

RESTRICTIVE COVENANTS – discharge – obsolescence – changes in character of property or neighbourhood – application refused – Law of Property Act 1925, section 84(1), ground (a)

IN THE MATTER of an APPLICATION under SECTION 84 of the LAW OF PROPERTY ACT 1925

BY

JACK IRVINE DAVIDSON SHAW & DORIS JOAN SHAW

Re: The Larches, 309 Crewe Road, Willaston, Nantwich, Cheshire CW5 6NP

Before: P R Francis FRICS

**Sitting at: Crewe County Court, The Law Courts, Civic Centre, Crewe CW1 2DP
on
11 December 2008**

Lee Maye, litigation friend, for the applicants, with permission of the Tribunal
Huw Roberts, instructed by Hill Smith Whittingham LLP, solicitors of Nantwich,
for the objectors

The following case is referred to in this decision.

Re Truman, Hanbury, Buxton & Co Ltd's Application [1956] 1 QB 261

DECISION

Introduction

1. The applicants in this case, Mr Jack Shaw and Mrs Doris Shaw, seek the discharge of restrictive covenants burdening land at their home, The Larches, 309 Crewe Road, Willaston, Nantwich, Cheshire CW5 6NP (the application land) so as to allow for the future construction of an additional residential dwelling or dwellings. The restrictions (which are set out fully below), imposed by the covenants in a transfer dated 17 November 1959, have the effect of limiting any development on the land to the single private dwellinghouse that has since been built, and is now occupied by the applicants as their principal residence, together with a garage and “out offices”. The applicants say that the developments that have taken place in the 49 years since the covenants were imposed, and planning applications made/consents achieved in the vicinity, renders the covenants obsolete and that they should be discharged.
2. The restrictions were imposed for the benefit of the vendor’s adjoining property. The first objector, Mrs Lillian May Heath, owns and occupies The Roses, 307 Crewe Road, Willaston, which occupies the major part of the benefited land. The second objector, Mrs Heath’s son Andrew, owns and occupies 305 Crewe Road, a house recently built within the grounds of 307 on part of the benefited land. The objectors say that the covenants are not obsolete and that the application should be dismissed. Most of the developments that have taken place in recent years, they said, have been on the opposite side of Crewe Road. There has been no material change to the character of the immediate neighbourhood, and no backland development has occurred within the immediate vicinity on the side of the road that the application land and objectors’ properties

occupy. Due to the configuration of the applicant's property any further building would have to be at the rear. This would seriously affect the sense of spaciousness and privacy that the imposition of the restrictions was designed to preserve to Mrs Heath's property.

3. Mr & Mrs Shaw had no professional representation. Their application, the draft statement of facts, supporting documentation and rebuttal statements had all been prepared for them by Mr Lee Maye. Mr Maye did not claim to have any relevant professional qualifications. Mr & Mrs Shaw had assumed that Mr Maye would be allowed to represent them, and in the circumstances I thought it right to allow this. Mr Maye called no evidence, factual or expert. He relied upon the documents that he had produced, cross-examined some of the objectors' witnesses and addressed me. I refer to this absence of professional representation in my conclusions. Mr Huw Roberts of counsel appeared for the objectors, and called them together with Mr Joseph Henry Chadwick, the owner and occupier of 323 Crewe Road Willaston, who had submitted a brief witness statement of fact, and Robert Elliott BSc BA (Hons) MRICS, of Butters John Bee, Chartered Surveyors, Stoke on Trent, who gave expert valuation evidence. I carried out an accompanied inspection of the application land from within its curtilage and from the grounds of number 307, on 10 December 2008.
4. For reasons that I give in my conclusions, I consider this application to discharge the restrictions on the ground that they should be deemed obsolete, must inevitably fail.

The application land and surroundings

5. The Larches lies on the north side of Crewe Road, Willaston, almost opposite the junction with Coppice Road in a predominantly residential area on the eastern outskirts of Nantwich, and about 3 miles west of Crewe. It occupies an L-shaped plot in a ribbon of roadside development and comprises a detached dormer bungalow constructed in about 1960 with driveway to the right-hand side leading to formal gardens and a large garage at the rear, located on the section of garden that extends behind nos. 311-313 Crewe Road. The application land has a total area of approximately 0.38ha (0.94 acres), of which 0.13ha (0.32 acres) lies outside the established settlement boundary of Willaston, as highlighted in the Crewe and Nantwich Adopted Replacement Local Plan (adopted 17 February 2005). This area, which comprises the part of the rear garden/paddock lying behind 315-321 Crewe Road, is classified as Open Countryside and a "Green Gap".
6. Mrs Heath's property, 307 Crewe Road, lies immediately to the west of the application land and enjoys the same building line. It comprises a large, 2-storey detached house that has been extended and modified in recent years and, until the land for 305 Crewe Road was hived off, occupied a plot of about 0.21ha (0.54 acre). The plot upon which number 305 has been built was acquired from Mrs Heath by her son Andrew in about 2004; planning consent was obtained for the construction of one detached dwelling which has since been built, forward, in part, of the established building line, and has a driveway shared with number 307. It is now occupied by Mr Heath and his family.
7. Immediately to the rear of the benefited and burdened properties lies an area of open countryside comprising fields and, accessed off nearby Colleys Lane, behind residential properties having a frontage to it, some playing fields. On the opposite side of Crewe Road, and on Coppice Lane, are a number of frontage properties and small self-contained residential developments (The Spinney and Coppice Close being examples), together with larger developments (Derwent Close, Murrayfield Drive and Victoria Mill Drive) that have been constructed since the restrictions were imposed. Further frontage properties have been developed along Colleys Lane in the last 10 years, along with two large detached houses occupying backland plots on the east side, themselves facing onto the open countryside, playing field and Green Gap land referred to above.

The restrictive covenants

8. The restrictions are contained in Schedule 1 to a conveyance dated 17 November 1959 made between Hilda May Lawton (1) The Crewe Benefit Building Society (2) and Dennis Rowland (3). The covenant states:

“The Purchasers so as to bind the plot of land hereby conveyed into whosoever hands the same may come and so that this covenant shall be for the benefit and protection of the Vendors adjoining property hereby covenants with the Vendor that the Purchaser and the persons deriving title under him will at all times hereafter observe and perform the restrictions and stipulations set forth in the first schedule hereto.

THE FIRST SCHEDULE before referred to

- (a) Not to erect on the land hereby conveyed more than one private dwellinghouse with the usual out offices and garages
- (b) No building to be erected on the said land should be placed nearer to the road than the adjoining dwellinghouse known as number 307 Crewe Road aforesaid belonging to the vendor
- (c) No roadway or drive from Crewe Road aforesaid to any messuage or dwellinghouse to be erected on the land hereby conveyed should be nearer than fifty feet from the Vendor’s adjoining property known as number 307 Crewe Road aforesaid.”

9. By a transfer dated 19 May 2004, the applicants acquired title to the application land.

The statutory provision

10. The ground upon which the application was made is that set out in section 84(1)(a) which provides:

“84 (1) The Lands 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 Lands Tribunal may deem material, the restriction ought to be deemed obsolete”

Applicants’ case

- 11. Mr Maye said it was the applicants’ case that there had been considerable changes to the character of the neighbourhood since the restrictions were imposed. Over 150 properties had been built in the area together with a school, and the construction by Mr Heath of the massive new house at number 305 was particularly overbearing. Due to the fact that it was built partly forward of the established building line, it overshadowed Mrs Heath’s house and by permitting this development, she had by her own actions destroyed the “feeling of space and privacy” that she was now arguing should be protected. Nothing that the applicants intended to do on their own land, in terms of development, could possibly have as much of a detrimental effect. By selling off part of the benefited land, Mrs Heath had set a precedent that made her current objection unsustainable, and rendered the restriction obsolete.
- 12. Mrs Heath had also undertaken extensive building works on her own property, substantially enlarging it by the provision of numerous extensions, and a further precedent had been set, he said, by the fact that the replacement garage for 307 Crewe Road, recently added to the right hand side of her house (adjacent to the application land), had been built on land that was

identified on the Land Registry plan as being burdened by the restrictions. The deeds referred to a plot frontage of 92 feet for 309, but the actual frontage was less than this. If the full 92 feet were taken, then Mrs Heath's new garage was effectively constructed on burdened land, and was certainly within fifty feet of the applicants' own driveway, which thus made restriction (c) unenforceable. Mr Maye said that all these actions meant that, either expressly or by implication, Mrs Heath had consented to the discharge. In respect of the point concerning whether or not Mrs Heath's new garage was constructed on the applicants' burdened land, I explained that the Tribunal's jurisdiction did not extend to the determination of boundary disputes. The parties did acknowledge that the current physical boundary between numbers 309 and 307 had been in place without dispute since the covenant was first imposed.

13. As to number 305, Mr Maye said that whilst it was accepted that Mr Heath may legally still have the benefit, this was, in fact, doubtful as the wording of the covenant stated that the restrictions were "for the benefit and protection of the vendors adjoining property". That meant 307, and now that the plot had been divided, 305 was not 'adjoining'.
14. Mr Maye said that no applications for planning permission had been made by the applicants, as it was not considered worth doing so until the restrictive covenant issue was resolved. However, he produced a number of Ordnance Sheet extracts, dating from 1854 to almost the present day that indicated the extent of development that had taken place in the vicinity over that period. He also produced a coloured plan showing individual and estate developments that had occurred since 1959, when the restrictions were imposed. Whilst it was accepted that a number of the properties that had been approved and subsequently constructed were on infill/road frontage plots, he pointed out some that could clearly be described as backland development and thus supported the applicants' view that development to the rear of the existing bungalow could conceivably be acceptable in planning terms. Firstly, a new bungalow had been constructed on land to the rear of 353 Crewe Road, accessed from a drive to the west side of 351 Crewe Road. There was also a residential dwelling on land to the rear of 361 Crewe Road, and permission had been granted for a residential development to replace 397 Crewe Road, and provide 3 additional units to the rear. All of these developments, Mr Maye said, abutted the Green Gap land and open countryside. He also referred to two properties that had been built on the east side of Colley's Lane (shown on the documentation as 26c and 42/40), behind those on the road frontage, and that overlook the playing field and Green Gap land lying to the rear of the application land.
15. There had also been a large number of planning consents relating to land and infill plots on the opposite side of Crewe Road, including for the development of flats. Mr Maye summarised by saying that the area in which the application land is situated has been developed greatly over the past 40 years, and bears little resemblance to the spacious and rural area that existed in 1959. The covenant, he said, should therefore be discharged. As to Mrs Heath's suggestion that the applicant intended to undertake a comprehensive redevelopment of the application land, Mr Maye pointed out that Mr & Mrs Shaw were currently having their kitchen completely refitted, and they would not be undertaking such a project if it was their intention to demolish the property.

Objectors' case

16. Mrs Heath said that she and her late husband purchased The Roses in February 2000, and that they had been made aware of the existence of the restrictive covenants by their solicitor at the time. Moving from a heavily developed location, she said that they placed a huge priority on privacy, spaciousness and peace and, with the property overlooking open countryside to the rear, they were comforted in the knowledge that the restrictions would serve to prevent any intrusive or unwanted development on the burdened land. Whilst she accepted that alterations and extensions had recently been carried out on her property, Mrs Heath said that the works were more of a re-structure than extensions to the overall size. She understood that it was the applicants' intention to demolish the existing bungalow at 309 to allow access for a comprehensive development of the land at the rear and that there was a possibility further land to

the east (in different ownership) may be incorporated to allow an even larger development. There had been no other backland development in the immediate vicinity, and she was concerned that the level of protection she currently enjoys would be destroyed if the restriction were to be discharged, and such a development was to take place. As to the planning applications and consents referred to by Mr Maye, many of these related to the opposite side of Crewe Road which was a very different proposition as frontage properties there were not backing onto open countryside.

17. As to number 305 Crewe Road, Mrs Heath said that after her husband died in 2002, she found it a struggle to maintain her gardens and grounds and decided, therefore, to transfer a part of the land to her son Andrew so that he could build a house on it for occupation by him and his family. She said that she would not have sold the land to anyone else, and it was a benefit to her to have her family in such close proximity. The house that he had built was a large, detached property that was in keeping with the tone of the neighbourhood, and did not compromise the character of the area. It had been a requirement of the local planning authority that the new house was not constructed behind the existing building line of The Roses, and thus, to enable the proposed house to fit onto its plot, she had had to demolish her sitting room and move it to the rear. It was also a planning condition that no new access should be made onto Crewe Road, hence her driveway now being shared with that serving her son's property. She said that she did not agree with Mr Maye's suggestion that her son's property dominated or overshadowed her own, and her privacy had not been compromised. It was the likelihood of new properties being built to the rear of The Larches that was of concern, and any such works would seriously affect the spaciousness and privacy that the covenants were designed to protect.
18. It should be noted, Mrs Heath said, that Mr & Mrs Shaw only purchased The Larches in 2004, and it was unjust that they were now trying to remove the restrictions of which they would have been made fully aware at that time.
19. Mr Heath said that as his new house was built upon land that formerly benefited from the restrictions, he had assumed that they continued to apply. He reiterated much of what his mother had said in her statement and stated his concerns that any development to the rear of The Larches would damage the character of the neighbourhood (including his own property), and the level of privacy and peacefulness that he currently enjoys would be seriously compromised. He said that Mr Shaw had told him that he might demolish The Larches to provide an access route to a development, and that a friend of his, Richard Dodd (of 351 Crewe Road), had mentioned that the owner of 337 Crewe Road owned land abutting the eastern boundary of the applicants' paddock land at the rear of 311-321 and had tried previously to obtain permission for development of it. As a result of this information, Mr Heath said that he believed that it was the applicants' intention to facilitate a comprehensive development of this backland area.
20. Mr Chadwick is the owner and occupier of 323 Crewe Road. He said that the driveway, which lies to the west of his house, is shared with number 321 and with the owner of number 337, a Mr Greaves. Mr Greaves had applied for planning consent for development at the rear of 337, with vehicular access over the shared driveway, but this had been refused on both application and appeal on grounds that the access was over Green Belt land.
21. Mr Elliott is a chartered surveyor, employed by Butters John Bee of Stoke on Trent, Staffs, and specialises in residential and commercial valuations throughout Staffordshire and South Cheshire. He had been instructed to prepare a report on the impact that discharge of the restrictive covenants would have upon the objectors' properties. Commenting firstly on planning issues, he pointed out that whilst the existing bungalow, driveway, garage and front/rear gardens were within the established settlement boundary of Willaston, the area of garden/paddock that extends behind 315-321 Crewe Road was classified in the Local Plan as Open Countryside and Green Gap.

22. Open Countryside (Policy NE2) confirmed that only development that is essential for purposes of agriculture, forestry, outdoor recreation, essential public service works or statutory undertakings would be permitted. An exception may be made for infilling small gaps with one or two dwellings on an otherwise built up frontage. Green Gaps (Policy NE4) refers specifically to the area of land north of Crewe Road (and onto which the applicants' property backs) and is referred to as the Willaston/Rope Gap. The purpose of this policy, Mr Elliott said, was to prevent existing communities merging into one another, and it stated that exceptions in terms of new build would only be considered where it could be demonstrated that there was no similar location available. It was clear, therefore, that in planning terms, there was no opportunity for the applicant to succeed on the area of his curtilage that fell within the Green Gap. Whilst the Open Countryside policy allowed for appropriate infilling, the relevant area of land was behind other frontage properties, as was the land adjoining it to the east.
23. Mr Elliott said that there may be a possibility, from a purely planning perspective, for limited development upon the part of the applicants' land that fell within the settlement boundary, but due to its current configuration, any such development would either have to be at the rear of the bungalow, or a replacement for it, and not only would a single additional unit to the rear of The Larches be most unlikely to receive approval, but replacement of the current building would not be economically worthwhile.
24. Whilst replacement of Mr & Mrs Shaw's current dwelling with another, constructed on the same building line would be unlikely to impact upon the amenity and value of Mrs Heath's property (and in any event it would not breach the covenants), development to the rear most certainly would. In the unlikely event that planning consent were to be forthcoming for any development at the rear, it was Mr Elliott's view that the value of her house would be diminished by 10 – 15%. Having considered asking prices for new and second hand properties in the immediate area, he was of the opinion that it was worth approximately £500,000 at the date of his valuation (March 2008). He said that in his professional opinion there would be no detrimental effect in terms of value on Mr Heath's property, 305 Crewe Road.
25. Mr Elliott said that he did not think that the fact a property had now been built on land formerly part of 307's plot would render the restrictions obsolete as it was simply an infill plot adjacent to Mrs Heath's house rather than backland development which would have a material impact upon her property. The amenity of her property would be affected by the construction of 305, but only to a marginal degree. The covenants had been imposed to prevent development on 309, and building a property or properties at the rear would have a much more significant impact.
26. Mr Roberts submitted that as the applicants had not revealed their plans (if any) to undertake development at 309 Crewe Road, and had not submitted a planning application, the question of obsolescence needed to be considered in relation to all possible developments that may be proposed in the future. He said that the question of obsolescence turned on the original purpose for which the restrictions were imposed, and although there was no direct evidence, it could reasonably be assumed that covenant (a) was to minimise loss and privacy, and to prevent any adverse impact on the value of the benefited property. As to (b), it was to maintain a uniform building line between 309 and 307, and (c) was to prevent disturbance caused by vehicles entering and leaving 309. The restrictions benefit only 307 Crewe Road (which now includes 305), and burdens only 309, so the effects upon the wider neighbourhood are not relevant.
27. He submitted that there have been no changes in the character of the burdened property, and there have been no fundamental changes to the character of the neighbourhood. There had been some modest infilling of plots along the north side of Crewe Road that had not had any material affect – the pleasant rural outlook to the rear remaining uncompromised within the vicinity of the benefited and burdened properties. The nearest example of backland development was the unit behind 353 Crewe Road which was some distance away. It was acknowledged that development since 1959 on the opposite side of the road had been more substantial, but this did not seem to have altered the character of the land on the north side. There was no question that the original

purpose of the restrictions could still be fulfilled as, even with the loss of part of its garden to facilitate the construction of Mr Heath's property, no.307 still enjoyed privacy and spaciousness. Similarly, the alterations carried out to no.307 have not affected the relevance of the covenants. Whilst it was accepted that the building line (restriction (b)) had been broken by the construction of no.305, it was still of benefit in preserving that line between nos.307 and 309. It was also accepted that the discharge of covenant (c) would be unlikely to have any detrimental effect upon the value of Mrs Heath's property, although the original purpose of it remained relevant. It was assumed that the discharge of covenants (b) and (c) would only be pursued if the applicant was successful in respect of covenant (a).

Conclusions

28. This application for discharge of the three restrictive covenants was made on ground (a) only. It was agreed that there had been no material change to the character of the property (the application land), and therefore the only matters for the Tribunal to determine are whether "by reason of changes to the character of the neighbourhood or other circumstances of the case that the Lands Tribunal may deem material, the restriction ought to be deemed obsolete."
29. The test by which it is to be judged whether a "restriction ought to be deemed obsolete" appears from the Court of Appeal decision in *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261. In issue in that case were estate covenants as to user. At 271-2 Romer LJ, with whom Evershed MR and Birkett LJ agreed, said this:

"It seems to me that the meaning of the term "obsolete" may very well vary according to the subject matter to which it is applied. Many things have some value, even though they are out of date in kind or in form – for example, motor cars or bicycles, or things of that kind – but here we are concerned with its application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them.

It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what is intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in connection with section 84(1)(a)."

Truman's case concerned, as I say, estate covenants, whereas the present application relates to restrictions imposed for the benefit of a particular property. The test of obsolescence is nevertheless the same, and the question that requires to be answered is whether the purpose for which the restrictions were imposed can no longer be served.

30. The purpose of the restrictions is, in my judgment, clear. They were imposed to protect 307 from development that might adversely affect it. They do that by restricting development of the burdened land to a single dwellinghouse with the usual out offices and garages, and limiting its location on the site and the location of any roadway or drive. That this purpose can still be served is obvious when one asks the question, is there development of the burdened land that could adversely affect 307? Clearly, to take examples, a four-storey block of flats or a hotel or some industrial use, could well have an adverse effect. But so also, I think, could intensification of residential development on the burdened land, and despite the fact that the rear of the benefited land is quite well screened by the mature line of conifers along the boundary separating the rear gardens of 307 and 309, protection from the loss of privacy and spaciousness that in my view could reasonably be expected to have formed part of the reason for the imposition of the restrictions would be severely compromised.

31. There is no doubt in my mind that the character of the neighbourhood has not changed sufficiently to bring into question whether the original purpose of the restrictions could still be served, despite Mr Maye's arguments relating to the development that has taken place in the area since 1959. In my judgment, whilst it is clear that, over the past 50 years or so, there have been many examples of additional (or in a number of cases, replacement) properties being built along the north side of Crewe Road and on the eastern side of Colley's Lane, and even more so on the south side of Crewe Road and off Coppice Road, the area remains predominantly, and indeed principally, a good class residential area. The properties in the immediate vicinity of the application land back onto an area of unspoilt and attractive open countryside, and the sporadic infilling of vacant plots along the road frontages (including the construction of Mr Heath's new house) has not, in my opinion, diminished that character in any way. The land to the rear is protected under Policies NE2 and NE4 of the adopted Local Plan, and that is in my view an important and valuable consideration. If there were active proposals for that area to be comprehensively redeveloped for some residential or commercial purpose, then the question would be somewhat different.
32. The application is in the circumstances misconceived. There is no question of deeming the restrictions obsolete (subject to what I say about covenant (c) below). If, in order to realise the development potential that the applicants believe their land to have, they had sought professional advice, they would have been advised either to reach agreement with the owner of 307, or to obtain planning consent for the development (in connection with which the circumstances behind the backland developments referred to by Mr Maye would be relevant, and considered at the application stage), and then to make application under ground (aa) for modification of the restrictions so as to permit that development. I am far from saying that such an application would succeed (since success would depend on the particular development proposed), but it would not, like the present application, be bound to fail.
33. In respect of Mr Elliott's evidence, I am satisfied that the value of Mrs Heath's property would undoubtedly be detrimentally affected by any residential development upon the application land to the rear of the existing dwelling, but because the application fails, the question of determination of compensation does not, in this instance arise. It was accepted that there would be no diminution of value in respect of 305, which, for the sake of completeness, I do consider has the benefit of the restrictions.
34. I add a few words about covenants (b) and (c). It seems to me that, in the light of the above, a decision on whether those parts are obsolete would be academic. Having said that, I do not think that the fact number 305 has been in part built in front of the established building line between 307 and 309 lends weight to the argument that that element may well now be obsolete. I am satisfied, as submitted by Mr Roberts, that the restriction was simply to preserve the building line between the burdened and benefited land, and what has occurred on the other side of Mrs Heath's property is of no relevance. In respect of (c), if indeed a determination on that was to be required, I think that issue is incapable of resolution without further evidence. However, I note that Mr Elliott was of the view that discharge of that part of the covenant would have no detrimental impact on the value of Mrs Heath's property.
35. The application fails, and is refused. This decision will become final when the question of costs is decided, and the accompanying letter sets out the procedure for costs submissions in writing.

DATED 19 January 2009

P R Francis FRICS