UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0528 (LC)
UTLC Case Number: LP/24/2013

RESTRICTIVE COVENANT – discharge or modification – dwellinghouse – restrictions preventing erection of building and any additions, alterations, fences and outbuildings without Vendor's consent – application to discharge or modify restrictions to permit implementation of planning permission to demolish existing two storey dwelling and replace with larger house – whether requirement for consent extended to original Vendor's successors in title – if consent of original Vendor only required, whether restrictions absolute or obsolete following her death – whether changes in character of neighbourhood rendered restrictions obsolete – whether restrictions secured practical benefits of substantial value or advantage – whether discharge or modification would cause injury – amount of compensation payable in event of discharge or modification – application for discharge granted – held restrictions obsolete – Law of Property Act 1925 s84(1)(a),(aa) and (a)

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

BY

(1) BARRY RONALD COOK
(2) GILLIAN COOK **Applicants**

Re: 21 Shawfield Park
Bromley
BR1 2NQ

Before: N J Rose FRICS
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on 4 November 2014

Lawrence Power, by public access, for applicants
Adam Chambers, instructed by Nigel Owen and Company, solicitors of Chislehurst, for the objector, Mrs Johanna Broad

The following cases are referred to in this decision:

Churchill v Temple [2010] EWHC 3369 (Ch)
Margerison v Bates [2008] EWHC 1211 (Ch)
Crest Nicholson Residential (South) Ltd v McAllister [2003] 1 EGLR 165
Crest Nicholson Residential (South) Ltd v McAllister [2004] 1 WLR 2409 (CA)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1WLR 896

The following case was also referred to:

Re Truman, Hanbury, Buxton & Co Ltd's Application [1956] 1QB261

DECISION

Introduction

1. This is an application by Mr Barry Ronald Cook and Mrs Gillian Cook under section 84(1) of the Law of Property Act 1925, seeking the discharge or modification of restrictive covenants affecting freehold land containing a two-storey dwellinghouse known as 21 Shawfield Park, Bromley (No.21), so as to permit the construction of a larger house on the site.

2. The restrictions were imposed by a conveyance dated 16 February 1962 by Mrs Gladys Nellie Lewis (the Vendor) to Mrs Joan Florence Randall (the Purchaser). Clause 2 of the conveyance provided as follows:

> "For the benefit and protection of Number 23 Shawfield Park, Bromley aforesaid or any part or parts thereof and so as to bind the property hereby conveyed into whosoever hands the same may come the Purchaser hereby covenants with the Vendor that the Purchaser and the persons deriving title under her will at all times hereafter observe and perform the restrictions and stipulations set out in the First Schedule hereto but so that the Purchaser shall not be liable for a breach of this covenant occurring on or in respect of the property hereby conveyed or any part thereof after the Purchaser shall have parted with all interest therein."

The restrictions in the First Schedule were:

> "1. Not to erect any building on the land hereby conveyed except in accordance with plans and drawings to be previously approved in writing by the Vendor and not to make any additions or alterations thereto without the previous consent in writing of the Vendor.
>
> 2. Not to permit any trees or shrubs on the land hereby conveyed to obstruct the access of light to the Vendor's adjoining property known as Number 23 Shawfield Park aforesaid.
>
> 3. Not to erect any fences walls sheds or additional buildings of any description on the land hereby conveyed without the previous consent in writing of the Vendor which shall not be unreasonably withheld.
>
> 4. Not to do anything or permit to be done anything which may become a nuisance or annoyance to the Vendor or to the owners or occupiers of the adjoining property."

3. On 16 January 2012 planning permission was granted by the local planning authority for

> "demolition, extensions and alterations to provide a three-storey house including accommodation in roof, basement garage and cellar room."

By condition 1 the planning permission required the approved development to be begun not later than 15 January 2015.

4. The application seeks the discharge or modification of restrictions 1 and 3 in the First Schedule, both of which require the written consent of "the Vendor" to be obtained before the works there specified are undertaken.

5. A formal objection to the application was made by Mr William Alfred Broad and Mrs Johanna Broad, the owners of 23 Shawfield Park (No.23) which abuts the eastern boundary of No.21. Sadly Mr Broad died some months ago, although it was not until the commencement of the hearing that the applicants and the Tribunal were formally advised of this, and informed that the executors of Mr Broad's estate were not pursuing the objection which was being advanced by Mrs Broad alone.

6. Mr Lawrence Power of counsel appeared for the applicants and he called Mr Cook to give factual evidence. Counsel for Mrs Broad, Mr Adam Chambers, did not call any evidence. I inspected No.21 and No.23 on 13 November 2014, accompanied by Mr Power and Mr Nigel Owen, Mrs Broad's solicitor.

Mr Cook's evidence

7. Mr Cook said that he and his wife purchased the application property in December 1999. Mrs Lewis, who sold the site to Mrs Randall in 1962, had inherited it in about 1961 when her mother passed away. She lived at No.23. Mrs Randall was a friend of Mrs Lewis. She previously lived alone in a large house at 5 Shawfield Park. At the time of the purchase Mrs Randall was widowed and had no family, so she wanted a smaller house.

8. The house at No.21 was designed to accommodate Mrs Randall's particular requirements. In Mr Cook's opinion it was not in keeping with the size or style of other properties in the street. and was a bad example of 1960s architecture. The bathroom, the original large double aspect bedroom and dressing room were on the upper floor. The original building was added to in 2006. The current building extended to around 60cm from the site boundary on both sides, a distance which was no longer acceptable under the planning regulations. A distance of 1m was now required. As a result the planned new building would be 80cm narrower than the existing building, making the street less crowded. The new building would not extend beyond the current front and rear building lines. The footprint would be very similar to the existing building, just not as wide. In addition the roof height of the new building would be lower than that of No.23. Most properties in Shawfield Park, including Nos, 19, 23 and 25 on the same side of the road, were either on three storeys or two storeys with large loft space.

9. A housing development known as Grayland Close was erected immediately behind Nos 21 and 23 in about 1975.

10. Mr Cook said that the brief to his architect had been to design a building that would be totally in keeping with the street scene. He believed that the planned new building would achieve this objective. The redevelopment project would take about eight months to complete.

11. Mr and Mrs Broad were the only neighbours who had objected to the planning application for the proposed development. The application and plans had been subjected to a rigorous examination by a planning sub-committee of Bromley Council, which was addressed by Mr Broad in person. Despite the concerns he expressed the sub-committee approved the application.

12. Safeguards, including a hip roof, had been incorporated into the plans to ensure that the new building would be in keeping with the neighbourhood and did not overlook No.23. Mr Cook did not think that the planned new building would cause an obstruction to the view from the ground floor windows of No.23 as had been suggested. These windows currently looked out onto the garage of No.23 which lay between No.21 and No.23. The only view from No.23, therefore, was sky and the hip roof had been incorporated to minimise any impact on this view.

13. The other neighbours had been very supportive of the proposed re-build. Mr Cook produced letters to Bromley planning department indicating the support of the owners of No.19, which adjoined No.21 to the west, and of No 16B, set back on the opposite side of the road. The neighbours saw the new building as providing an enhancement to the street and thereby a benefit to their properties.

14. Mr Cook said that he and his wife had, over the past 13 years, tried to resolve the matter with Mr and Mrs Broad, but without success. Mr Broad had said that he did not want to live next door to a four bedroom house, but this was odd as all the houses in the street, including No.23, had at least four bedrooms, and many were much larger.

15. Mr and Mrs Broad, purportedly exercising their rights under the covenant, had written to him on a number of occasions over the years to complain that they had not been asked for permission to instal certain items on No.21, including a water butt, a garden feature and a trampoline. In every decision he had made concerning home improvements Mr Cook believed that he had had acted considerately of Mr and Mrs Broad's feelings.

16. In cross-examination Mr Cook agreed that the present structure immediately to the west of the boundary between Nos. 21 and 23 was only single storey and significantly lower than the proposed structure; that the new hip roof would be higher than the present roof, and that the ground level of No.23 was considerably higher than that of No.21.

Grounds for the application and conclusion

17. The application is made under paragraphs (a), (aa) and (c) of section 84(1). I start with ground (a), namely whether, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete.

18. Mr Power submitted that the covenant was obsolete because it required the consent of the original Vendor (the deceased Mrs Lewis) to the proposed development; properly construed, the

term "Vendor" did not extend any further than the original covenanting party. In support of this submission Mr Power relied upon the High Court judgments of Mr N Strauss QC in *Churchill v Temple* [2010] EWHC 3369 (Ch) and Mr Edward Bartley Jones QC in *Margerison v Bates* [2008] EWHC 1211 (Ch).

19. Mr Power argued that, had the draftsman of the covenant intended the requirement for consent to extend to the Vendor's successors in title, he would have included an express provision to that effect, for the following reasons. Firstly, despite its common use in covenants as a "time-hallowed phrase" (*Margerison*), the draftsman did not include the term "the Vendor and her successors in title." Secondly, the absence of an express provision indicated the draftsman's clear contemplation of the limitations of the restrictions, particularly since he had expressly provided that the purchaser's successors in title would be bound by the covenant. Thirdly, following the reasoning of Chadwick LJ in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 WLR 2409 at paras 42-43, there was no intention to extend the consent provision to the Vendors' successors in title automatically under s78 of the Law of Property Act 1925 either, as the draftsman could equally have relied upon the perpetuity provided by s79 of that Act, but he nevertheless expressly provided for the purchaser's successors to be bound by the covenant.

20. Mr Power concluded that the objector was in no position to provide any consent under the contractual terms of the covenant and the impossibility of obtaining consent from the deceased Mrs Lewis rendered the covenant obsolete.

21. Furthermore, the absence of any express provision in para 1 of the First Schedule that consent was not to be unreasonably withheld, not only to the erection of any buildings but also to any additions or alterations, indicated that the original covenanting parties had only intended the restriction to operate in the short-term. Mr Power relied, in support of this submission, on *Churchill* at para 63 where, referring to the decision of Neuberger J in *Crest Nicholson Residential (South) Ltd v McAllister* [2003] l EGLR 165 at paragraphs 36 and 63, the Deputy Judge said this:

> "I am therefore bound to follow the judgment of Neuberger J, which I gladly do since it is in my view obviously right. There are only two discrepancies between *Crest* and the present case. The first is that the vendors in the present case ceased to exist through death, rather than through the dissolution of a company. This is not a reason for distinguishing *Crest*, and Mr Davies has not suggested otherwise. The second difference is that there is, in the present case, the additional covenant in paragraph 5 against any structural alterations. However, this serves only to strengthen the conclusion that these covenants were intended to operate in the short-term, when Mr and Mrs Strong were still around to object to an alteration to what they had permitted under paragraph 4. [Paragraph 4 was a covenant not to erect a dwelling house without the approval of the vendors or their surveyor to the situation, drawings and specifications thereof, such approval not to be unreasonably withheld]. The parties cannot sensibly be taken to have intended that the purchaser or his successors would be unable to make any structural alteration, at any time in the future, or at least not without an application to the Lands Tribunal."

22. In those circumstances, said Mr Power, it was not in the interest of contractual certainty to artificially reset or remake the covenant so as to construe it in the manner suggested by the objector. The appropriate course was to discharge the restriction under ground (a).

23. Alternatively, Mr Power submitted that the covenant should be deemed to be obsolete by reason of the changed character of the neighbourhood which now consisted of mostly 3 storey buildings or 2 storey buildings with large loft spaces. The proposed development would bring the applicants' dwelling house in keeping with the current character of the neighbourhood.

24. Responding firstly to Mr Power's alternative submission, Mr Chambers said that, as a matter of fact, there had been no changes in the area such as to make the covenant obsolete. Although there had been some residential development at the rear of the application property, in the large garden of what had been a house known as Elmbank, Sundridge Avenue, this had not changed the nature of the area. If one approached Shawfield Park from the main road it was an area of suburban development, and had been ever since the application property was sold with the material restrictive covenant.

25. Mr Chambers submitted that it was not the purpose of the covenant to ensure that whatever was built on the site was in keeping with the area. That was a planning consideration. The purpose of the restrictions was to control the development of the plot that used to be the garden of No.23, such that it did not cause a detriment to No.23 or its occupants. That purpose had not changed and could still be performed as the building at No.23 was still a dwelling house. It was important to remember that planning law and restrictive covenants were different mechanisms for controlling the development of land. That was all the more important when the covenant was entered into at a time when planning control was already established. It was to be inferred that the covenant was intended to give a benefit beyond that afforded to the parties by planning restrictions.

26. On the issue of whether the death of Mrs Lewis had rendered the covenant obsolete, Mr Chambers pointed out that the restriction was not to build on the land, and that it was expressly intended to be for the benefit of No.23. The covenant was essentially against building, with a provision that permitted some building in certain circumstances. Although the expression "Vendor" might mean only Mrs Lewis, that restriction applied only to the right to give permission, not to receipt of the benefit and protection of the covenant. There was therefore a clear separation between the restrictive part of the covenant – not to build – and the exemption for approved development.

27. The owners of No.23 were the only people who might be able to enforce the covenant through owning the land which was expressed to have the "benefit and protection" of the covenant. The applicants were not the original covenantors and so were not bound in contract. Mrs Lewis no longer owned the benefited land and so could not enforce the covenant. The owners of No.23, however, had the right to waive the enforcement. They thereby had a veto on the development of the application property, which used to be part of the garden of No.23.

28. Thus, the covenant continued to protect and benefit No.23 as it was expressed to do. The covenant was therefore not obsolete, even in the unusual sense of not operating as intended.

29. Mr Chambers added that the connection of the restriction with the original vendor – Mrs Lewis – was so close that the absence of that party did not bring the covenant to an end. Were that the case the current application would be unnecessary, because there would be no covenant. The

application implied that the covenant still had legal effect. The inability of Mrs Lewis to give her consent had the effect that the covenant was now absolute, not obsolete. When the original property owned by Mrs Lewis was divided into two, the effect was not to create a building scheme. It was simply an agreement between two people who knew each other to ensure that things remained unchanged. The purpose of the covenant was to give the owner of No.23 a veto over any plans that might be approved by the local planning authority.

30. Mr Chambers acknowledged that, in the case of para 4 in the First Schedule, the draftsman had referred to the owners or occupiers of the adjoining property – No 23 – as well as the Vendor as being entitled to the benefit of the covenant against causing nuisance or annoyance to the adjoining property, whereas paragraphs 1 and 3 referred to the Vendor only. But, said Mr Chambers, the difference in wording was not significant. The draftsman had sacrificed consistency for elegance and used more flowing prose rather than repeating himself.

31. In closing Mr Power referred to the following extracts from the judgment of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913 on the correct approach to the construction of a conveyance or any other document:

> "6(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract…
>
> "6(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

32. Mr Power submitted that it was unlikely that a reasonable person would conclude that Mrs Lewis and Mrs Randall – who were friends – should have intended that any party who purchased No.23 in the future would have an absolute right of veto over any building activity on No.21. If that had been the intention it would have been a catastrophic mistake by the draftsman to fail accurately to represent what had been agreed, merely in the interests of verbal elegance. There was no evidence to suggest that Mrs Randall was prepared to agree that, in the event of her friend's death, her friend's successors in title would have an absolute veto on any future changes to her house. The expression 'successors in title' was omitted because it was intended that the right to approve works on No.21 would be restricted to Mrs Lewis during her lifetime and that thereafter only the local planning authority would be entitled to restrict development on the site.

33. I accept the submissions of Mr Power, firstly that the references to "the Vendor" in paras 1 and 3 of the First Schedule should not be interpreted as extending to the original vendor's successors in title and, secondly, that with the death of Mrs Lewis both restrictions became obsolete. I would express my reasons for this conclusion as follows. In para 4 of the First Schedule the covenant not to do or permit anything which may became a nuisance or annoyance is expressed to be for the benefit of "the Vendor or the owners or occupiers" of the adjoining

property. Paras 1 and 3, by contrast refer only to the Vendor. The difference in language indicates a difference in substance, and that where the draftsman used the expression "Vendor" he meant the vendor, Mrs Lewis and her alone. An interpretation of paras. 1 and 3 as including the vendor's successors in title would only be justified if "something must have gone wrong with the language" adopted by the draftsman. I am unable to conclude that the draftsman must have made an error in drafting the restriction and that the original contracting parties intended that control over development of the application land would be vested in perpetuity in the vendor's successors in title.

34. It is true that a covenant which gives the original vendor power to maintain control over the land after he has sold it is somewhat unusual. It is, not, however, unheard of. In his first instance judgment in *Crest* Neuberger J said at para 46:

> "the Company's grounds for refusing approval to plans after it parted with any beneficial interest in the estate could only have been aesthetic, financial or altruistic. [As to] altruistic … it is fair to say that, on the facts of this case, …. this looks an unlikely ground. The Company might have financial ground, in the sense that it might have been able to demand money for giving its consent … an altruistic ground might have been raised if the Company had thought it right to take into account the interests of those owning land to which the *benefit* of the covenant is annexed…."

35. The Deputy Judge referred to the first instance *Crest* judgment in *Churchill*. In the latter case the issues were similar to those that arise in the instant case, although the provisions in paragraph 1 of the First Schedule were contained in two separate paragraphs; the required consent was to be of "the Vendors or their surveyor"; and consent to the proposed new house (but not to alterations or additions thereto) was not to be unreasonably withheld.

36. In para 37 Mr Strauss said:

> "(e) On the particular question which arises here, whether it makes sense for the original vendors to have a power of veto after they have sold part of their property, there are, as Neuberger J said, possible aesthetic, financial and altruistic reasons even, in my view, in a one property case. Of these, no doubt, financial reasons are likely to be the most powerful. Where vendors retain part of their property, they may wish to be in a position, when they come to sell it, to promise the purchaser that they will exercise their powers under the covenant if requested to do so. This might be a valuable right, enabling them to sell at a good price, if potential purchasers of the retained part of the property might otherwise have been afraid of developments next door.
>
> (f) Of course, a covenant with successors in title would serve this purpose even better, but it might not be acceptable to the purchasers. I therefore do not think the approach of Judge Kirkham in Mahon [*Mahon v Sims* [2005] 3 EGLR 67] is of universal application, even in cases not involving a development or building scheme. It may not always sufficiently take into account the realities of the vendor's position as regards both his negotiations with his current purchaser and his future negotiations with a purchaser of the retained land." [In her judgment referred to in *Mahon*, Judge Kirkham had said that, in a private sale of a single

dwelling "it would be unusual for a person who had disposed of his interest in the property to retain the right to give or withhold consent to building"].

37. In my judgment Mr Strauss's observations in *Churchill* are of assistance in resolving the present dispute. Although not very much is known of the background to the sale in 1962, it is common ground that it was a sale by one lady to another, who was her neighbour and friend. In my judgment it is entirely possible that the vendor, Mrs Lewis, would have wanted to control the form of development carried out on No.21 and to be able to exercise such control even after she disposed of her interest in No.23 in the future. Mrs Randall may have been prepared to rely on the reasonableness of her friend in considering proposals for future building works on No.21. But she may not have been prepared to agree that, after Mrs Lewis died, Mrs Lewis's successors in title would have had power to withhold consent to any building works, particularly bearing in mind that consent under paragraph 1 could be withheld unreasonably. These considerations provide a plausible explanation for an intention that Mrs Lewis should be able to influence development at No.21 even after a sale by her of No.23. The fact that, on my preferred construction of the covenants, Mrs Lewis would have enjoyed that right, is therefore no reason for rejecting it.

38. I therefore hold that the language in the restrictions ought to be given their literal effect and that it was not intended that the references to the Vendor would extend to the Vendor's successors in title.

39. I turn to consider the effect of Mrs Lewis's death. Read literally, the restrictions would become an absolute bar to any future building works, because no consent could be obtained from "the Vendor". I do not consider that to be the correct construction of the provisions. Otherwise, Mrs Lewis's death would put subsequent owners of No. 23 in the same position as they would have been if the covenants had in fact been with their successors, which I have held was not the parties' intention. Indeed, as regards paragraph 3 of the First Schedule they would have been in a better position, because consent could now be withheld unreasonably. Such a permanent and absolute control over the development of adjoining property is such an improbable arrangement that only clear language would justify such an interpretation. The better construction, which I find quite consistent with the language of the instrument and the known relationship between the parties, is that it was intended that on the vendor's death the covenant would lapse and become unenforceable.

40. I therefore find that ground (a) has been made out and that the restrictions in paragraph 1 and 3 of the First Schedule to the conveyance dated 16 February 1962 are obsolete. In the light of that finding it is not strictly necessary for me to decide whether the restrictions are obsolete because of changes in the character of the neighbourhood. Nevertheless, for completeness I would state that in my judgment the character of the neighbourhood is not significantly different now from what it was when the restrictions were imposed. Any small change that there has been is insufficient to render the restriction obsolete.

41. I now consider the application under paras (aa) and (c), in case my conclusion that the restrictions are obsolete is wrong. On (aa) the issues are whether, in impeding the construction of

the proposed dwelling house on No.21, the restrictions secure to Mrs Broad any practical benefits of substantial value or advantage to her.

42. Although he did not call any evidence to that effect, Mr Chambers relied upon the original notice of objection, and the original objectors' statement of case to submit that the restrictions were of substantial value and advantage because they prevented the erection of a building which would overcrowd the site and overlook the house and garden at No.23. He also submitted that the occupants of No.23 would be disturbed and annoyed by the extensive construction works. Mr Cook's evidence was that any adverse impact would be minimised by the design of the proposed new roof and the fact that, insofar as the view from the ground floor windows of No.23 was currently of that property's garage, the position would not change. The new house would have the opposite effect to the overcrowding suggested and the building works would only last for eight months.

43. In the light of the evidence and my site inspection I conclude that the effect of the restrictions in impeding the proposed development is of practical benefit to Mrs Broad, in that it prevents some limited interference with the light to and the view from No.23, as enjoyed through one side window in the rear living room and in the rear garden. I consider that the proposed development would not overcrowd the site and the construction works would not cause any more inconvenience than is normally to be expected from building works in a suburban road. In my judgment such practical benefit that I have found to exist is of significant, but not substantial value or advantage to Mrs Broad. If the restrictions were not obsolete, therefore, the application would have succeeded on ground (aa) and I would have exercised my discretion to discharge the restrictions in question. My decision to discharge rather than modify would have been based on the fact that, in the past, the owners of No.23 have sought to use the restrictions to exercise unreasonable control over activities in No.21, by asserting that their consent was needed for the placing of a trampoline and a water butt in that property's rear garden.

44. On the question of compensation I do not consider that any award would have been justified, because the limited adverse effect of the new house on the amenities of No.23 would have been more than offset by the increase in the desirability and value of that property resulting from the improvement in the general architectural quality of the houses in this part of Shawfield Park.

45. Finally, I do not think that the application on ground (c) would have been made out, because the interference with the view and light to which I have referred would have amounted to an injury to Mrs Broad.

46. The application is allowed. I order that the restrictions in paragraph 1 and 3 of the First Schedule to the conveyance dated 16 February 1962 be discharged on ground (a).

47. If the parties are unable to reach agreement on the question of costs, any application for an order for costs should be made in accordance with the letter which accompanies this decision.

Dated. 19 December 2014

N J Rose FRICS