

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 00185 (LC)

UTLC Case Number: LC-2022-702

Royal Courts of Justice
Strand, London WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE OR MODIFICATION – covenants restricting extension and business use - proposal to erect a three-storey side extension and to use for business purposes – renewed application with the benefit of planning permission – application granted in part

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

BETWEEN:

(1) RAJARAJAN NARAYANASAMY NAIDU
(2) KAVITHA DAMODHARASWAMI NAIDU

Applicants

-and-

(1) VALERIE MORTON
(2) HANS ANDREASSEN AND ELSBETH ANDREASSEN
(3) EDWARD SWEENEY AND JANET SWEENEY

Objectors

Re: 52 Beechcroft Manor,
Weybridge,
Surrey,
KT13 9NZ

Mrs Diane Martin MRICS FAAV

DETERMINATION ON WRITTEN REPRESENTATIONS

Decision Date: 1 August 2023

The following cases are referred to in this decision:

Johnson & Anor, An Application by [2022] UKUT 294 (LC)

Naidu & Anor v Morton & Ors [2022] UKUT 172 (LC)

Introduction

1. This is a renewed application for the Tribunal to discharge or modify restrictive covenants (“the restrictions”) that burden the title to 52 Beechcroft Manor, Weybridge (“the Property”), preventing any alteration to the external plan or elevation of the building (“the building restriction”) and preventing its use for business purposes (“the business restriction”). A previous and very similar application was heard on 1 June 2022, at which time the applicants had applied for planning permission for a side extension but not received a decision.
2. In my decision on the previous application, *Naidu & Anor v Morton & Ors* [2022] UKUT 172 (LC), with regard to the business restriction I agreed with the objectors that the proposed uses described by the applicants, to work from home or run a business from home as self-employed people, were not impeded by the restriction and so I had no jurisdiction to modify that covenant.
3. Regarding the building restriction I found that jurisdiction was made out under ground (aa) of section 84(1) for me to modify the building restriction, which impedes a reasonable use of the Property and does not secure to the persons entitled to the benefit of it practical benefits of substantial value or advantage. However, I declined to exercise my discretion to modify the restriction before the plans for the side extension had been subject to scrutiny and determination through the planning process. Mrs Morton, the objector whose property 51 Beechcroft Manor (“No. 51”) sits adjacent to and at a higher level than the Property, had a particular concern over risk to the structural support that her property receives from the area of garden where the extension was to be built. Without properly scrutinised and approved plans, including the specification for a new retaining wall, it was inappropriate to make a conditional modification.
4. I concluded in paragraph 54 of that decision:

“If planning permission is obtained, the applicants will have the option of renewing their application to this Tribunal for modification. They will also have the option of engaging directly with the objectors, in particular Mrs Morton, to see whether the concerns underlying the objections have been satisfied by the permission and its conditions.”
5. Planning permission for the side extension was granted on 16 September 2022 and the approved plans included structural drawings of the proposed new retaining wall in the garden beneath No. 51. The applicants wrote to their neighbours on 24 September 2022 to invite discussions over any remaining matters of concern. Mrs Morton and her daughter asked a surveyor friend to look at the site in the light of the approved plans. It was subsequently confirmed that the surveyor gave them oral advice that the works should not affect No. 51 if the plans were adhered to. However, this was not sufficient to satisfy the ongoing concerns of Mrs Morton, or the neighbours at Nos. 53 and 54. A new application was made to the Tribunal on 25 November 2022 and notices of objection were received

from the same three neighbours as in the previous application, all of whom were admitted as objectors.

6. I listed a case management hearing by video for 2 June 2023 and urged the objectors to nominate one of their number, or a representative, to attend on their behalf. They declined to do so and the hearing was attended solely by Ms Francis on behalf of the applicants. I directed that the application would subsequently be dealt with on the papers, which included witness statements from the objectors, after a requested period of time had been allowed for the applicants to file and serve further engineering drawings. In the event no new drawings were provided and I made an unaccompanied site inspection on 19 July 2023.
7. I do not propose to reiterate all the facts and evidence set out in my 2022 decision, but it is helpful to extract brief facts from it before reviewing the legal background and the application.

The factual background

8. The Property is a three storey town house at the upper end of a stepped terrace of three similar but not identical houses within a spacious private development known as Beechcroft Manor. The plan below shows the location of Nos. 52 to 54 within that terrace and of No. 51 at the end of a separate terrace situated at a higher level. The remaining properties in Beechcroft Manor are four blocks of flats, each of three storeys. On 17 March 2022 Elbridge Borough Council granted prior approval under Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 for construction of an additional storey on each block to provide 11 additional dwellings.



9. The ground floor accommodation at the Property comprises a garage converted to a bedroom, an office with access to the garden and a WC. The first floor comprises a kitchen, dining room, and sitting room with balcony overlooking the rear garden. The second floor comprises a master bedroom with en-suite facilities, a bathroom and two further bedrooms, of which one is very small.
10. The proposed extension would provide a further bedroom, a shower room and utility room on the ground floor, allowing the converted garage to become a second study/office. On the first floor the whole of the new area would be a living room with windows to the rear and side. On the second floor the additional space would be used to provide a large new bedroom with en-suite bathroom, and a dressing room and larger en-suite bathroom for the existing master bedroom. The new side elevation would have two full size windows at first floor and an additional window at second floor.
11. Construction of the extension would require part of the garden and its retaining wall to be taken back, at the side and front corner of the house, and a new retaining wall to be built. At the entrance regrading would be required, together with cutting back of the leylandii hedge, to give access for construction and then to provide the proposed second parking space. The construction period is expected to be at least six months.

The legal background

The restrictions

12. Restrictions were first contained in the Third Schedule to a Transfer dated 16 October 1986 (“the 1986 transfer”) between Wolverlight Limited (transferor) and Wolverlight Developments Limited and Seaward Homes Limited (Transferee). That schedule provides as follows:

“Transferee’s Covenants

...

2. Not to increase the external dimensions of any approved building erected on the property.

...

5. Not to use the Property for any business purposes.

...”

13. Similar restrictions are contained in the Third Schedule to a transfer dated 6 January 1989 (“the 1989 transfer”) between Seward Homes Limited and Wolverlight Developments Limited (Vendor) and Jacqueline Anne Hall (Purchaser). They are stated to be “for the benefit and protection of all other premises now or formerly vested in the Vendor and comprised in the Development...”. The schedule provides:

“(a)(i) Not without the previous written consent of the Vendor to alter the external plan or elevation of any building standing upon the Transferred Property nor without the like

permission to erect any building thereon save those erected or in the course of erection at the date hereof

...

(b) Not to use the Transferred Property at any time for any purposes other than that of a single private dwellinghouse and so that no trade business or manufacture whatsoever shall be carried on

...”

Statutory provisions

14. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The application was made under grounds (a) and (aa).
15. Ground (a) of section 84(1) is applicable where a restriction has become obsolete as a result of changes to the neighbourhood since it was imposed.
16. Ground (aa) of section 84(1) is satisfied where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures “no practical benefits of substantial value or advantage” to the person with the benefit of the restriction, or that it is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.
17. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to 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.”
18. The Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it. If the applicant agrees, the Tribunal may also impose some additional restriction on the land at the same time as discharging the original restriction.

The application for discharge of the building restriction under ground (a)

19. The applicants seek to have the building restriction discharged from both the 1986 and 1989 transfers on the grounds that the restriction ought to be deemed obsolete due to a

change in the character of the neighbourhood since it was imposed. They submit that the change in character arises from implementation of the prior approval in March 2022 for an additional storey to be constructed on each block of flats in Beechwood Manor. The approved plans were submitted in evidence, together with the report of the case officer recommending approval.

20. The objectors say that the character of the two terraces of houses has not changed since they were built, and attribute that to the benefit of the restrictions. They make no reference to the prior approval for an additional storey to be added to the blocks of flats within Beechcroft Manor.
21. On my inspection I observed that construction of an additional storey had commenced on the block shown on the plan above as Nos. 28 to 36, with scaffolding erected and protective sheeting around the upper level. Work to the block shown as Nos. 37 to 45 appeared to be at a very preliminary stage, with no scaffolding erected. Although it was not possible to see what the completed development will look like, I have the benefit of the approved elevation drawings submitted by the applicants in their bundle. These drawings, together with my observations on site, lead me to conclude that an additional floor of flats added to existing three storey blocks, in materials to match the original and with no change to the footprint of those blocks, will not give rise to a change in character of the neighbourhood. Moreover, in the case officer's report supporting approval it is stated at paragraph 26:

“...The proposal would increase the height and massing [of the blocks] however, it is not considered that this would be harmful to the character or appearance of the existing buildings or the wider area. ...”

22. The application under ground (a) for discharge of the building restriction fails because there is no change in the character of the neighbourhood arising from implementation of the prior approval, nor any other material circumstances to suggest that the restriction ought to be deemed obsolete.

The application for modification of the building restriction under ground (aa)

23. In my decision of 4 August 2022 I concluded at paragraphs 45 to 47:

“45. Overall, it is my conclusion that the building restriction secures specific practical benefits to Mrs Morton at No. 51 but no discernible practical benefits to the objectors in general. If the practical benefits secured by the restriction are of substantial advantage to any of the objectors, then ground (aa) will not be made out. I must therefore consider whether the benefits secured to Mrs Morton are sufficient to be described as substantial.

46. A substantial advantage in the context of a s.84 application is generally held to be one which is “considerable, solid, big”, as explained by Carnwath LJ in *Shephard v Turner* [2006] 2 P&CR 28, at [19] – [23]. Although I take seriously the benefits secured by the building restriction for Mrs Morton, I am conscious that the controls provided within the planning system are there to ensure that the adverse impact on neighbours of proposed

development is mitigated by a framework of national policy and guidance. The additional protection provided by the restriction is important but, in this case, I do not consider it to be a substantial advantage.

Would money be an adequate compensation for the loss or disadvantage caused by modification?

47. Whether money would be an adequate compensation for the disadvantage which Mrs Morton might suffer from modification I cannot judge in the absence of a planning permission with its associated conditions. If a planning permission is obtained which recognises within its conditions the importance of structural engineering drawings for excavation and reconstruction of the retaining wall, and those conditions are followed rigorously, then in principle modification should cause no permanent loss or disadvantage requiring monetary compensation. There would inevitably be temporary disruption and disturbance during the construction phase but, in an appropriate case, the Tribunal would have no difficulty in assessing a small sum as compensation for any such temporary inconvenience.”

24. In paragraphs 51 to 53 I determined:

“51. I am satisfied that jurisdiction is made out under ground (aa) for me to modify the building restriction, which impedes a reasonable use of the Property and does not secure to the persons entitled to the benefit of it practical benefits of substantial value or advantage. But this is only the first step in my determination.

52. In *Alexander Devine Children's Cancer Trust (Respondent) v Housing Solutions Ltd (Appellant)* [2020] UKSC 45, the Supreme Court confirmed that while an applicant may be able to make out one of the grounds of section 84(1) it is then necessary for the Tribunal to decide whether it should exercise its discretion to modify.

53. A lack of planning permission is not necessarily fatal to an application for modification, as demonstrated by the decision of the Tribunal (Mr P D McCrea FRICS) in *Smith v Goodwin* [2021] UKUT 145 (LC) where a conditional modification was granted. In this case, however, the structural concerns affecting Mrs Morton at No. 51 require specialist engineering input, for which a conditional modification would be inappropriate. I am therefore not prepared to exercise my discretion to modify the building restriction before scrutiny and determination through the planning process have taken place.”

25. The submitted floor and elevation plans upon which I based my determination in paragraph 51 have now received planning permission, together with two additional plans, dated August 2022, which provide a specification for the construction of the new retaining wall in the garden. Mrs Morton has received informal advice that the plans, if followed, should ensure that her property will be unaffected by the works. She has not suggested that this advice cannot be taken at face value.

26. In paragraphs 48 and 49 of my previous decision I explained how I had taken into account the provisions of s.84(1)(B) concerning the development plan, the declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area, together with the period at which and context in which the restriction was created.
27. I am therefore satisfied that I should now exercise discretion to modify the building restriction under ground (aa) to allow the applicants to construct their side extension in accordance with the planning permission.
28. I am now also satisfied that modification should cause Mrs Morton no permanent loss or disadvantage requiring monetary compensation. The restriction does not secure the practical benefit of preventing temporary disturbance during the construction period and Mrs Morton has made no claim in this respect.

The application for modification of the business restriction under ground (aa)

29. In his evidence Mr Naidu explains that he is a Senior Geomechanics Specialist and his wife is a Software Test Analyst, both working for organisations that allow work from home. They wish to vary the business restriction in order to be covered by the policies of their employers and to allow flexibility for future self-employment, operating their own businesses.
30. Modification is sought to limit the business restriction in the 1986 and 1989 transfers to purposes which require planning permission, as shown in bold below:

1986 transfer:

*“5. Not to use the Property for any business purposes **requiring planning permission**”.*

1989 transfer:

*“(b) Not to use the Transferred Property at any time for any purposes other than that of a single private dwellinghouse and so that no trade business or manufacture **requiring planning permission whatsoever** shall be carried on.”*
31. The objectors point out that they have not been made aware of the nature and scope of any planned business activity. They reiterate their statements from the previous application, that they have no objection to the applicants working from home, but fear that a modification of the covenant for unknown business purposes could allow present or future residents of the Property to carry on commercial activities which would cause access and parking issues for neighbours.
32. It is my view that by applying to modify the business restriction at the same time as applying to modify the building restriction, to allow a sizeable extension to be built, the applicants have created in the minds of the objectors the potential for more disruptive non-residential uses than may be intended. None-the-less, without detail of what business use is

proposed, it is not possible to determine whether the proposed modification would have the adverse effects the objectors fear.

33. At the case management hearing, and in the directions that followed, I drew the attention of the parties to my decision in *Johnson & Anor, An Application by* [2022] UKUT 294 (LC), concerning modification of a business restriction for a defined business use which did not require planning permission but was impeded by the restriction. Mr and Mrs Johnson proposed to run a small childminding business, for which planning permission is not required for up to six children. They provided extensive evidence to allay concerns over the potential impact of additional car movements and parking in a residential area. The case provides an example of why a simple modification to allow uses which do not require planning permission could have significant results. It also provides an example of good practice by applicants who undertook to demonstrate how the purpose of the business restriction was not undermined by their proposal.
34. In this case the application is lacking any detail which might allow me to consider whether the statutory grounds are satisfied to modify the business restriction for a limited purpose. The application therefore fails. But the applicants are aware that the objectors make no objection to them continuing to work from home as they have been doing, whether for themselves or for an employer.

Determination

35. I am satisfied that ground (aa) is made out and that I have discretion to modify the building restriction, which impedes a reasonable use of the Property and does not secure to the persons entitled to the benefit of it any practical benefits of value or advantage.
36. The following order shall be made:

The restrictions in the Charges Register for the property known as 52 Beechcroft Manor, Weybridge, Surrey KT13 9NZ (Title SY594297) shall be modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words:

“PROVIDED that the development permitted under the grant of planning permission on 16 September 2022 by Elmbridge Borough Council under reference 2022/1292 and subject to the conditions attached thereto may be implemented in accordance with the terms, details and approved drawings referred to therein. Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions thereto.”

37. An order modifying the restriction shall be made by the Tribunal provided, within three months of the date of this decision, the applicants shall have signified their acceptance of the proposed modification of the restriction in the Charges Register of the Property.

Mrs Diane Martin MRICS FAAV
Member, Upper Tribunal (Lands Chamber)

1 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.