



LP/17/2006

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – discharge or modification – dwellinghouse – application to erect an additional bungalow in the grounds of existing bungalow – whether injury caused to adjoining owners – application refused – Law of Property Act 1925 s84(1)(c)

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

BY

SHIRE BARNS DEVELOPMENTS LLP

**Re: Part of
7 Wealden Way
Haywards Heath
West Sussex
RH16**

Before: N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL
on 16 March 2009**

Mr Ian Eldred, with permission of the Tribunal, for the applicant.
David Mayall, instructed by Waughs, solicitors of East Grinstead for Mr Robert Small and Mrs Jennifer Small, objectors.

© CROWN COPYRIGHT 2009

The following case is referred to in this decision:

Ridley v Taylor [1965] 2 All ER 51

The following further cases were referred to in argument:

Re Diggins' Application No.2 [2001] 2 EGLR 163

Blumenthal v Church Commissioners for England [2004] EWCA Civ 1688

Shephard v Turner [2006] EWCA Civ 8

Duffield v Gandy [2008] EWCA Civ 379

Winter v Traditional and Contemporary Contracts Limited [2007] EWCA Civ 1088

DECISION

Introduction

1. This is an application by Shire Barns Developments LLP under Section 84 (1) of the Law of Property Act 1925 for the discharge or modification of a number of restrictive covenants affecting freehold land containing a dwellinghouse known as 7 Wealden Way, Haywards Heath, West Sussex, RH16 4AF so as to permit the erection of a detached house on part of the existing garden, which the applicant has an option to purchase.

2. The restrictions were imposed by three conveyances and one deed of release, as follows:

(A) Conveyance dated 26 October 1878 between (1) Editha Agnes Sergison and others (2) Arthur Bigge (3) Arthur Bigge and others (Vendors) (4) Warden Sergison and (5) George Woodward Reid (Purchaser).

The Purchaser covenanted

“with the Vendors their heirs and assigns for the benefit of all persons entitled to or interested in the adjoining lands belonging or near to the purchased hereditaments and for the protection of the aforesaid lands adjoining or near thereto and the buildings to be erected thereon and the occupiers thereof for the time being ... that he the Purchaser his heirs or assigns will not at any time hereafter erect or permit to be erected on the purchased hereditaments more than three houses the prime cost of each of which shall not be less than one thousand pounds each house to be erected on a site and according to plans specifications and elevations to be previously approved in writing by the Vendors their Architect or Surveyor and to their or his satisfaction in all things. And also that no building of any kind shall at any time hereafter be erected by the Purchaser his heirs or assigns within twenty feet of either of the boundary fences of the said purchased hereditaments ...”

(B) Conveyance dated 1 June 1882 between (1) Editha Agnes Sergison and others (2) Arthur Bigge (3) Arthur Bigge and others (4) Warden Sergison and (5) Jane Jeffery.

Jane Jeffery covenanted with the Vendors and the persons claiming under them

“for the benefit of all persons entitled to or interested in the lands adjoining or near to the hereditaments intended to be hereby conveyed and for the better protection of such adjoining land and the buildings to be erected thereon and the occupiers thereof for the time being that the said Jane Jeffery or persons claiming under her ... will not erect or permit to be erected on the said piece of land intended to be hereby conveyed other than detached or semi-detached houses and that the prime cost of each house shall not be less than £800 and each house shall be erected on a site in manner and according to plans specifications and elevations to be previously approved in writing by the said Warden Sergison or the persons claiming under him or his or their Surveyor and to his and their satisfaction in all things AND that no trade or business shall be carried on nor any nuisance or annoyance shall be

committed or permitted on the said piece of land intended to be hereby conveyed or any part thereof ...”

(C) Conveyance dated 3 September 1958 between (1) Robert Gavin Morley (Vendor) and (2) Monica Maureen Harvey (Purchaser).

The Purchaser covenanted for herself and her successors in title

“with the Vendor for the benefit of his property adjoining the said property hereby conveyed to the south thereof but so that the Purchaser shall not be liable for a breach occurring after she shall have parted with all interest in the property hereby conveyed as follows: - (1) not to erect more than four single detached houses on the said land hereby conveyed no one of which shall have a floor area including all floors and any integrated garage of less than one thousand two hundred feet superficial. (2) To erect and for ever after maintain a chain link fence on the southern boundary of the land hereby conveyed and marked with a ‘T’ on the inside of the boundary. (3) Not to erect or permit to be erected on the said land any building within six feet six inches of the northern boundary or within twelve feet of the southern boundary thereof.”

(D) Deed dated 6 July 1973 between (1) Homemakers (Saltdean) Limited (the Company) and (2) Edith Rose Stratton (Mrs Stratton).

By clause 2, in consideration of Mrs Stratton covenanting not to take any action to enforce the restrictive covenants contained in a conveyance dated 4 July 1905 between (1) Jane Jeffery and (2) Douglas Wellwood Clarke, the Company covenanted with Mrs Stratton and her successors in title for the benefit and protection of the land edged green on the attached plan No.1 [being the property known as Linden Garth, Oakwood Road] as follows:

- “(a) To carry out the development of their land substantially in accordance with the layout shown on plan No.2 but only so far as Units 3, 4 and 5 [now known as 3, 7 and 11 Wealden Way] are concerned.
- (b) To erect a six foot oak or durable hardwood close boarded fence (with concrete posts at nine foot intervals) between the points marked A-B on the said plan No.2 [being the boundary between 7 Wealden Way and Linden Garth] the face of such fence to be towards the land edged green on the said plan No.1.
- (c) Not to erect or cause permit or suffer to be erected sheds or other structures at a height of more than six feet on the land forming part of the garden of Unit No.4 shown on the said Plan No.2 and thereon hatched blue.
- (d) To enter into a free transfer to Mrs Stratton at even date herewith of the piece of land hatched green on the attached plan No.2” [being a strip of land 3m wide along the northern boundary of Linden Garth].

3. On 12 October 2004 planning permission was granted by Mid Sussex District Council for the erection of a single storey three bedroom house with integral garage on the eastern section of 7 Wealden Way, which currently forms part of its garden. The applicant now seeks discharge or modification of the restrictions to permit that development. The grounds relied upon are (a) and (c) of section 84(1) of the Act in respect of the restrictions in the 1878 and 1882 conveyances and (c) in the case of the two more recent sets of restrictions.

4. There are no outstanding objections in the case of the restrictions imposed in 1878, 1882 and 1958. So far as concerns the 1973 restrictions there are outstanding objections from Mr Robert Small and Mrs Jennifer Iris Small of Linden Garth, Oakwood Road, whose southern boundary abuts the northern boundary of 7 Wealden Way. It is agreed that Mr and Mrs Small are entitled to the benefit of the 1973 covenants.

5. At the hearing Mr Ian Eldred appeared for the applicant with the Tribunal's permission. Mr Eldred gave evidence himself and called expert evidence from Mr J D Holt BSc (Hons), MRICS of Messrs Gould and Company, chartered surveyors of London. Mr David Mayall of counsel appeared for the objectors and called Mr Small to give factual evidence. I inspected the application site and Linden Garth on the afternoon of 23 March 2009 accompanied by Mr Eldred and Mr Small.

Facts

6. In the light of the evidence and my site inspection I find the following facts. 7 Wealden Way is a detached bungalow set on a bank on the north side of the road. To the eastern side of the bungalow, and within its curtilage, is a large garden area, also set upon the bank. The site area of this garden, which forms the subject of the application, is approximately 0.074 acres. The eastern boundary of the garden abuts the western side of Oakwood Road, a private road which runs south from Muster Green South to Wealden Way, a short distance to the west of Haywards Heath town centre. A six foot close boarded timber fence currently bounds the site. Wealden Way provides access to a number of cul-de-sacs and the immediate surrounding area contains good quality private housing.

7. The proposed development involves excavating the currently sloping site to street level, rather than setting the new building on the existing bank. The new bungalow would have three bedrooms, living room, kitchen, two bathrooms (one en suite) and an integral garage. It would measure approximately 16m wide and 8m deep. Its total height would be 3.8m above the excavated ground level.

8. Linden Garth stands on a site of approximately 0.289 acres immediately north of 7 Wealden Way and its garden, with both of which it shares a common boundary. It was erected in the 1950s on two storeys. The first floor is formed within the roof space. There are two dormer windows with flat roof projections in the southern roof pitch. Its main access is via a tarmac driveway from Oakwood Road and a timber front door facing east. The

gross internal area is approximately 197m² (2,125 sq ft). To the north of the house is a single storey garage.

9. The proposed development would be located approximately 7.6m from the boundary with Linden Garth and approximately 18.8m from the nearest projection of Linden Garth's southern elevation.

Evidence and submissions

10. I consider firstly the restrictions contained in the Deed dated 6 July 1973, since this is the only one to which the objections relate. In this case the application is solely on ground (c) of section 84, namely that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

11. Mr Eldred relied upon the fact that planning permission has been granted for the proposed bungalow. He said that the application had, in its revised form, been prepared in the knowledge of the restrictive covenants. Because of the proposed reduction in ground levels in the vicinity of the proposed dwelling the ridge height would be less than six feet above the level of the land at the boundary with Linden Garth. That was below the top of the fence which had been erected along this boundary, pursuant to clause 2(b) of the Deed.

12. Mr Eldred said that the local planning authority had taken full account of all the neighbouring properties when it considered the planning application. He referred in particular to the following observations in the officer's report to the planning committee which granted permission:

“The current application is for a building more in keeping with the general style of properties in Wealden Way. It differs significantly from the previous proposal in that the level of the plot would be reduced to street level, rather than setting the new dwelling up on the bank. This has been proposed by the applicant as a method of overcoming the restrictions of a covenant on the land which is understood to prevent buildings of more than 6 feet in height being erected there. However, matters relating to this covenant are not for planning consideration ... The bungalow would measure approximately 3.8m in height from the proposed excavated ground level. As a result of it being set down into the bank there are no significant neighbour amenity issues arising.”

13. Mr Eldred concluded from this report that the proposed development was reasonable and would have no adverse effect on the amenities of Mr and Mrs Small, the area generally, or the general character of the street scene. He produced a cross section showing the relationship between the proposed bungalow, Linden Garth and the existing bungalow at 7 Wealden Way. He said that this showed that the proposed dwelling would be below the six foot threshold specified by the restrictive covenant and would cause no injury, loss of light, loss of view or overlooking.

14. Mr Holt considered that the market value of Linden Garth at the present time was £675,000, and that this figure would not change if the proposed development were completed. He commented upon the impact of the proposed development on Linden Garth as follows:

“From the plans provided and our site visit the current consented proposal for development at 9 Wealden Way [as he termed the application site] will not project above the close boarded timber panel fence erected along the boundary. Therefore the views currently enjoyed by Mr and Mrs Small from their garden and at ground floor level would not be obstructed. Views from the dormer windows of the first floor of Linden Garth look directly down on to the site, after development would be directly on to the roof pitch of the new property. To the south side of the boundary fence between 9 Wealden Way and Linden Garth is an area of mature vegetation ... In places this extends beyond the height of the boundary fence and will be more prevalent during summer months, we suspect furthermore obscuring the view. However, I should point out this height is lower than that of the existing property at 7 Wealden Way ... The proposed structure accords with the General Government Planning Policies and has met Planning Policy for Mid Sussex District Council with regards to impact on neighbouring properties. It should also be pointed out that the new dwelling structure proposes to be a good quality housing structure, in keeping with other properties on Wealden Way.”

15. In the course of cross examination Mr Holt accepted that it was possible for the interruption of a view from a neighbouring property to be considered acceptable for planning purposes, but still cause damage to the enjoyment of that property. He had not been granted access to Linden Garth when he prepared his report. In the light of information which had been provided at the hearing, however, he now accepted that the bungalow would be visible from Linden Garth at ground level and that it might be possible to see all the windows in the north elevation of the proposed building from first floor level.

16. Mr Eldred suggested that the proposed development would not breach the restrictions in the 1973 Deed. His justification for this suggestion was as follows. The limitation on the erection of sheds or other structures, contained in clause 2(c) of the Deed, to a height of no more than six feet, did not state from where the height was to be measured. Two matters were significant. Firstly, the six foot restriction was identical to the height of the fence required to be erected by clause 2(b). Secondly, two plans were attached to the Deed. Plan No.2 showed the then existing contours of the land. In Mr Eldred’s submission, the intention of the restriction was to permit a structure to be built on the application site, provided it did not impact on the privacy of Linden Garth. This would be achieved by ensuring that the height of the building was no greater than that of the boundary fence.

17. Mr Small said that he and his wife had purchased Linden Garth in 1984, when they were advised that the covenants contained in the 1973 deed would protect them from further development on their southern aspect. They wished to continue to enjoy that aspect as it was. The proposed development would be visible from their property from both the upstairs and downstairs rooms and from the garden. It would be something that they would notice. They

were seeking no monetary compensation. Their sole concern was to safeguard their amenity of life in their own home.

18. On behalf of the objectors Mr Mayall pointed out that, if Mr Meldred was right in contending that the proposed bungalow would not infringe the covenant, there would be no need for the application to seek its discharge or modification. In any event, he said, it was clear that the building of the proposed dwelling, which would be more than six feet in height, would infringe both clauses 2(a) and 2(c) of the restrictive covenant.

19. He submitted that the suggestion that the covenant in clause 2(c) in the 1973 Deed

“Not to erect ... sheds or other structures at a height of more than six feet on the land forming part of the garden of unit No.4”

was intended to allow the construction of a house more than twice as high was unsustainable. Plan No.2 annexed to the Deed showed that, of the maximum of three houses permitted by clause 2(a), only one would be visible from the rear of Linden Garth – namely 7 Wealden Way, which was situated to the south west. The remaining permitted units, Nos.3 and 5, were shown to be located well to the west and east respectively. The compromise reached between the parties which resulted in the 1973 Deed, therefore, meant that Homemakers could interfere with the view from Linden Garth by erecting one house in front of it. There would be no interference with the view over the land subject to the restriction which, as was clear from clause 2(c), was to be used as part of the garden of unit 4 (7 Wealden Way). The intention of clause 2(c) was to reserve that land for garden use and to limit the type of structures to be erected upon it to those connected with such use.

Conclusions

20. I accept Mr Mayall’s submissions on the interpretation of clause 2(c). The proposition that the prohibition on erecting “sheds or other structures at a height of more than six feet” was intended to permit the building of a dwellinghouse of more than twice that size is in my judgment hopeless. Clause 2(a) permitted the company to carry out development “only so far as units 3, 4 and 5 are concerned”. It was clear from the attached plan that each of those units would be a house. The construction of a further house, on land intended to form part of a garden of one of the three permitted houses, would therefore be a clear breach of the restriction. I also reject the suggestion that the six foot height restriction referred to measurements taken from the then ground level as shown by the contours on the attached plan. If that had been the intention the parties could and would have said so.

21. I now turn to consider whether the proposed modification would cause injury to the objectors. The threshold for establishing injury is very low. In *Ridley v Taylor* [1965] 2 All ER 51 Russell LJ said this:

“My own view of para (c) of s84(1) is that it is, so to speak, a long stop against vexatious objections to extended user ... Both this passage in *Jolly* and the

corresponding passage in Preston and Newsom suggest that para (c) may be designed to cover the case of the, proprietorially speaking, frivolous objection. For my part I would subscribe to that view.”

22. In my judgment, Mr and Mrs Small’s objections to the proposed modification cannot be described as vexatious or frivolous. I am satisfied that, if the proposed bungalow is built, the view from the rear of their house, both at ground floor and first floor levels, will change significantly and they are very unhappy at the prospect. The proposed modification would therefore cause them injury. Accordingly, the application on ground (c) fails and I have no jurisdiction to modify or discharge the 1973 restriction.

23. For completeness I add that the application would also have failed if the applicant had chosen to rely on ground (aa). I consider that the restriction, in preserving the existing views from the rear of Linden Garth by impeding the proposed development, secures to Mr and Mrs Small practical benefits of substantial advantage to them, whether or not it increases the market value of their property.

24. There were no objections to the proposed discharge or modification of the three earlier restrictions. Assuming in the applicant’s favour that the grounds relied upon in these cases have been made out, I would have a discretion whether or not to grant the relief sought in respect of the three sets of restrictions. I do not consider that it would be appropriate for me to exercise that discretion, bearing in mind that the effect of my decision on the 1973 restrictions is that the development proposed by the applicant cannot go ahead.

25. The application is therefore refused. A letter on costs accompanies this decision, which will take effect when the question of costs has been determined.

Dated 6 April 2009

N J Rose FRICS