

UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – discharge or modification – redundant farm buildings – covenant not to use other than for agricultural use or as a riding school and livery stable – application to discharge or modify to permit erection of detached dwelling house and conversion of existing buildings to provide three dwelling houses – objection by owner of neighbouring agricultural land within Green Belt but with residential development potential on part – application granted – Law of Property Act 1925, s84(1)(aa) and (c)

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

BY

(1) MICHAEL ROBERT TATE

(2) AMANDA JAYNE TATE

**Re: Dunston West Farm
Whickham Highway
Whickham
Newcastle Upon Tyne
NE16 4EP**

Before: N J Rose FRICS

**Sitting at: HM Courts and Tribunals Service, 2nd Floor, Royal Quays,
Kings Court, North Shields, NE29 6AR**

on 1 and 2 May 2013

David Marshall, instructed by George F White LLP, surveyors, of Wolsingham, County Durham for the applicants.

Stuart Grimes, land manager, Persimmon Homes Ltd, for the objector, Neazer Homes Ltd.

The following cases are referred to in this decision:

Stockport MBC v Alwiyah Developments (1986) 52 P & CR 278
Re Davies & Others' Application [2001] 1 EGLR 111

The following cases were also cited:

Re Collins' Application (1974) 30 P & CR 527

Gilbert v Spoor [1983] Ch 27

Margerison v Bates [2008] EWHC 1211 (Ch)

Re Gaffney's Application (1974) 35 P & CR 440

Re Harper's Application (1986) 52 P & CR 104

DECISION

Introduction

1. This is an application by Mr Michael Robert Tate and Mrs Amanda Jayne Tate under section 84(1)(aa) and section 84(1)(c) of the Law of Property Act 1925 for the discharge or modification of a restrictive covenant affecting freehold land known as Dunston West Farm, Whickham Highway, Whickham, Newcastle Upon Tyne, NE16 4EP (the application site) so as to permit the applicants to implement planning permissions which have been granted for residential development.
2. The restriction was imposed by a conveyance dated 17 November 1980 between William Leech Ltd (Transferor) and Florence Hood (Transferee) in the following terms:

“The Transferee hereby covenants with the Transferor so as to benefit the remainder of the land comprised in the title number TY28528 and to bind the land hereby transferred into whosoever hands the same may come but not so as to render the Transferee personally liable in damages for any breach of a restrictive covenant after he shall have parted with all interest in the land hereby transferred as follows.

That the property hereby agreed to be sold will not be used for any purpose other than for agricultural use or as a Riding School and Livery Stable.”
3. Planning permission was granted on 3 March 2010 for the erection of a detached dwelling house on part of the application site, with detached garage and associated access and landscaping. Previously, on 3 November 2008, conservation area consent had been granted for the partial demolition of a vacant storage/workshop building and the rebuilding of the exposed western elevation of the reduced building, which would enable access to be gained to the proposed detached dwelling house. In addition, on 13 May 2011 planning permission and listed building consents were granted for the conversion and change of use of former agricultural buildings on the site to provide three dwelling houses with associated access, landscaping and parking.
4. William Leech Ltd has changed its name on a number of occasions since the imposition of the restriction. It is now Beazer Homes Ltd, a wholly owned subsidiary of Persimmon Holdings Ltd. Although objection to the application was submitted in the name of Persimmon Homes Ltd it is agreed that the objector is in fact Beazer Homes Ltd and that it is entitled to the benefit of the restriction.
5. Mr David Marshall of counsel appeared on behalf of the applicants. He called two expert witnesses, namely Mr Andrew Entwistle MRICS, FAAV and Ms Maria Ferguson MRTPI. Mr Entwistle and Ms Ferguson are respectively partner and head of planning and development at George F White LLP, a multi-disciplinary surveying firm with offices in Wolsingham, County Durham and elsewhere.

6. The objector was represented by Mr Stuart Grimes, land manager with Persimmon Homes Ltd. He called expert evidence from Mr Peter Jordan MRTPI, regional projects and planning director of Persimmon Homes (North East and Teesside).
7. I inspected the application site and the surrounding area, accompanied by representatives of the parties, on the afternoon of the first day of the hearing.

Facts

8. In the light of an agreed statement of facts and the evidence I find the following facts.
9. The objector is now part of the largest housebuilding group in the Newcastle/Gateshead area. In 1966 it purchased a large area of farmland situated between the urban areas of Dunston and Whickham, south west of Gateshead, with a view to possible future development. The land included Dunston West Farm.
10. On 13 December 1974 the objector sold the farmhouse of Dunston West Farm to Florence Hood. The farmhouse was situated at the south west corner of the farm adjoining the built up area of Whickham. This land is now registered under title number TY427874. It is not the land to which the application relates.
11. On 17 November 1980 the objector sold the remainder of Dunston West Farm to Mrs Hood. The land comprised a range of traditional buildings and stables adjacent to the farm house and 35 acres of permanent pasture. The land was later registered under title number TY85606. This sale imposed the restrictive covenant which is the subject of this application.
12. At some point the farm buildings of Dunston West Farm were taken out of title number TY85606 and put into a new title number TY201551. It is that land which is the subject of this application. It amounts to about 0.23 hectares (0.57 acres).
13. The applicants acquired Mrs Hood's land (all three registered titles) on 4 May 2007. They live in the farmhouse.
14. The applicants wrote to the objector on 7 August 2006. They said they were considering buying the farm and asked whether the objector would consider releasing the covenant on the farmhouse and outbuildings and a small proportion of the surrounding land. The objector replied on 21 September 2006 saying that it would be prepared to remove the restrictive covenant on payment of £100,000.
15. Between 2008 and 2011 the applicants were granted a series of consents (planning, conservation area, listed building) which authorised them to convert the outbuildings into three dwellings and build one new house. The area of the objector's land having the benefit of the restrictive covenant amounts to about 35.3 hectares (87.22 acres). The objector owns other land in the area but in this decision the term 'the objector's land' means only the land having the benefit of the restrictive covenant.
16. The shortest distance from the application site to any part of the objector's land is about 95 metres.
17. Part of the objector's land is identified in the Gateshead Strategic Land Review Plan as site 270. Although it is currently in the Green Belt there is a reasonable likelihood that site 270 will be approved for residential development. If so, the remainder of the objector's land will be dedicated as a country park. The objector anticipates being able to make a planning application for residential and country park development in 2015. The local planning authority considers that site 270 has an area of 3.4 hectares and capacity for 123 dwellings. Site 270 is situated approximately

450m to the south-east of the application site. Neither site 270 nor the application site can be seen from the other.

18. Two other sites within the ownership of the objector, but which do not have the benefit of the restriction, have also been identified as potential housing land in the Strategic Land Review Plan, where they are shown as sites 269 and 62.

Issues

19. It is agreed that the proposed use of the application site is reasonable and that the continued existence of the restrictive covenant would prevent the proposed development. The issues to be decided are as follows:
 1. Will the proposed discharge or modification injure the objector? (s84(1)(c))
 2. Does impeding the proposed use secure to the objector any practical benefits? (s84(1A))
 3. If so, are those benefits of substantial value or advantage? (s84(1A))
 4. Is impeding the proposed user contrary to the public interest? (s.84(1A)(b))
 5. Would money be an adequate compensation? (s.84(1A))
 6. What compensation, if any, should be paid?

Case for the objector

20. In his expert report Mr Jordan approached his assessment of the effects of the release of the restrictive covenant on two bases: (a) that it was released prior to any planning approval being granted for sites 269, 270 and 62 and (b) that it was released close to, or after the date of such planning approval.
21. I summarise Mr Jordan's evidence on basis (a) first. The four proposed dwellings were likely to be occupied by ten new residents, that is ten potential objectors to the proposed residential allocation of sites 269, 270 and 62. Their objections might not only be to the visual impact of the proposed new housing, but also to the principle of the change of use from Green Belt to residential. Moreover, any new residents would find themselves confronted with a masterplan proposal to change the use of private agricultural land, located adjacent to their properties and within their view, to a public country park. The development of the application site could therefore result in additional objections, both to the proposed residential use and to such components of a country park as car parking and footpaths.
22. The promotion by the objector's parent company of sites 269, 270 and 62 for residential development had been a careful and sensitive exercise, given the Green Belt allocation and the impact of the proposal on the locality. New residents of houses within Dunston West Farm could object to the project on a variety of grounds. Any objection would represent an additional risk to the overall development by compounding the level of current objections from local residents. The detrimental impact that local residents might have on the objectors' planning promotional process could be significant. To put this into context, during the current promotion of site 270 the occupiers of seven adjacent properties had objected, and this had resulted in a reduction of 20 dwellings in the scale of the overall development within site 270.
23. Furthermore, an increase in the number of residents would lead to a corresponding increase in the demands on local infrastructure and services such as education, health, community facilities and highways. The capacity of local infrastructure and services would be assessed as part of the planning process. Any deficiencies in the existing capacity would have a major influence on the

scale of planning obligations that a developer would have to provide in order to secure planning permission. Although one might think that the impact of an extra ten residents would be minimal, in fact section 106 payments were based upon “trigger point scenarios” whereby, if capacity reached a certain level, even ten residents could tip the balance and result in significant additional payments by the housebuilder towards the cost of infrastructure, rather than a mere pro rata additional payment.

24. On basis (b) Mr Jordan said that any residential development on the application site would be in direct competition with any contemporaneous development on sites 270 and 269. In his closing submissions, however, Mr Grimes withdrew this ground of objection.
25. Mr Jordan said that, where his company had the benefit of a restrictive covenant, it was its practice to seek to extract a proportion of any increase in the value which would be released if the restriction were discharged or modified. Accordingly, if the application were successful the objector would seek compensation of £250,000.

Case for the applicant

26. The applicants’ case is that the requirements of section 84(1)(c) are satisfied, that is the proposed discharge or modification will not injure the objector. They say that the objector’s land is currently in arable use and this would be unaffected by any housing development on the application site. The section of the objector’s land immediately adjacent to the application site is likely to remain in the Green Belt for the duration of the Local Development Framework of the local planning authority, Gateshead Council (2012-2030). There is a chance that the objector’s site 270 will be residentially developed, but the proposed development on the application site would have no detrimental effect on that development because the application site is not visible from site 270.
27. The suggestion that the implementation of the proposed development on the application site would result in the presence of ten additional residents, some of whom might object to any planning application that the objector might make, is without merit, as is the contention that the development would put a strain on the infrastructure that could harm the objector financially. The objector’s proposed development would be relatively remote from the application site. Any objections made by occupiers of the applicants’ development would carry no more weight than objections from other residents in the wider area, of which there have been many. Such objections would be considered by the local planning authority on their merits, not on the basis of a headcount. Furthermore, it is far from clear that the occupiers of the applicants’ proposed development would object. Indeed, they might consider that the objector’s proposal to create a country park near their homes would enhance the amenities and attraction of their properties. The suggestion that ten extra residents might put a strain on the infrastructure which would impact adversely on a development of 120 houses half a kilometre away does not withstand scrutiny.
28. The applicants also rely on ground (aa). They point out that loss of amenity – which is usually the relevant issue when considering whether impeding the proposed user secures practical benefits to the objector – does not arise in this case. Moreover, maintaining the covenant would not assist the objector’s proposed development; if it had, the objector would not have been prepared to release the restriction on payment of compensation. The real reason for imposing and maintaining the restrictive covenant in this case is not that it secures any practical benefits to the objector but that it enables the objector to demand a share of the development value of the application site. That is demonstrated by the objector’s letter of 21 September 2006 in which it demanded £100,000, and by the subsequent notice of objection in which it asked for £250,000. Those figures bear no relationship to any alleged benefit resulting from the continuance of the covenant.
29. If, contrary to the applicant’s main case, the continuance of the covenant does secure a practical benefit, any benefit that the objector might obtain from preventing the applicant’s development is not of substantial value or advantage, being insignificant in relation to the value of the objector’s

landholding. This is illustrated by the fact that, by contrast to the payments of £100,000 and £250,000 which have been demanded to release the restriction, Mr Jordan estimated the objector's loss if the development of site 270 were prevented at approximately £14,000,000, and at substantially more if site 269 could not be developed either.

30. The second ground relied upon under ground (aa) is that the restriction, in impeding the proposed use of the application site, is contrary to the public interest. The formal notice of objection dated 19 June 2012 asserted that any new homes constructed on the application site following discharge or modification of the restriction would be in direct competition to the objector's business. The objection is therefore contrary to the public interest, which clearly requires there to be an open market in housing. Moreover, some of the buildings on the application site are listed. Blocking the development would prevent a viable use for these buildings and therefore endanger them.

Conclusions

31. I start by considering the applicants' case on ground (aa), and in particular whether the restriction secures to the objector any practical benefits of substantial value or advantage.
32. The objector's case has changed since it submitted its notice of objection in June 2012. At that time its sole concern was with the threatened competition to its business from the four proposed dwellings. In his closing submission Mr Grimes said that that ground of objection was not being pursued. Given Mr Jordan's acceptance in cross-examination that the proposed dwellings on the application site were likely to be sold before any development of the objector's sites took place, Mr Grimes's concession was inevitable.
33. In his expert report, Mr Jordan expressed concern that his company's delicate ongoing negotiations with the local planning authority might be adversely affected if one of the proposed houses on the application site were purchased by an individual who objected strongly to the principle of development on Green Belt land. I do not consider that such concern is justified. I accept that a particularly determined and articulate objector might potentially influence the attitude of a local planning authority to the development of a particular site. But in preparing the Local Development Framework Gateshead Council as local planning authority has identified as suitable for housing 21 sites that are at present in the Green Belt, and one of them includes site 270, which is located 450 metres from the application site. In my judgement any person who had a strong objection to residential (or, indeed, country park) development in the Green Belt would make enquiries as to the local planning authority's attitude to such development in the vicinity of the application site before he agreed to buy a house on that site. Having made such enquiries he would turn his attentions elsewhere, and focus his search on houses on other sites in or within the vicinity of the Green Belt which were likely to remain undisturbed by residential development.
34. Nor do I consider that there is any merit in Mr Jordan's concern that four additional houses would lead to an increase in the section 106 obligations which the objector would be required to accept in order to secure residential planning permission on its land. I accept Ms Ferguson's evidence that the increase in population resulting from the proposed development on the application site would be negligible in applying thresholds for developer contributions in respect of the objector's property. There will no doubt be a point where the additional use of local infrastructure by new residents will increase the risk of additional section 106 payments being required. As an example Mr Jordan referred in his report to a development of 1,000 units in the north east of England which had resulted in a payment by the developer of £5.7m towards the provision of a secondary school, and to a reduced scheme of 650 dwellings which had attracted a section 106 educational contribution of only £350,000. That example showed what happened when the density of residential development was increased by over 50%. In the present case, by contrast, the four dwellings on the application site would represent only 3% of the number of units proposed for site 270 and an even smaller proportion if the total capacity of Persimmon's other sites in the area were included. I would add that the credibility of Mr Jordan's concern

about an increased educational contribution was not enhanced by the fact that he did not even know whether the application site and site 270 were in the same school catchment area.

35. In the course of cross-examination Mr Jordan accepted that, so far as his company was concerned, a restrictive covenant was a commercial mechanism to “capture value” from someone else’s development of the application site. In my judgement, the only practical benefit of the restrictive covenant to the objector is that it enables it to demand a monetary payment for allowing a profitable development of the application site to go ahead. That is not a benefit contemplated by subsection 1(aa) (see *Stockport BC v Alwiyah Developments* (1986) 52 P & CR 278, per Eveleigh LJ at 281).
36. In the absence of any other practical benefit to the objector resulting from the restriction I find that the appellants have established ground (aa) and I therefore have power to discharge or modify the restriction. In those circumstances it is not necessary for me to reach a conclusion on sub section 84(1A)(b) – the public interest point – or on ground (c) – the injury point.
37. I have a discretion as to whether to exercise my power to discharge or modify the restriction. The circumstances which give me that discretion create a positive case in favour of exercising it in the applicants’ favour. The objector has not suggested that there is any sufficient reason not to do so in this case and I conclude that the restriction should be discharged.
38. I turn to the consideration which it may be just to award as compensation to the objector. In view of my conclusion that the restriction is of no practical benefit to the objector, the question of compensation under subsection (i) does not arise. As to subsection (ii) Mr Jordan said that, although he could not provide firm evidence to demonstrate the effect which the restriction had had in reducing the consideration paid for the application site when it was sold in 1980 – a copy of the original conveyance could not be located – the imposition of any restrictive covenant could have a significant effect on the selling price. In the absence of any information as to the price paid for the application site in 1980 Mr Entwistle was not able to say whether a reduction in price to reflect the restriction was in fact agreed at the time. He expressed the view, however, that if such a negotiation had taken place it was likely that the difference in price paid would have been in the region of £1,000 which, adjusted at my request to reflect changes in the retail prices index in the intervening period (see *Re Davies & Others’ Application* [2001] 1 EGLR 111 at 115) was equal to approximately £3,000 in today’s money. In the absence of any more cogent evidence I accept the latter figure as representing the effect which the consideration had, at the time when it was imposed, in reducing the consideration then received for the application site.
39. A formal order discharging the restriction will be made by the Tribunal provided it receives satisfactory evidence within six weeks of the date of this decision that a payment of £3,000 has been made by the applicants to the objector.
40. A letter on costs accompanies this decision, which will take effect when the question of costs is decided.

Dated 25 June 2013

N J Rose FRICS

Addendum

41. I have received written submissions on costs.
42. The applicants accept that where an application under section 84 succeeds each party will normally pay its own costs. They submit, however, that in this case their costs should be paid by the objector because the objector has behaved unreasonably.
43. The grounds for this submission are as follows. Firstly, the objector effectively forced the applicants to make the application by refusing all attempts to reach an agreed settlement on terms that would have been more favourable to the objector than the outcome of the application.
44. Secondly, after the application was issued the objector continued its refusal to negotiate and rejected a formal Calderbank offer, dated 7 March 2013, of £10,000 compensation plus legal costs in return for modification (not discharge) of the covenant. That offer was more favourable to the objector than the eventual outcome.
45. Thirdly, the ground of objection relied on by the objector in the notice of objection was unsustainable and was abandoned at the hearing.
46. Fourthly, the objector introduced new grounds of objection by serving an expert's report out of time. The new grounds also failed.
47. Fifthly, the Tribunal found that the objector's purpose in objecting was to obtain a financial benefit to which it was not entitled.
48. Sixthly, the objector's figures for compensation were grossly exaggerated and not based on any objective evidence.
49. The applicants seek an order for their entire costs, or alternatively their costs from the date when the offer dated 7 March 2013 should have been accepted.
50. The objector submits that the application for costs should be dismissed. It denies that its non acceptance of the applicants' offers constituted unreasonable behaviour. It says that it carefully considered each offer that it received. However, its view as to what was a fair compensation figure (firstly £100,000 and subsequently £250,000) was based upon an aspect of law which could only reasonably be decided by the Upper Tribunal. It related to the question of what constituted a practical benefit.
51. The objector says that its suggested compensation figure was based upon an argument which was backed up by case law, namely that practical benefits could be construed as including financial considerations such as "capturing value". This argument was formed after legal advice had been obtained but was not accepted by the applicants. The applicants and the objector had significant differences of opinion on these issues and the applicants therefore had to apply to the Upper Tribunal to determine the dispute. The case was complex and required the considered judgement of the Upper Tribunal in order to clarify the matter.
52. The objector adds that, during negotiations prior to the application to the Upper Tribunal, it verbally explained the grounds on which it believed that it was entitled to the benefit of the covenant. Furthermore, following the application the objector was available for comment throughout the process and followed all procedures in accordance with the Tribunal's directions.
53. The objector's conduct was professional throughout. It was always available to discuss the matter over the telephone, which it did on many occasions with the applicants' agent. Furthermore, it did not object to the applicants' interlocutory application on 20 September 2012 for permission to serve further documentary evidence which the applicants suggested would have a significant

bearing on the case. Neither did the objector object to the applicants' request for an extension of time to submit its application for costs. The objector cooperated with the applicants in order to ensure a fair hearing.

54. My conclusions on the issue of costs are as follows. Unsuccessful objectors to applications under section 84 will not be ordered to pay any of the applicant's costs unless they have acted unreasonably. This is because the applicant is seeking to remove or diminish particular property rights that the objector has (para 12.5(3), Lands Chamber Practice Directions, 29 November 2010). With that in mind I do not consider that the following aspects of the objector's conduct can properly be characterised as unreasonable: its rejection of offers which were more generous than the compensation subsequently awarded by the Tribunal; its abandonment of the original ground of objection; its late service, with permission, of an expert report containing new grounds of objection.
55. Different considerations arise, however, in respect of the objector's contention that the ability to capture value from a proposed development was a practical benefit and in respect of the amount of compensation claimed in the event that the application succeeded.
56. The Tribunal is bound to follow previous judgements of the Court of Appeal. That the ability to demand a monetary payment was not a practical benefit had been made clear by the Court of Appeal in *Stockport* as long ago as 1986. There was no need to seek the Tribunal's view on a question of law which had already been clearly answered.
57. As for the level of compensation claimed, although the objector did not put forward any calculations to justify its figure of £250,000, it was clear from Mr Grimes's closing submission – in which he sought support for that sum from Mr Entwistle's valuation – that the objector was seeking most, if not all of the increase in value which would result from discharge or modification of the restrictions. In my judgement it should have been clear to the objector – a member of a large property development group which had obtained legal advice on the matter – that there was no reasonable prospect of compensation being awarded by the Tribunal on that basis, or anything like it.
58. The reason for that conclusion is this. Giving the judgement of the Court of Appeal in *Winter v Traditional and Contemporary Contracts Ltd* [2008] 1 EGLR 80 at 84, Carnwath LJ referred to *SJC Construction Co Ltd's Application* [1976] RVR 219, in which Lord Denning MR held that the Lands Tribunal had not erred in law in awarding compensation under section 84(1)(i) based on 50% of the released development value. Carnwath LJ said (para 37):

“*SJC* is undoubtedly a difficult decision because the Court of Appeal seems, with respect, to have re-interpreted the tribunal's award to fit its own different view of the law. However, it was clarified and set in context by *Stockport*. That should have dispelled any idea that objectors in cases of this kind have any expectation of a windfall “*Stokes* percentage” of the released development value, or anything like it. [*Stokes v Cambridge Corporation* (1961) 13 P&CR 77 provided support for an award of 50% of the additional realisable development value of other land when assessing compensation for the compulsory acquisition of land which is required to unlock that development value]. Even if the reasoning of *Stockport* was not sufficiently clear, the figures spoke for themselves. The award of £2,250 was upheld, in the face of an apparently credible *Stokes* claim of £75,000. Against that background, we find it surprising that, almost a quarter of a century later, this basis of claim is still being advanced by valuers and advocates ... This creates unrealistic hopes in objectors, thus delaying settlement and aggravating the loss and anxiety that the section seeks to compensate”.
59. In this case the objector's claim for compensation was not 50% of released development value, which was described in *Winter* as unrealistic, but 100% or thereabouts. That such a claim was put forward in the face of clear authority of the Court of Appeal to the contrary amounted in my

judgement to unreasonable conduct, which is not mitigated by any of the matters prayed in aid in the objector's submissions.

60. The objector must pay the applicants' costs incurred after 21 March 2013, being in my view the last date when the Calderbank offer should have been accepted. In default of agreement such costs are to be assessed by the registrar of the Lands Chamber on the standard basis.

Dated 31 July 2013

N J Rose FRICS