Discharging or Modifying Restrictive Covenants

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With property prices continuing to hold, many people with larger gardens are looking to develop and build on their plots. However, properties often come with restrictive covenants preventing such development. Anya Newman takes a look at the recent trends in the Upper Tribunal for modifying or discharging the covenants altogether.

Introduction

1. We are all used to seeing restrictive covenants preventing the owners of larger plots from building further properties on their land. Sometimes, the covenants are in place for a good and continuing reason however, this is not always the case. In certain circumstances, obsolete covenants or covenants which impede reasonable use to no substantial benefit or which run contrary to the public interest, can be altered by application to the Land Tribunal. Let's look at three recent cases from the Upper Tribunal to understand the factors being taken into consideration in this growing area.

Recent cases from the Upper Tribunal

2. In ***Adams and Adams v Sherwood and others*** **[2018] UKUT 411 (LC)** the owners of a property applied to discharge two different restrictive covenants which would have prevented them from building three detached houses on their land. Two houses were to be built on land which was subject to a 1928 covenant preventing more than three houses being built on the land. The other proposed house was to be built on land which was subject to a covenant preventing the building of anything save for buildings "in connection with [a specified adjoining property]" unless the southern boundary of the said piece of land had a frontage to the public road.

3. The house to be built on the land subject to the 1929 covenant ("house 3") was right next to the objectors' properties. The two houses to be built on land subject to the 1928 covenant ("houses 1 and 2") were to be built behind house 3, with the effect that, if house 3 was built, the building of houses 1 and 2 would have little added impact on the objectors' properties.

4. The Applicants contended that the covenants were either obsolete under s84(1)(a) of the Law of Property Act 1925 or, pursuant to section 84(1aa) were of no substantial, practical benefit to the persons benefiting from the covenant. The relevant sections of the Act (with emphasis added) are as follows:

5. 84 Power to discharge or modify restrictive covenants affecting land.

(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

(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.

6. In considering Obsolescence the Tribunal held that it was necessary to identify the purpose of the covenant, to ask whether the character of the property or the neighbourhood had changed since the covenant was imposed and to ask whether the restriction had become obsolete by reason of those changes. The 1928 covenant was not obsolete as its purpose had been to main low-density housing and it had continued to do so. The 1929 covenant was obsolete however, its purpose had been to impose a pattern of access to the land which was

no longer possible, no longer observed and could not be achieved. Accordingly, the 1929 covenant was discharged and house 3 could be built.

7. The Tribunal went on to consider whether the 1928 covenant could be modified under s84(1aa). The problem for the objectors was that once house 3 was built, the additional development of houses 1 and 2 would have very little added detriment to their plots. The evidence was that the reduction in value of the objectors' properties of building houses 1 and 2 (providing house 3 was in situ) was only £7,500. The Tribunal therefore held that the remaining 1928 covenant did not secure the objectors any practical benefit of substantial value. The 1928 covenant was therefore discharged pursuant to s84(1aa) and the Applicants were ordered to pay £7,500 to each of the objectors.

8. In the case of ***O'Bryne and O'Byrne*** **[2018] UKUT 395 (LC)** the Applicants had bought a farm house from the objector college in 2001 for the price of £600,000. The farm had two barns. The Applicants had got planning permission to develop the barns into a further residential dwelling however, the land was subject to a restrictive covenant stipulating that it could only be used for a single private dwelling. The land also benefited from a right of way over the college's private road.

9. The application was made pursuant to section 84(1aa). The college argued that the covenant could not be said to impede the reasonable use of the land as there was a second restriction: the private road over which only the owners of the farm house held a right of way. It therefore submitted that there was no jurisdiction under s84(1aa) to modify the covenant. It also argued that the covenant was of substantial value to it and that relaxation of the covenant would set a precedent for other development on the land that it had sold off.

10. The Tribunal rejected the challenge to its powers concerning the right of way. It preferred a purposeful construction that if it modified the restrictive covenant, the right of way would be modified alongside it. It was further held that although there were practical benefits from the covenant to the college, these were not of substantial value: the use of the land would be limited to 2 dwellings and would not conflict between the residential and agricultural uses of the area. As to the 'setting a precedent' argument, each application would be considered on its merits and would have to be granted planning permission. This was not enough to defeat the application. In the circumstances, the application was granted however, the Applicants

were ordered to pay £60,000 to the college, representing a notional 10% increase in the sale value of the farm house without the restrictive covenant.

11. In ***Hancock and Hancock v Scott and others*** **[2019] UKUT 16 (LC)** the Applicants applied, pursuant to sections 84(1a), (1aa) and (1c) to modify a covenant preventing them from building two further dwellings in their garden. The objector had developed the land referred to as the 'enclave' and had built two retirement complexed upon it.

12. Section 1(c) provides that the Tribunal may modify or discharge the covenant if it is satisfied:

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

13. The Tribunal held that a clearer case of a situation supporting an obsolescence argument could not be recalled: When the covenant was put in place, the only building on the land had been a school but now there were 48 houses built on the area. The development of the enclave (by the objector) had rendered the covenant obsolete insofar as its purpose was to provide "calm tranquillity". The Tribunal noted that the true motivation of the objector appeared to be obtaining the land in question for a lower price.

14. What is interesting about Hancock is that the Tribunal went on to consider the other grounds as opposed to simply stopping once it had allowed the application under the first (and arguably most obvious) ground. The Tribunal also upheld grounds 84(1aa) and 84(1c). It commented that the proposed development would have virtually no effect on the neighbouring property and an estimated 10% increase in traffic was not significant. The 'snowball' objection was over-stated: the objector had not been concerned when it had permitted the other developments to proceed and any future applications would probably be rejected in the planning process. No compensation was ordered to be paid to the objector.

Analysis

15. It seems that what we are seeing from the Tribunal is a real willingness to discharge or modify restrictive covenants in using s84 of the Law of Property Act to its full effect: The forensic way in which the Adams case was dealt with by the Tribunal and in particular the order in which it

deal with the issues, demonstrates a readiness to pick apart the objections in order to engage section 84; The O'Bryne matter suggests a certain pragmatism from the Tribunal and; the Hancock application shows the tribunal using the context of the objections to great effect.

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Law is correct as at 4th April 2019