Mrs Gowland.

17. There is in my judgment force in some of the points made by Mr Rowarth. In the light of the evidence and my inspection I am satisfied that the effect of the proposed development on the amenities of The Briars would be very limited indeed. In arriving at his opinion, however, I do not think Mr Rowarth has had sufficient regard to the personal circumstances of Mrs Gandy as a beneficiary of the restriction.

18. Mrs Gandy said that, when she first visited Overweigh with her husband, she was told that the application site was subject to a restrictive covenant preventing any development upon it. That was a major factor in their decision to buy Overweigh. They specifically wanted a house with a private garden, and the covenant meant that they would not have a house or garden immediately over the hedge on that side. Riversview itself was about 70 yards away from Overweigh, and so had no real impact upon it. Any family living in the proposed bungalow would be likely to use their back garden at the same time as she was using hers and there would only be a few feet between them. She would be aware of the presence of her new neighbours on the other side of the hedge. Each would be able to hear the other. They would be able to glimpse each other through the hedge. All of this would tend to make her feel uncomfortable and to some extent inhibited. The only parts of her garden which were really used as a garden space were at the back and the sides, because the slope was much less pronounced there than at the front. She and her family would not be able to relax completely in their rear garden. Mrs Gandy said that she would be devastated if the covenant were discharged or modified to allow a new bungalow to be built on the other side of the hedge. Money would not be enough to compensate her for this. She was also concerned that the construction of an additional house on the hillside would aggravate the drainage problems which had existed over a long period. The applicants had repeatedly tried to persuade her and her husband to agree to remove the covenant, but they had consistently replied that they were not prepared to do so, however much they were offered. They had bought Overweigh intending it to be their last move. She had been very happy there and had no intention of moving.

19. I accept Mrs Gandy's evidence. I bear in mind that she was disappointed when a new house, Appletree Cottage, was recently erected close to the south western boundary of her home. I find that the practical benefit to her of preventing the erection of a dwelling house on the application site is of substantial advantage to her. It follows that ground (aa) has not been made out.

Para (a)

20. I turn to paragraph (a) of section 84(1), namely that 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. Mr Rowarth suggested that there was a case for arguing that the character of the neighbourhood had changed since 1936. He referred to the objectors' own properties and to a number of houses built in 2005 – Appletree Cottage and a development of four detached houses to the west of Riversview known as Village View. He suggested that a number of other houses had been erected to the north east of the objectors' properties since 1936. As a result, the neighbourhood had changed significantly in terms of its housing density and associated open space and the extent to which properties were now overlooked and generally affected by adjoining properties.

21. Consistently with the fair way in which he gave his evidence throughout, Mr Rowarth readily conceded that it was far from certain that ground (a) could be established. In my judgment he was right to make that concession. I accept Mr Robinson's evidence that the majority of the properties surrounding Overweigh were either already constructed, planned or in the process of development at the time the restriction was imposed and that, while additional dwellings have been constructed in recent years, the character of the neighbourhood is largely unchanged. The purpose of the restriction was to safeguard the amenities of the benefited land. It is clear from Mrs Gandy's evidence that, by preventing an unwelcome development close to her back garden, the covenant is still capable of serving that purpose. It is therefore not obsolete and the requirements of paragraph (a) are not satisfied.

22. As the applicants have not succeeded in establishing either of the grounds relied upon, the application fails.

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

Dated 10 July 2007

N J Rose FRICS