

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification – dwellinghouse – restriction preventing any permanent building or structure to be erected without seller’s consent – application to modify to permit erection of large garden shed – whether restriction obsolete – whether those entitled to benefit of restriction agreed to its modification – whether injury to objectors – application granted – nil compensation payable – Law of Property Act 1925, s84(1)(a), (aa), (b) and (c).

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

by

PHILIP CROWE

and ALISON HEATON

Re: Hafod y Gan Abbey Drive Gronant Flintshire LL19 9TE

Before: N J Rose FRICS

**Sitting at Wrexham County Court, Crown Buildings, 31 Chester Street,
Wrexham, Denbighshire, Wales, LL13 8XN**

on 12 March 2008

Applicants in person

Richard Selwyn Sharpe, instructed by Aaron & Partners LLP, solicitors of Chester for the objectors.

Although not referred to in this decision, the following cases were referred to in argument:

Stevens v Gourley (1859) 7 CBNS

R v Swansea City Council ex parte Elitestone Ltd [1993] 2 PLR 65

Tewkesbury Borough Council v Keeley [2004] All ER (D) 231 (Nov)

Skerritts of Nottingham v Secretary of State for the Environment [2000] 2 PLR 102

Cardiff Rating Authority v Guest [1949] 1 KB 385

DECISION

Introduction

1. This is an application by Mr Philip Crowe and Miss Alison Heaton (the applicants) under section 84(1) of the Law of Property Act 1925, seeking the modification of a

restrictive covenant affecting freehold land containing a dwelling house, garden and parking area known as Hafod y Gan, Abbey Drive, Gronant, Flintshire, LL19 9TE (Hafod) so as to permit the erection of a large shed in the garden.

2. The restriction in question was imposed by a conveyance of Hafod dated 16 December 1997 between Mr John Alan Massey and Mrs Maureen Mary Massey (“the Seller”) and Barclays Bank Plc (“the Buyer”). The Buyer covenanted with the Seller for the benefit of the whole and every part of the land retained by the Seller as set out in the Second Schedule to the conveyance. Paragraph 2 of the Second Schedule read as follows:

“Not to erect or cause or permit to be erected on any part of the Property any building or structure of a permanent nature without first obtaining the consent in writing of the Seller (as well as the consent if appropriate of the local planning authority) any consent to be subject to such conditions (if any) as to value and character as the Seller may reasonably impose.”

3. In 2004 the applicants made an offer to purchase Hafod for £158,000. The offer was accepted. The applicants then approached the Masseys to enquire about the restrictive covenants. They were told that the covenants would be discharged if the applicants made a payment of £20,000. The applicants studied the covenants and decided that they were not unreasonable. They therefore declined the Masseys’ offer and continued with the purchase, which was completed on 28 October 2004. Early in 2006 the applicants erected the shed which is the subject of this application. They considered that it was not of a permanent nature and therefore did not require the Masseys’ consent. On 17 February 2006 Messrs Bone and Payne, the solicitors then acting for the Masseys, wrote to the applicants. They asked the applicants to cease work on the shed (which they described as “a large wooden structure”) and remove it, failing which the Masseys would consider instituting proceedings for an injunction.
4. On 23 February 2006 the applicants replied to the effect that their “sectional wooden shed” was not a permanent building or structure.
5. On 4 May 2006 another firm of solicitors, Messrs Aaron & Partners LLP, issued a claim in the High Court on behalf of the Masseys. The claim was for:

“1. A declaration that the Claimants are entitled to enforce against the Defendants the restrictive covenant contained in a transfer of land dated 16 December 1997 and made between the Claimants and Barclays Bank Plc.

2. A declaration that the wooden structure erected by the Defendants upon part of the retained land comprised in the said transfer was so erected in breach of a covenant contained in the Second Schedule to the Charges Register of the Defendants’ registered title ‘Not to erect or cause or permit to be erected on any part of the property any building or structure of a permanent nature without first obtaining the consent in writing of the Seller ...’

3. A mandatory injunction ordering the Defendants to remove the large wooden structure that they have erected on the said land in breach of the said restrictive covenant.

4. Further or in the alternative damages together with interest pursuant to section 35A of the Supreme Court Act 1981.”

6. The applicants dismantled the shed on 14 August 2006, but they kept the parts in the same location so that they could be inspected if necessary. They placed the timber

panels on the ground, supported on pallets and covered them with the shed's pitched roof, which remained in one piece.

7. The Masseys' claim proceeded to a hearing on 3 April 2007 before HHJ Halbert, sitting as a judge of the Chancery Division of the High Court at Chester District Registry. The judge indicated that in his view the shed could be a permanent structure. At the applicants' request, however, he ordered the claim to be stayed so that an application could be made to the Lands Tribunal under section 84. The claim itself was transferred to Chester County Court.
8. Although the application submitted to the Tribunal stated that it was simply for modification of the restrictions, it contained several references to the shed. Following a request to clarify the extent of the modification they were seeking, the applicants wrote to the Tribunal on 29 October 2007. They stated that they wished to modify the covenant to the following:

“Not to erect or cause or permit to be erected on any part of the property any building or structure of a permanent nature without first obtaining the consent in writing of the seller. The definition of permanence will be established by the current legislation from the local planning authority.

Their guidance in November 2006 was as follows, we assume that it has not significantly changed since then:

You will not require planning permission for a garden shed, swimming pool or any other building/structure with a use incidental to the enjoyment of the house, within your garden provided that:–

1. It does not project in front of any wall of the house which fronts onto a highway (road, footpath, service road, garage court), unless the highway is more than 20 metres away;
2. If any part of the building will be within 5 metres of any part of the house, it should not have a cubic content (ie length x width x height external measurements) greater than 10 cubic metres;
3. The height of the building/structure does not exceed 4 metres with a pitched roof or 3 metres in any other case;
4. The total area of ground covered by the buildings/structures (not including the original dwelling house) within the garden would not exceed 50% of the total garden area (excluding the area of the original dwelling house);
5. The cubic area of the building does not exceed 10 cubic metres if your property is a listed building or within a conservation area;
6. There is not a planning condition attached to the original planning consent of the property stating that no sheds or other structures can be erected without the prior approval of the local planning authority. If you are not certain please check with the planning division;
7. The property is not within an area where an Article 4 direction is in force, such as a conservation area. If you are not certain please check with the planning division.”

9. The applicants added that there was another smaller shed in the garden. It had been in place when they purchased the property, but they would remove it if they were allowed to retain the new shed.
10. In answer to questions from me at the hearing, the applicants confirmed that the November 2006 guidance to which they had referred related to development permitted by virtue of the General Permitted Development Order 1995, Schedule 2, Part 1, Class E. They further confirmed that they were not seeking to take full advantage of the 1995 Order, which would allow them for example to erect a swimming pool. They merely wished to be permitted to reinstate the dismantled timber shed.
11. At the hearing the applicants appeared in person and gave evidence. Mr Richard Selwyn Sharpe of counsel appeared for the objectors, Mr and Mrs Massey, who it is agreed are entitled to the benefit of the restriction as original covenantees. Mr Massey gave evidence on behalf of himself and his wife. Following completion of the hearing I inspected Hafod and Oak Tree House, accompanied by the parties.

Facts

12. In the light of the evidence, the documentation submitted and my inspection I find the following facts. Hafod is a two-storey detached house, erected over 100 years ago. It fronts onto the eastern side of a private cul-de-sac and public footpath which runs in a south-south-westerly direction off Abbey Drive, on the fringe of Gronant, a village some 2 miles east of Prestatyn. The cul-de-sac also provides vehicular access to two other two-storey detached houses, Oak Tree House, immediately to the north of Hafod and Abbey Cottage, immediately to the south.
13. Mr and Mrs Massey purchased the site of both Hafod and Oak Tree House in July 1983. At that time only Hafod was in existence. They commenced building the property now known as Oak Tree House during 1990. They intended to live in Oak Tree House and to retain Hafod as an investment. As a result of financial difficulties, however, they were forced to transfer ownership of Hafod to Barclays Bank Plc in 1997. Barclays then sold Hafod on to a Mr and Mrs Jones, who in turn sold it to the applicants in 2004.
14. The shed which forms the subject of the current application was located in the south-east corner of the garden of Hafod. It stood about 3 feet to the east of Abbey Cottage, about 60 feet south of the boundary with Oak Tree House and 100 feet south of Oak Tree House itself. The cul-de-sac rises away from the junction with Abbey Drive. Abbey Cottage is thus at a higher level than Hafod, which in turn is higher than Oak Tree House.
15. The shed was situated on a concrete base. It was constructed of timber with a felt tiled pitched roof. It was approximately 17 ft 9 ins wide x 12 ft 0 ins deep (20 ft 3 ins x 15 ft 10 ins including the roof overhang) and was approximately 10 ft high from the concrete base to the top of the ridge. It had glazing panels and double doors set in the elevation facing north towards Oak Tree House. It stood roughly on the site of another shed, approximately 10 ft long by 6 ft wide, which had been erected by Mr and Mrs Jones during the period of their ownership. Mr Crowe brought the shed to the site in kit form and then assembled it.

Grounds for the application and conclusions

16. The application is made under paragraphs (a), (aa), (b) and (c) of section 84(1) and I shall deal with each in turn.

17. Under ground (a) the issue is 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. Mr Selwyn Sharpe submitted that no evidence had been adduced by the applicants to show that there had been any change in the character of the property, neighbourhood or other material circumstances since the covenant was imposed in 1997 to justify deeming it obsolete. I accept that submission. The application to modify on ground (a) therefore fails.
18. I turn to ground (b), namely whether the persons entitled to the benefit of the restrictions have agreed, either expressly or by implication, by their acts or omissions, to the restrictions being discharged or modified. The applicants' case on (b) was expressed as follows:

“For many years Mr and Mrs Massey have threatened legal action against the previous owners of Hafod y Gan for erecting a shed and a greenhouse, however these threats were never taken any further. Furthermore, when Mr and Mrs Massey owned Hafod y Gan they actually started to build a stone built garage on the site of the shed however a neighbour objected because they had actually built it on the boundary of their property. This half built structure was left on the land and had to be removed by the subsequent owner. The Land Registry plan clearly outlines this structure which was significantly larger than our sectional wooden shed.”
19. Mr Massey said that, although he had objected to the erection of the previous shed, he had not pursued the matter because the owners were abroad. In the absence of any evidence to contradict that explanation, I accept it. In any event, as Mr Selwyn Sharpe observed, even if the objectors had accepted the first shed, it did not follow that they had also agreed to the subsequent erection of a much larger shed. Furthermore, any work that the objectors may have done to the property before the covenant was imposed cannot amount to an agreement by them to modify the covenant after it had taken effect. The applicants have therefore failed to establish ground (b).
20. The applicants also rely on ground (c), claiming that the proposed modification will not injure the objectors. They say that the new shed was erected a considerable distance from the objectors' property and could not be seen from within the objectors' site boundary. They add that the immediate neighbour whose property – Abbey Cottage – was very close to the area where the shed was erected has raised no objections to it.
21. Mr Massey said that the close proximity of Hafod to Oak Tree House meant that he and his wife would be directly affected by any development of Hafod. After living at Hafod for over 10 years they had developed a great affection for the house, which was a mock Tudor style property of enormous character and over 100 years old. They were anxious that no unsightly structures should be erected within its boundaries and that its unique character should be maintained.
22. In the light of the evidence and my site inspection, I am satisfied that the objectors' amenity objections to the proposed construction of the shed in the south-east corner of the application property are unfounded. My reasons for this conclusion are as follows. In his oral evidence in chief Mr Massey said that he could see the shed quite clearly from the three first floor windows on the southern elevation of his property when they were opened. He added that it would have been possible to see the garden of Hafod from the ground floor windows, had it not been for the 7 ft high conifer hedge and the small shed which had been erected along Hafod's northern boundary. In the course of cross examination Mr Massey suggested that the ground floor view had been deliberately blocked so that he could not see the shed.

23. It is clear from my site inspection that the proposed shed would not be visible from two of the three rooms on the first floor of Oak Tree House. The third room, used as a bedroom, would have a limited view of the shed in the distance, and that only if the velux window –containing obscured glass – were opened. As for the view from the ground floor, I was shown the stump of a large conifer tree in the middle of Hafod's garden, which the applicants removed before erecting the shed, and which had served to block any view of the shed which might otherwise have been possible from the ground floor of Oak Tree House. That view is still blocked to a considerable extent by the Masseys' own garage, 18 ft 6 ins wide by 11 ft 9 ins deep by 12 ft 6 ins high, which lies between Oak Tree House itself and the boundary with Hafod, as well as by Hafod's existing shed referred to in para 9 above. In my judgment, the suggestion that the view of the shed has been deliberately blocked by the applicants in order to counter any objection to its construction is fanciful.
24. Moreover, as Mr Crowe pointed out, Mr Massey did not explain the nature of the amenity that he was seeking to protect by preventing the construction of the shed. In fact, to the extent that there is any view at all of the south east corner of the application site from Oak Tree House, it is a view of an unexceptional garden fence.
25. In the light of the evidence, the site inspection, my inspection of the dismantled elements of the shed, and the photographs of the completed shed which were produced at the hearing, I am satisfied that the proposed shed will not damage the objectors in any way; if anything it might even improve their amenities. The application under ground (c) therefore succeeds.
26. Finally, the applicants rely on ground (aa). The objectors do not accept that the erection of the proposed shed on Hafod is a reasonable user of the land for a private purpose. They say that the applicants have not demonstrated that they will obtain planning consent for the shed or that they do not need it. Unless and until they can so demonstrate it cannot be said that the proposed user is reasonable. I do not accept that submission. The applicants have referred to the provisions of the General Permitted Development Order 1995 and I am satisfied that the proposed shed is permitted by that Order. I find as a fact that the proposed shed would constitute a reasonable user of Hafod, particularly bearing in mind that the applicants are prepared to remove the existing shed as a condition of the proposed modification.
27. The applicants do not suggest that the covenant, in impeding the construction and use of the shed, is contrary to the public interest. The remaining issues under ground (aa), therefore, are whether the restriction secures to the objectors any practical benefit of substantial value or advantage to them and, if it does not, whether money would be an adequate compensation for the loss or disadvantage which they would suffer from the proposed modification. In view of my findings on ground (c), it is clear that the restriction does not secure any practical benefit to the objectors and the question of the adequacy of monetary compensation does not arise. The application succeeds on ground (aa).
28. Since the applicants have succeeded in establishing two of the grounds relied upon, I have power to grant the modification proposed. I do not think there is any reason why I should not exercise that power as a matter of discretion. I therefore modify the restrictions to permit the erection of the proposed shed on the existing concrete base in the south-east corner of Hafod, and the subsequent erection of a replacement shed (or replacement sheds) in the same position. This modification is subject to the following conditions:

1. The dimensions of any replacement sheds erected pursuant to this modification must not be materially greater than those of the shed currently on the site, after it has been re-assembled.
 2. Before the new shed is used, the existing shed on the boundary with Oak Tree House must be demolished and removed from the site.
29. There was no suggestion that the consideration received for Hafod at the time the restrictions were imposed was reduced as a consequence of the restrictions. In view of that, and my finding that the modification will not damage the objectors, I do not order the applicants to pay any compensation.
30. In the light of the conclusion I have reached on the application, it is not necessary for me to consider the question whether the shed is a building or structure of a permanent nature.
31. A letter on costs accompanies this decision, which will take effect when the question of costs is decided.

Dated 15 April 2008

N J Rose FRICS