

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 0276 (LC)
Case No: LP/21/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – DISCHARGE – restriction preventing more than one house on plot, with plans to be approved – proposal to build a second house – no objections to the application – application for discharge refused – modification of restriction permitted – Section 84(1) (a) (aa) (c) Law of Property Act 1925

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

BY:

**(1) ANDREW JOHN PETHICK
(2) VERONICA ELIZABETH PETHICK** **Applicants**

**Re: 15 Gipsy Lane,
Liskeard,
Cornwall,
PL14 4HQ**

P D McCrea FRICS

Decision on written representations

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DECISION

Introduction

1. This short decision concerns an application under Section 84 of the Law of Property Act 1925 by Andrew and Veronica Pethick ('the applicants') in respect of the rear garden of 15 Gipsy Lane, Liskeard, Cornwall, PL14 4HQ ('the application land'). The applicants wish to build a new house on the application land but are prevented from doing so by a restriction in a transfer dated 10 February 1954, which limits development to the house already built at number 15. The applicants apply to the Tribunal to discharge the restriction, relying on grounds (a), (aa), and (c) of section 84(1) of the Law of Property Act 1925.

2. The beneficiaries of the restriction, admitted by the applicants to be potential objectors to the application, are the owners of 11, 17 and 21 Gipsy Lane; and two properties on New Road - 'The Orchard' and 'The Chapters' (formerly known as and described in the application as 'Tremelyn').

3. Despite correspondence between the applicant and the various potential objectors, only one objection was submitted to the Tribunal, by Mr and Mrs Bowker of 17 Gipsy Lane, but this was subsequently withdrawn upon them selling their house. All other potential objectors either confirmed their agreement to the application or did not engage with the Tribunal.

4. I am satisfied that, despite being alerted to the application by the applicants' solicitors, and on a number of occasions by the Tribunal, no current potential objectors have submitted an objection to the application. The application therefore proceeds unopposed and has been considered under the Tribunal's written representations procedure. In such cases, on being satisfied that a ground of application is made out, the Tribunal will usually issue a formal decision without providing reasons (as it is permitted to do where the only parties have consented to it doing so, see rule 51(3)(b), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010). In this case, however, I am giving a short decision because the application was originally opposed and because the Tribunal does not assume that, in the absence of participation, all those entitled to object are necessarily content to lose any benefits which the covenant confers on them.

Facts

5. From the evidence and my site inspection which took place on 12 September 2019, I find the following facts.

6. In around 1950 Mr Sidney John Matthews bought a field, known as "Aboveway" or "Boveway" at Gipsy Lane, about half a mile south west of the town centre of Liskeard, Cornwall. The field was broadly rectangular in shape, bounded by Gipsy Lane to the north and west, and by New Road to the south. It is not clear whether the land to the east of the field was developed at that point, but nothing turns on that.

7. Mr Matthews built a substantial and attractive house in the western half of the field, which became known as ‘Wychecroft’, 21 Gipsy Lane. Between 1954 and 1962, the eastern half of the field was sold off in three parallel plots, each running north to south, with Gipsy Lane along the northern boundary and New Road along the southern boundaries. Houses were built in the northern half of each plot, becoming, from east to west, 11, 15 and 17 Gipsy Lane, each with a garden to the south.

8. In 1954, the middle of the three plots, 15 Gipsy Lane, was sold to a Mr Leonard Harris, the manager of a grocers in the town. The transfer dated 10 February 1954 made between Mr Matthews and Mr Harris imposed various restrictions on the title. The restriction that is the subject of this application is contained in paragraph 1 of the First Schedule to the transfer, in which the purchaser, for himself and any successors in title, covenanted that:

‘no building other than a dwellinghouse with the usual outbuildings thereto shall be erected on the said land and such dwellinghouse shall be in a position and design and elevation to be approved by the Vendor before the building is commenced.’

9. The applicants purchased 15 Gipsy Lane on 2 March 1972. Much later, on 26 July 2012, they obtained conditional planning permission from Cornwall Council (ref PA12/03607) for the construction of a four bedroomed detached house with a new vehicular access from New Road. It is not clear whether this permission has now expired, but in any event the applicants are prevented from implementing the permission because of the “one house” stipulation in the restriction.

10. Despite the restriction, which the applicants say applied equally to numbers 11 and 17, houses have been built in the gardens of both of those properties, either side of the application land. In the garden of number 11, there is a quite tall three storey house called ‘The Orchard’, and in the garden of number 17, there is a two storey house which in the application was referred to as ‘Tremelyn’, but by the time of my site inspection was called ‘The Chapters’. Both are accessed from New Road, and between them the boundary of the application land to New Road is formed by a stone wall, with considerable overgrown vegetation above.

11. The topography of the land is relevant to this application. The original field slopes down significantly from Gipsy Lane to New Road, to the extent that the ridge line of ‘The Chapters’ is approximately level with the ground floorplate of the houses on Gipsy Lane, or at any rate not far above them. If developed in line with the planning consent, the ridge of the roof of the proposed building would be slightly higher, but still much lower than 15. Whilst not submitted with the application, I have read the Design and Access Statement written in support of the successful planning application which, in my view accurately, says that ‘the proposed dwelling has been inset within the contours of the existing gardens to reduce its dominance when viewed elevationally, this also maintains uninterrupted views from no.15 towards to opposite fields.’

The application

12. The application was made on the basis of a statement of case, with some supporting documents, but did not contain any witness statements or expert reports. It is said to be made under grounds (a), (aa) and (c) of section 81(1) of the Law of Property Act 1925, but the substance of the statement of case revolved around ground (a) in that the restriction is obsolete, and ground (c) in that its discharge would not cause injury to the beneficiaries of the restriction. The thrust of the application was as follows:

- a. The restriction applied equally to the gardens of 11 and 17 Gipsy Lane. Yet a house has been built on each of those plots.
- b. As regards 11, the applicants understood that an informal letter of agreement was given to the owners of 11 by Mr Matthews.
- c. As regards 17, the applicants believed that a specific payment was made to Mr Matthews of £3,000 plus expenses to discharge the covenant.
- d. In any event, there are now five properties on land where the restriction would only have allowed three; the character of the neighbourhood has changed. For these reasons the original restriction is therefore obsolete
- e. No prejudice would be caused to the adjoining owners by the proposed development. By allowing the erection of The Chapters and The Orchard, Mr Matthews has invalidated any claim to compensation.

13. Solicitors for the applicants wrote to the beneficiaries of the restriction seeking their agreement to the proposed development. In his response of 26 September 2014, Mr Roger Matthews (presumably a descendant of the original covenantee) said that the request was not unexpected, and that he had “no real objection” to lifting the covenant, subject to clarifying a number of points. Mr Matthews asked whether the applicants’ solicitor was aware that a fee of £3,000 was paid by the applicants’ neighbours for ‘receiving a similar privilege’ and asked whether the applicants would pay any associated fees or charges. But Mr Matthews wished the applicants good luck, and expressed his admiration of their ambition.

14. Despite this correspondence, as I note above, no objection to the application was filed with the Tribunal by Mr Matthews.

Statutory Provisions

15. As far as relevant to the application, Section 84 of the Law of Property Act 1925 provides as follows:

“(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or

(aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

...

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the [Upper Tribunal] is satisfied that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the [Upper Tribunal] shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition.”

Discussion and conclusion

16. In my judgment the determination of this application is relatively simple. The differing ground levels between Gipsy Lane and New Road frontage to the application land was striking, to the extent that I am satisfied that the construction of a house on the application land as proposed would have little effect on any of the covenant holders. 11, 15 and 17 are on significantly higher ground and some distance away.

17. Turning to the grounds of application, I am not persuaded that ground (aa) has been made out. The statement of case does not refer to it in any detail, and there is no evidence regarding whether, for example, the covenant secures to the beneficiaries a practical benefit of substantial value or advantage.

18. The application under ground (a) has some substance; the pattern of planning consents and development either side of the application land demonstrates that the character of the immediate neighbourhood has changed, and to the extent that the purpose of the covenants was to maintain the status quo it can no longer be fully achieved. Additionally, under ground (c) in the absence of any evidence from objectors, coupled with my site inspection, I am satisfied that the proposed development would not cause any injury to those around the application land.

19. However, I am mindful that the application is to discharge the covenant and I am not wholly convinced that it should be, despite the lack of objections. I do not think that a higher building, more akin to the three-storey 'the Orchard', could be considered to be as acceptable. The restriction continues to perform a valuable function in preventing intrusive development which might well cause injury to the beneficiaries.

20. In the absence of any objections to the application to discharge, a limited modification of the covenant could hardly be considered unacceptable to the occupiers of the neighbouring properties. Accordingly, in my judgment the appropriate order in this case is to modify the restriction to allow the construction of a house as proposed under the planning permission. I acknowledge that the planning permission may have expired, but a further application along the same lines could be made.

Determination

21. I determine that the restriction set out in paragraph 8 above shall be modified as follows pursuant to grounds 84(1)(a) and (c) of the Law of Property Act 1925.

22. The First Schedule to the transfer dated 10 February 1954 between Sidney John Matthews and Leonard Harris shall take effect as follows:

“notwithstanding Clause 1, a second dwellinghouse shall be permitted to be constructed in accordance with the planning permission granted by Cornwall Council on 26 July 2012 under reference PA12/03607. Reference to that planning permission shall include (1) any subsequent planning permission that is a renewal of that planning permission or which permits the construction of a dwellinghouse not materially taller than is permitted by that permission and (2) any other matters approved in satisfaction of the conditions attached to that or a subsequent permission.”

23. An order modifying the restriction in the First Schedule to the transfer dated 10 February 1954 referred to above shall be made by the Tribunal provided that, within three months of the date of this decision, the applicant shall have confirmed their acceptance of the proposed modification.

24. This decision is final on all matters. I make no order for costs.

Dated 20 September 2019



P D McCrea FRICS