IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 108 (LC)
Case No: LP/7/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – discharge – restriction preventing use of premises other than as offices – applicants wish to convert to two residential flats – whether restriction obsolete – whether covenant secures practical benefits of substantial value or advantage – whether discharge would injure the objector – application granted - Law of Property Act 1925 s.84(1)(a), (aa) and (c)

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

BETWEEN:

CRAIG WAGGOTT **Applicants**
KAREN WAGGOTT

- and -

WAI CHING YIP **Objector**

Re: 1 Alfred Street, Wantage, Oxon OX12 8AN

- -

Hearing date: 17 January 2017

Before: P R Francis FRICS

Royal Courts of Justice, London WC2A 2LL

- -

Andrew Francis, instructed by direct access, for the applicants
The objector in person

The following cases are referred to in this Decision:

Re Bass Limited's Application (1973) 26 P&CR 156
Shephard v Turner [2006] 2 P&CR 28
Re Wake's Application [2002] LP/2/2001
Re Zopats Application [1966] 18 P&CR 156

The following case was also referred to in argument:

Southwark London Borough Council v Tanner & Others [2001] 1 AC 1

DECISION

Introduction

1. This application was made on 11 March 2016 under grounds (a), (aa) and (c) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act") by Mr Craig Waggott and Mrs Karen Waggott ("the applicants") for the discharge of a restrictive covenant currently burdening land at 1 Alfred Street, Wantage, Oxon OX12 8AN ("the application land") so as to enable them to convert the building thereon from offices into two self-contained residential flats.

2. The restriction was imposed in a conveyance dated 15 May 1979 made between (1) Allied Breweries (UK) Ltd (Vendor), (2) Ind Coope (Oxford & West) Ltd (Trustee) and (3) James Laidlaw and Julie Helen Laidlaw (Purchasers). The land is registered with the Land Registry under Title Number: ON58470 and the relevant restriction is 1b in the Schedule of Restrictive Covenants which, so far as relevant to this application, provides:

> "1. The following are details of the covenants contained in the Conveyance dated 15 May 1979 referred to in the Charges Register:-
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> 'THE Purchasers hereby jointly and severally covenant with the Trustee and the Vendor and their respective successors in title for the benefit and protection of the adjoining property of the Trustee and the Vendor and shown coloured orange on the plan annexed hereto and so as to bind the property hereby conveyed and each and every part thereof into whosoever hands the same may come but so that the Trustee and the Vendor shall reserve the right to deal with the said adjoining property or any part or parts thereof without reference to and independently thereof as follows:-
>
> (a) …
>
> (b) Not to use the property hereby conveyed or any part thereof for any purpose other than as offices
>
> (c) - (f) …'"

3. The objector is Mr Wai Ching Yip who is now the freehold owner of No. 3 Mill Street (Registered Title Number ON83245). At the time the restriction was imposed this land was in the ownership of Allied Breweries and Ind Coope, the Trustee and the Vendor referred to above, and operated as a public house known as 'The Castle'. It adjoins the application land at one side and to the rear and is the land referred to in the Charges Register as coloured orange on the plan annexed to the Conveyance of the application land dated 15 May 1979. The Castle ceased trading and closed at some time after the restriction was imposed on the application land and before its transfer to Mr Yip on 23 March 1984. In 1984 Mr Yip obtained planning permission for the conversion of 3 Mill Street into a Chinese restaurant which he operated until it ceased trading in 2010. The ground floor and basement restaurant to the left hand side of the application land (when viewing from Alfred Street) and the kitchens to the rear remain empty

and disused, although the upper floors which were used for staff accommodation remain, at least in part, occupied for residential purposes.

4. Mr Yip contends that the restriction, which he says is not obsolete, confers upon him a valuable benefit in that office users are far less likely than residential occupiers to complain about noise and cooking smells from a restaurant. It should therefore not be discharged, and in his view the benefit was so important that financial consideration would not be adequate compensation for its loss.

5. Mr Andrew Francis of counsel appeared for the applicants and called Mrs Waggott who gave evidence of fact, and Mr Richard Adrian Jones FRICS, sole principal of Langtons, Abingdon who gave his expert opinion on the impact of the restriction and valuation aspects.

6. The objector, who was not represented, produced at the hearing a brief written statement and gave oral evidence of fact and opinion.

Facts

7. The applicants produced a comprehensive draft statement of facts and issues to which, unfortunately, the objector had failed to respond. Nevertheless, I found it to be an extremely helpful summary of the facts, background and relevant timeline and with much of the information being backed up by supporting documents, I consider it to be uncontroversial. From this, the evidence, and my inspection of the application land and immediately surrounding area on 16 January 2017, I find the following facts.

8. The application land comprises a period brick and clay tile roofed former cottage (planning permission having been obtained in 1978 for conversion to offices) which contains accommodation on four floors fronting onto Alfred Street, a narrow lane linking Mill Street with the western end of Market Place in the centre of Wantage. It consists of the right hand quartile of a block of four units which form a fully conjoined square of properties close to the junction with Mill Street. As described above, the objector's property forms the left hand front and rear right hand quarter of the block, those two parts being linked by a narrow passage in the centre of the sections where they adjoin. The remaining quarter comprises a shop unit with three residential units above known as 1/1a Mill Street. That property was also originally in the same ownership, but was sold in 1984 without a similar restriction to that binding the application land being imposed. To the right hand side of the application land is a narrow alleyway between it and a block known as The Coach House to the rear of 32 Market Place. That building was converted to two flats in 2001 following the grant of planning permission in 2001, that consent including a further three units in 32 Market Place itself.

9. The accommodation within the applicant's property, extending to approximately 110 sq m (1,184 sq ft) comprises entrance lobby, one office room and kitchen/washrooms at ground floor with steps leading down to two office/storage rooms in the basement and further stairs rising to

two office rooms on the first floor with a further two offices with restricted ceiling heights and dormer windows occupying loft rooms above.

10. Subsequent to the original 1979 transfer referred to above, the application land was sold to a company called Wessex Computing in 1981. It was then acquired by the applicants on 21 December 2005, following which, despite extensive works including replacement of the roof coverings and dormer windows and internal improvement works, it remained unoccupied for some 9 years. During this period, it returned to a state of some disrepair. A serious enquiry was eventually received from a potential commercial occupier as a result of which the applicants proceeded to undertake some further modernisation and refurbishment between April and June 2016 in order to make the premises fit for occupation by the potential office tenant.

11. Following these works and further negotiations, a business tenancy was granted to Day and Nightcare Assistance Limited ("Danacare"), as administrative offices for a 24-hour home care service commencing 30 August 2016 for a term of five years, subject to a break clause after 2.5 years which is mutually enforceable on giving six months' written notice. Under the terms of a statutory declaration, the tenancy is excluded from the provisions of sections 24-28 of the Landlord and Tenant Act 1954. There is no restriction within the lease as to hours of operation.

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 or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to 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; or
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> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

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 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 case for the applicants

12. The application is made under grounds (a), (aa) and (c) of section 84(1) of the Act, and the applicants rely upon their detailed statement of case and the oral evidence given by Mrs Waggott at the hearing together with the evidence of their expert, Mr Adrian Jones. Mr Jones is sole principal of Langtons, Chartered Surveyors, of Abingdon, has been undertaking surveys and valuations of property within a 30-mile radius of Oxford for over 40 years and now specialises in restrictive covenant and leasehold enfranchisement work. He produced a short

report setting out his observations and considered the questions under s.84(1)(i) and (ii) regarding whether or not, if the Tribunal determined to discharge (or modify) the restriction, consideration by way of compensation should be paid to the objector.

13. The applicants explained that the property had originally been purchased as an investment, and a considerable amount of money was spent to bring it up to a lettable standard (about £125,000). However, the recession in 2007/08 had a seriously detrimental effect upon commercial values and the falling demand for town centre offices generally meant that a tenant could not be found. With Mr Waggott having been made redundant and the couple expecting twins, money from the property was needed to help fund the purchase of a larger house. No. 1 Alfred Street was thus marketed for sale in 2008. A sale was agreed but it fell through, and local agents subsequently advised that the value of the property had fallen. In 2009, the objector viewed the property through the applicants' agent, but no offer was forthcoming from him. Mr Yip advised the agent that he would not consider removing the restrictive covenant. Marketing continued and in 2012 a further subject to contract sale fell through. In 2014 the applicants reviewed their options. Advice received from local agents indicated that the property could have an enhanced value if it was converted back to residential – either to two small flats or a single dwelling.

14. It was decided, whilst continuing to seek a commercial occupier, to pursue the residential option. An application was made to the local planning authority for planning permission for conversion to residential in December 2015. A letter in response dated 26 January 2016 advised that planning permission for change of use from offices (B(1)(a) back to residential (C3) was not required as it would fall within Class O of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.

15. The next stage would be to seek formally to get the restriction lifted as Mr Yip had failed to respond to offers that the applicants had made in attempts to persuade him to agree to its discharge. Whilst in February 2016 an approach had been received from a seriously interested potential office tenant through the Wantage Town Team co-ordinator, significant additional works would be required to bring the property back to a suitable standard and there was no guarantee that the letting would proceed. Thus, the application to this Tribunal was made in March 2016.

16. However, the interest from the potential office tenant remained strong and after the required works were undertaken at a further cost of about £50,000, the letting to Danacare was completed in August 2016. Mrs Waggott said, in answer to a question from the Tribunal, that she and her husband were pursuing the application, despite the successful letting, because they had been advised that "they were in a strong position to get it discharged". They knew it would be a time consuming exercise and if the tenant either defaulted, or decided to exercise the break which was now only two years away, that hurdle would (hopefully) have been cleared if they then wanted to achieve the property's potentially enhanced value as a residential opportunity. The other beneficiary of the restriction (the owner of 1/1a Mill Street) had confirmed that he would not be objecting.

17. Under ground (a), it was pointed out that since the restriction was imposed in 1979, there has been a significant change of emphasis in respect of the use of buildings within the immediate vicinity and within the town centre in general. Many former commercial premises have been converted into residential accommodation, especially upper floors above shops. There is, according to the local authority, a flat above the restaurant premises of the objector and it is clear that all of the upper floors are used for residential purposes. A map was produced by the applicants identifying, from the local planning authority's records, all those properties in the immediate vicinity (i.e. those towards and beyond the western section of Market Place, Alfred Street and Mill Street). The applicants also produced an extract from the relevant Development Plan Policies within the Vale of White Horse District Local Plan 2013 (adopted on 14 December 2016) and the Vale Local Plan 2011 which was still being relied upon for day to day decision making on planning applications. The relevant Central Government Planning Guidance (PPG3) was also referred to, and the applicants said it was clear that the conversion of existing commercial buildings to residential use in town centres was being actively encouraged and promoted.

18. It was pointed out by Mr Jones that No.3 Mill Street is no longer a public house. It was assumed that the purpose of the restriction was to prevent a competing business from opening on the application land and to minimise the impact of anti-social behaviour from those leaving at closing time on the one property in the block of four that the brewery would no longer own (at the time). It was not imposed to prevent complaints about noise or cooking smells from restaurant premises, that being the benefit that the objector contends the restriction gives him. Cooking smells and the effects of late night opening as permitted by the Licensing Act 2003 would not have been a consideration when the covenant was applied. It was also pointed out that no similar restriction was imposed upon 1/1a Mill Street which was sold by the same owner some five years after the application land was transferred.

19. Mr Jones said it was a fact that the restaurant had not been operational for the past six years, and there was no evidence that any steps were being taken by the objector to reopen it. Thus the restriction had not provided the suggested benefit throughout this period. If and when the restaurant does reopen, there is nothing in the restriction to prevent the complaints that Mr Yip is worried about from an office occupier. With there being no restriction on the offices' operating hours, there would be nothing to stop the occupier (whether freeholder or tenant) complaining if he felt inclined to do so.

20. Mr Francis submitted that the answers to the questions that must be asked when applying the two stage test under ground (a) were incontrovertible. The first stage is to ask whether there have been material changes in the property or the neighbourhood or other material changes in circumstances since 1979. The evidence from the applicants and from Mr Jones relating to uses in the area, the planning regime and the changes in circumstances that have occurred over the past 45 years or more reveals that the answer is clearly yes. As to the second stage, the answer to the question whether the <u>original</u> purpose of the covenant can be achieved (said to be to protect against public house nuisance), must be no. The user of the premises is no longer as a public house and has therefore completely changed. Whilst the precise reason why the use was restricted to offices can only be assumed, that the scheme of the restrictions as a whole was to prevent competition is an assumption that is strongly supported by other

restrictions imposed in the transfer – particularly 1(d) which, in terms, says that the land shall not be used for:

> "…the trade or business of a licensed victualler or manufacturer distiller blender brewer or seller either of wholesale or retail of wines beers or spirits or permit the same to be used as an off licence or for the purpose of a Club…in which excisable liquors are sold or consumed…"

21. It was the material change of circumstances part that was the key to this case, and further when considering the matters to be taken into account under section (1B) there can be no question that the restriction is undoubtedly obsolete.

22. Turning to ground (aa), it was submitted that one needs to adopt the conventional approach of answering the seven questions raised in *Re Bass Limited's Application* (1973) 26 P&CR 156. They are:

> Question 1 (under subsection (1)(aa)): "Is the proposed user a reasonable user of the land for private purposes?"
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> Question 2 (under subsection 1(aa)): "Do the covenants impede the proposed user?"
>
> Question 3 (under subsection (1A)): "Does impeding the proposed user secure practical benefits to the objector?"
>
> Question 4 (under subsection (1A)(a)): "If the answer to question 3 is affirmative, are those benefits of substantial value or advantage?"
>
> Question 5 (under subsection (1A)(b)): "Is impeding the proposed user contrary to the public interest?" It was common ground that this question does not apply in this case.
>
> Question 6 (under subsection (1A)): "If the answer to question 4 is negative, would money be adequate compensation?"
>
> Question 7 (under subsection (1A)): "If the answer to question 5 is affirmative, would money be adequate compensation?" This question is clearly not applicable here.

23. It was submitted that there could be no valid argument to suggest that the proposed user was not reasonable (question 1). The application land was originally a residential property and the intention was to return it to that use. The restriction has clearly impeded the reasonable user (question 2), and, as the applicants' evidence demonstrated, it has cost them dearly in that there having been no demand for office use for in excess of ten years, there was no opportunity to convert the building into a property from which a return could more readily be achieved.

24. Impeding the proposed return of the application land to residential use was said not to secure any practical benefit to the objector (question 3). Mr Yip's concern that there would be an increased risk of complaints from a residential occupier about noise, smell and "other nuisances" was illusory – more so when one considers that the objector's former restaurant adjacent to the application land has accommodation above as does his existing takeaway business at 37 Market Place. Mr Jones said that anybody purchasing a residential property in a quasi-commercial location, and next to premises that even whilst currently not trading, have permission for restaurant use, would be aware that there might occasionally be some inconvenience. Although it was more likely that a residential property would be occupied late into the evening and overnight than office premises (even though there is no restriction in the current lease on hours of use), office users have just as much right to complain and could do so equally during the day when the premises are open for lunchtime trade. Even if there were to be some marginal increase in the possibility of complaints from residential occupiers, thus arguably providing some limited benefit to the objector, the prospect needs to be set against the reality and with the risks being so miniscule any perceived benefit could in no way be described as of substantial advantage.

25. It was submitted that if the restaurant business was properly managed and run in accordance with its licence terms and with environmental health requirements the prospect of complaints from anybody would be minimal. Further, the objector has, whether there is a restrictive covenant or not, the law of private nuisance on his side which, before action will be taken, requires complaints to be above the threshold of "trifling" (see *Southwark London Borough Council v Tanner & Others* [2001] 1 AC 1). That case related to two appeals by occupiers of flats who had claimed that noise disturbance from other flats within their respective blocks was in breach of the landlord's covenant for quiet enjoyment. In dismissing the appeals, it was held by the House of Lords that for a complaint to succeed under the law of private nuisance, the disturbance complained of must be more than trifling.

26. I was also referred to a decision of mine: *Re Wake's Application* [2002] LP/2/2001. In that case, consideration was given to an application under grounds (aa) and (c) for the conversion of a detached barn into a separate dwelling (for which planning permission and listed building consent had been achieved) within the curtilage of the applicant's house which was located within a tiny rural village (comprising no more than 20 houses) and adjacent to an enclave of farm buildings and yards forming part of a large farming operation. The covenant restricted the use of the applicant's property to a single dwelling (which it was agreed would not have prevented conversion of the building into additional accommodation ancillary to the main house). The only concern of the objectors (who were the owners and users of the farm and a number of the surrounding farm buildings) had been that there was a possibility of complaints from future occupiers in respect of the farming activities and noise from the use of the farm buildings and yards and a pump house that lies directly behind the barn, the subject of the application, meaning that the farm's activities might have to be curtailed.

27. Mr Francis submitted that, whilst that decision might on the face of it appear to go against his arguments in this case because the objectors had been successful, it was necessary to compare and contrast in terms of fact and degree. Circumstances in a busy town centre were vastly different from those applicable in a rural setting and some consequences of living in such

a location were only to be expected. Further, whilst in *Re Wake* the restriction was against the provision of an additional dwelling, the occupation of which by 'an outsider' might result in complaints because he or she might not have anticipated the level of disturbance that could occur, in this case it was a restriction as to the type of use. The facts here suggest that the likelihood of complaints being made is negligible, and in any event they could equally be made by the permitted office occupier. Again, unless the activities complained of could be proven to be above and beyond what might be expected within a busy town centre, then the risk of a successful action in nuisance simply does not exist and therefore the restriction does not realistically secure any practical benefit to the objector.

28. It should be borne in mind, it was submitted, that the benefit, if it does exist, needs to be "considerable", "solid", "big" (per Carnwath LJ in *Shephard v Turner* [2006] 2 P&CR 28 at paras 17-23) if it is to be considered as having substantial value or advantage (question 4). That, as the evidence demonstrated, was clearly not the case here. Mr Jones' view was that the extractors were far enough away from the windows of No. 1 Alfred Street not to create the perceived problem (unlike the pump house in *Re Wake* referred to above), and the risk of noise and disturbance late at night was no greater than anywhere else within a town centre location.

29. With the answer to question 4 being, in the applicants' view, negative, question 6 comes into play. As to whether or not compensation should be payable to the objector under s.84(1)(i) and (ii), Mr Jones' conclusion was that for the reasons he had given no practical benefits of substantial value or advantage accrued to the objector. There would in his opinion be no diminution of value to his premises if the restriction were modified or discharged and there was also no evidence that the value of the application land was reduced by the imposition of the restriction when it was sold in 1979. Thus, the extinguishment (or modification) of the restriction should be subject to nil consideration.

30. Finally, as to ground (c), it was submitted that for the reasons given in respect of grounds (a) and (aa), it is clear that no injury would be caused by the discharge of the restriction.

The objector's case

31. Mr Yip said that the extremely close proximity of the application land and his premises (they share two walls) and the fact that the entrances are also close to each other was a vital consideration. The principal purpose of the imposition of the restriction was to prevent or greatly minimise complaints about noise and other environmental nuisance emanating from the use and operation of the adjacent licenced premises. The fact that the restriction was imposed when No. 3 Mill Street was a public house, and the user was subsequently changed to a restaurant, is not a reason for arguing that it is now obsolete. The restaurant premises (when they were operating) were licenced, and the chance of some noise disturbance occurring from people leaving the premises late at night was just as likely under each type of use. Therefore, the restriction is as relevant now as it was when it was imposed.

32. It was suggested that if the application land were to revert to residential use the situation could arise where, say, an occupier of the property might be studying for an exam late into the evening, and be distracted by noise from the restaurant. Similarly, if there was a young baby living there, it might get woken by rowdy parties leaving the restaurant late at night prompting a complaint to the authorities. This was a much less likely scenario if the application land was used as offices. That statement, Mr Yip said, was supported by the fact that, in the thirty years since the restaurant first opened, there had not been a single complaint to the authorities relating to alleged nuisance.

33. It was pointed out that the applicants were (as they had admitted) well aware of the existence of the restrictive covenant when they bought their property and Mr Yip said that they should, therefore, respect it.

34. Asked why, if the restaurant was re-opened, he intended the main entrance to be on the Alfred Street elevation, close to the application land, Mr Yip said that the pathway in front of the Mill Street entrance was very narrow and was directly onto a main road. The doorway was also accessed up steps. He was thus concerned for the safety of diners when leaving the premises.

35. Mr Yip insisted that the existence of the restriction was a valuable and tangible benefit that should not be taken away. He had refused a financial inducement offered by the applicants as it was his view the risk of the possible consequences resulting from a change of user of the application land was "not acceptable or worthwhile" even in money terms.

Discussion

36. As to ground (a) it is clear from an inspection of the area, and from the planning evidence provided by the applicants, that residential use has dramatically increased in recent years – that being in accordance with the planning policies referred to. Indeed, as Mr Yip confirmed, the upper floors of his restaurant premises are provided for staff accommodation, including a room above the kitchen to the rear of the unit where, during the site inspection, one of the occupiers was seen to enter. As the restaurant is no longer trading, I infer that the current occupiers are staff working at the objector's other premises, a Chinese takeaway which operates at 37 Market Place and which has a rear staff entrance onto the lane directly behind the kitchen at No.3 Mill Street.

37. The Coach House to the rear of No.32 Market Place which is adjacent to the application land on the other side from the objector's unit, has been converted to residential; there are three flats within 1/1a Mill Street, directly behind the restaurant and as was explained in evidence, no such restriction was ever imposed by the covenantee when that property was sold at around the same time as the application land was sold. I do find that fact somewhat surprising as the main entrance to what, at the time the restriction was imposed upon the application land, was a presumably typical town centre public house (The Castle), was immediately adjacent to 1/1a Mill Street. There appears to have been a secondary entrance onto Alfred Street, close to the

application land. In my view, most noise and disturbance from late night revellers would have occurred in Mill Street rather than Alfred Street, so if the reason for the imposition of the restriction was to prevent the likelihood of complaints from adjacent residential occupiers, why was a similar restriction not imposed upon 1/1a Mill Street? I note that now, the objector points out that the main entrance to the former restaurant was what I referred to as the 'secondary entrance' in Alfred Street.

38. The applicants say that the objector's reasoning for the retention of the restriction (to prevent complaints about cooking smells and noise from people leaving late at night) does not square with the assumed reason it was imposed in the first place – to prevent complaints about noise and disturbance from pub-goers. On the question of cooking smells, Mr Jones calculated that the nearest kitchen extractor to the application land was some 8.2 metres away (on the Alfred Street elevation) from the nearest window on the application land, at ground level and at a much lower level generally due to the incline of the street "and so it's unlikely that cooking smells would present a problem." However, he accepted in cross-examination that he was unaware of the precise location of the kitchen, having not realised it was to the rear of the application land rather than next to it. During the site inspection, Mr Yip confirmed that the four extractors at on the front (Alfred Street) elevation were for air conditioning units to the restaurant areas at ground floor and basement, and did not serve as extractors for the kitchen which is in fact behind the application land, and the only extractor for it is a stainless steel chimney (for the cooking ranges) which exits through the roof.

39. There are no windows to either ground or first floor rooms on the west flank wall of the applicants' property, and only a small window on the second floor overlooking the passageway. Thus, with no kitchen extractors on the front elevation, in my view, the chances of cooking smells leading to complaints is even less than Mr Jones thought. Also, I think that the risk of noise from the four air conditioning vents, or the transmission through them of sounds from within the premises disturbing the occupiers of the application land, is non-existent. The vents are, as Mr Jones said, a long way down the Alfred Street frontage of the restaurant, close to the junction with Mill Street, and the frontage of the application property is also set back behind the main building line. The windows on the front elevation are therefore shielded to a great extend from any noise emanating from down the street. The objector also accepted that if and when he does re-open his premises as a restaurant he would have to comply with the latest health and safety legislation, and that would include the operation of any extraction and ventilation equipment. Further, I agree with Mr Jones' general point that people purchasing town centre flats or houses will be cognisant of the fact that there will be people around late at night, and some disturbance is only to be expected.

40. The other restrictions (e.g. no retail or wholesale selling of liquor) support the reason for the imposition being to protect the brewery's public house business. I agree. The applicants also suggested that the fact that the public house has been long gone, and it is never likely to be replaced, adds further support to the argument that the restriction should now be deemed obsolete. I also agree with that point, and accept the submissions set out in paragraphs 20 and 21 above.

41. However, the brewery's concern may not simply have been to protect its business from the risk of commercial competition, since the comprehensive prohibition on the sale of alcohol would have been sufficient to achieve that. Given the close proximity of the application land to the public house, the restriction to office use is likely to have been further motivated by a desire to protect the public house business from a different sort of risk, namely the risk of complaints from residents. But that risk ceased to be relevant when the pub closed. There is no realistic prospect of the objector's premises being used as a pub again and in my judgment a restriction intended to protect that use is redundant. Nor is there any present evidence that the objector's premises might again be used as a restaurant. So, even if it is appropriate to consider the purpose of the covenant as being to protect the benefitted land, whatever it may be used for, from the risk of objections from residential occupiers, that risk is not currently real. Even if the restaurant were to reopen I am of the view that the levels of noise that might be expected from a small operation like this would be much less likely to lead to complaints than might have been the case under the previous user. I am therefore satisfied that the answers to the two key questions are answered as Mr Francis suggests and that the restriction should be deemed obsolete. The application thus succeeds under ground (a).

42. Turning to ground (aa), conversion of the building back to its former residential use is unquestionably in my view a reasonable user, particularly when taking into account the evidence relating to the changes that have occurred to the town centre over the years, and the planning policies referred to that are designed specifically to encourage extended residential use in such locations. There can also be no question that the restriction impedes that user.

43. As to whether or not the restriction secures to the objector any practical benefit (and if so whether such benefits are of substantial value or advantage) Mr Francis set some store by my decision in *Re Wake*. In that case the pump house was located immediately behind the barn and it was noise from the automatic 24-hour operation of the pumps which may have provoked complaints from an occupier who was not used to it. Those circumstances were particularly relevant to the determination that the restriction did in that instance confer upon the objectors a practical benefit of substantial value or advantage. There was also the intensive farming activity to be taken into account, much of it being concentrated upon the adjacent agricultural buildings and yards and at certain times of the year (harvesting for instance) disturbance would undoubtedly be considerable. Whilst the restriction did not prevent conversion of the barn into residential accommodation as an adjunct to, and as a part of, the principal dwelling, because of their existing occupation and knowledge of the surroundings, complaints from the existing occupier (the applicant) would be unlikely to be made. It was considered that it was perfectly reasonable for the operators of the farm to wish to maintain control of their activities without running the risk of having to deal with complaints or objections from new occupiers. It was also pointed out that I agreed with the submission in that case that the covenant had the effect of imposing a 'cordon sanitaire', helping to preserve the value of the farm as a working unit.

44. In this case, I am satisfied that the increased risk of complaints from residential occupiers over an office user is so minimal as to constitute the smallest of practical benefits. For the reasons I have outlined above, I do not think there would be any disturbance from cooking smells. As to noise nuisance, as Mr Francis pointed out, the problems would have to be more than trifling for any action to succeed. It is true that complaints may be received even where the

level of disturbance being experienced is not so great as to be actionable, this is a town centre location and complaints from over-sensitive neighbours are unlikely. As Mr Jones said, there could equally be complaints from office occupiers from noise caused from a rowdy group in the late afternoon and so whilst Mr Yip is right to say that there might be a greater chance of upsetting residential neighbours, I do think that, the risk is minimal – after all this was a restaurant and not a night club. Indeed, the objector said that never while the restaurant was operational, had complaints about noise been made – and there are plenty of other residential units within close proximity. Surely, if Mr Yip does reopen his restaurant, and does opt to use the side entrance which is closer to the application land than the entrance on the front, Mill Street, elevation, there is nothing to stop him placing a prominent notice on the inside of the entrance/exit door asking customers when leaving to respect the fact that there are residential properties nearby and to leave quietly.

45. Is that minor practical benefit of substantial value or advantage? I think not. It certainly could not be described as "considerable", "solid" or "big" (*Shephard v Turner*). As Erskine Simes QC said in *Re Zopats Application* [1966] 18 P&CR 156 (which was in connection with the preservation of a view):

> "…it is, I am satisfied, a case where the prospect terrifies while the reality will prove harmless."

The same, in my view, is true here and I agree with Mr Jones' professional opinion that the objector's property will not be devalued if the user of the application land becomes, in due course, residential.

46. It follows that the application also succeeds under ground (aa). With no loss or disadvantage accruing to the objector I conclude that no compensation should be payable to him under s.84(1)(i) or (ii). Further, in connection with ground (c) it is clear that the objector will suffer no injury if the restriction is discharged.

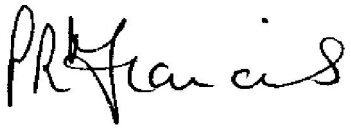
47. Finally, although in the light of my findings it is no longer relevant, I should record that Mr Francis submitted in the alternative that if the Tribunal were to find that none of the argued grounds were satisfied, and formed the view that protection against complaints required a covenant to achieve that end, it has the power under section 84(1C) to impose a new covenant (by modification of the existing wording of paragraph 1(b) of the Transfer). In that regard, a suggested draft modification was produced as part of Mr Francis's skeleton argument. This was not attractive to the objector, and I also expressed concern that in its suggested form it would provide little if any protection and be difficult if not impossible to enforce.

48. It was agreed at the end of the hearing that a revised modification would be submitted to the objector for his consideration within seven days. This was also rejected out of hand.

49. I determine that the application succeeds under both grounds (a) and (aa) and the restriction in the transfer at paragraph 1(b) is duly discharged.

50. This decision is final on all matters other than costs. The parties may now make submissions on costs and a letter giving directions for the exchange of such submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Dated: 13 March 2017



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ADDENDUM ON COSTS

51. The applicants seek an award of the whole of their costs of the application, which they assess in the sum of £15,880.95 including VAT, from the objector. Noting paragraph 12.5(3) of the Tribunal's Practice Directions which states:

> "With regard to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs."

they said that Mr Yip's failure to engage had been unreasonable. Furthermore, citing paragraph 2.2 of the Practice Directions, which provide:

> "In exercising its power to order that any or all of the costs of any proceedings incurred by one party be paid by another party or by their legal or other representative the Tribunal may consider whether a party has unreasonably refused to consider ADR when deciding what costs order to make…"

it was submitted that the objector, in not responding to their "clear and helpful correspondence" (which included suggestions for ADR and mediation) both prior to and during the Tribunal process, had unreasonably refused to consider alternative means of resolution that could have saved significant costs.

52. Provided within the hearing bundle was a chain of correspondence including direct requests for meetings, ADR and mediation to which there had been no response from the objector whatsoever. In July 2014 an offer was made to the objector as an incentive to encourage him to agree to discharge of the restriction. That offer remained open for over a year, but as no response was received, the applicants advised Mr Yip that it would be withdrawn on 13 October 2015 and that a surveyor was to be appointed to advise them on the next steps. Mr Langton's initial report which advised that a successful outcome could be anticipated if the matter went before the Tribunal, and that they would be in a strong position to recover their costs, was openly shared with the objector but still no response was received. There had only been one telephone conversation with Mr Yip, way back in 2006, from which it became clear that he did not wish to discuss the restriction.

53. In 2009, the objector and his wife viewed No.1 Alfred Street through the applicants' appointed agents, Green & Co, who, through their Mr Robin Heath, advised that:

> "At the 11th hour (that is 5pm) Mr & Mrs Yip came into the office asking to view No.1. I duly let them in and I think I understand that one of their banker sons will be putting up the money personally for them, but he is on business in Hong Kong. He [Mr Yip] remains adamant that he will not release the covenant voluntarily or otherwise and will resist an appeal to the LT in any way he can. I said the ball was in his court and to make an acceptable offer…"

Nothing further was heard.

54. By chance, Mrs Waggott met the objector's wife in the street in 2015, and following a "cordial" conversation another viewing of the application land was arranged (as there might have been some interest from one of the objector's relations in buying the property). Once again it was clearly evident that the subject of the restrictive covenant would not be up for discussion. The applicants did advise the objector that any offer they did make on the property (which was not forthcoming) should reflect the value without the burden of the restriction as that would be the position the buyer would be in immediately upon completion of the purchase.

55. As there was clearly no chance of any progress being made, the applicants said they had no alternative but to pursue the matter to the Tribunal. They said that during the process they kept the objectors closely advised, copied them into correspondence with the Tribunal (and copied to them all the relevant Tribunal documentation and guidance notes) and requested the objector's input into agreeing a draft statement of facts and issues. Again there was no response, even though a comprehensive 'tick-box' questionnaire had been prepared to assist in the narrowing of issues. The objector did not provide a witness statement beyond his initial response to the application (until the morning of the hearing), and did not appoint an expert or

any other representative to appear. Indeed, it was not until seven days before the hearing that it became clear that Mr Yip did intend to appear and to sustain his objection, and he also attended the site inspection.

56. It was submitted that the objector's repeated refusal to respond to reasonable requests and suggestions designed to achieve an amicable settlement, including the offer of ADR, was unreasonable behaviour that would warrant an award of costs against him. Examples were given of similar cases where costs were awarded in favour of the successful party. In *Re Cook* [2014] UKUT 0528 (LC) where the applicants had succeeded in obtaining the discharge of a restrictive covenant burdening their land, they were awarded the whole of their costs against objectors who were deemed to have acted unreasonably in a number of respects, particularly in that the objections appeared to be have been motivated by a desire to obtain a substantial payment rather than by any genuine concern as to the impact of a proposed development.

57. In *Ridley v Taylor* [1965] 1 WLR 611 where, as here, it was found that no injury will be suffered by the objector and therefore ground (c) was satisfied, Russell LJ stated that ground (c) was "a long-stop against vexatious objections" and, "designed to cover the case of the, proprietarily speaking, frivolous objection. This objection was, it was submitted, in this category. Finally, in *Re Laav* [2015] UKUT 0448 (LC) Mr A J Trott FRICS concluded that the third objector's conduct was "unreasonable to a high degree and deserving of an award of indemnity costs in favour of the applicant." The applicants counsel, Mr Francis, had advised that indemnity costs would be also appropriate in this case.

58. In his response to the applicants' costs submissions, the objector said that he had consistently held the view that the existence of the restriction on user of the application land has protected him from the risk of complaints. The restriction, he said, was not "centuries old" and, in covenant terms is relatively recent. He said that the offer made by the applicants in the sum of £5,000 was intended to include his own solicitor's costs if the transfer were to proceed, and in his view this was wholly inadequate especially bearing in mind the risks associated with removal of the restriction.

59. In Mr Yip's view, the difference in value to the property with and without the restriction was likely to be very much greater than the sum offered. For these reasons, he said he had no alternative but to maintain his objections. He did not feel that his attitude had been unreasonable and that as the applicants stood to make a considerable financial gain as a result of the Tribunal's decision, it would be unfair for him to have to bear any of the successful parties' costs.

60. The Tribunal's Practice Directions specifically differentiate between the general rule for costs, and that which should apply in determining costs under s.84. The matter has to be considered, as paragraph 12.5(3) states, in the wider context as the Tribunal is being asked to upset a contractual provision the objector holds and thus diminish a property right that he enjoys. In my judgment, the objector was not unreasonable to try to defend what he saw as an important benefit. However, it appears to me, particularly from the gist of the views he

expressed in his response to the applicants' submissions on costs, that he thought the value of that benefit was considerable, and very much more than the sum he was offered, effectively as compensation, for the loss of that benefit. His motives I suspect were more financial than the fear of complaints. My conclusions on what I considered to be the value of that benefit are set out above and clearly differ greatly from those of Mr Yip.

61. Where I do think the objector has been unreasonable is in his failure to engage with the applicants. If he wished to obtain a higher percentage of what he thought the increased value would be to the applicants, he should have communicated that to them. Even if his sole concern was the risk of complaints from residential occupiers, the lack of any sort of response to the applicants' correspondence was discourteous and unhelpful to say the least. It seems to me that Mr & Mrs Waggott have acted entirely correctly in attempting to progress what is an essential exercise if they wish to (eventually) implement their plans to convert the property to residential use. They have been (certainly so far as the evidence and documentation produced is concerned) polite, courteous and helpful in their attempts to get some response and to take matters forward. They have been frustrated by a total lack of cooperation or input from the objector and, as far as the Tribunal is concerned, he has not followed the procedures that the Waggotts were very carefully complying with

62. Nevertheless, even if the objector had cooperated, but for whatever reason no deal could be struck, the matter would still have needed to proceed to a hearing and thus costs would inevitably have been incurred. It would not, therefore in my view, be appropriate to penalise the objector for all the applicants' costs. However, I do think that if there had been any opportunity for compromise, that chance was lost because of the objector's unreasonable behaviour.

63. Doing the best that I can in the circumstances therefore, I determine that the objector shall pay a contribution of £7,500 towards the applicants costs.

DATED 12 April 2017

P R Francis FRICS