

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2018] UKUT 114 (LC)
Case No: LP/6/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – additional house – whether covenants secure practical benefits of substantial value or advantage – loss of open aspect – loss of light – overbearing development – diminished outlook – disturbance – reduction in open market value of objectors’ houses – s84(1)(aa) Law of property Act 1925 – application refused

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

BY

(1) ROBERT CHARLES FOGG

(2) BARBARA FOGG Applicants

**Re: The Cobbles,
Horse and Gate Street,
Fen Drayton,
Cambridge,
Cambs.
CB24 4SH**

Before: A J Trott FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

on

19 March 2018

The applicants in person
Philip Brown, instructed by Tees Solicitors, for the objectors

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The following cases are referred to in this decision:

Re Gaffney's Application (1978) 35 P&CR 440

Shephard v Turner [2006] 2 P&CR 28, [2006] EWCA Civ 8

Introduction

1. Mr Robert Fogg and Mrs Barbara Fogg (“the applicants”) have owned the freehold of the house known as The Cobbles, Horse and Gate Street, Fen Drayton, Cambridge CB24 4SH (“the application land”) for 30 years. They now wish to develop a second house on the plot for which they obtained full planning permission (recently expired) on 16 March 2015. They are prevented from doing so by restrictive covenants contained in the Second Schedule of a conveyance of the application land dated 9 November 1973.

2. The relevant covenants are:

“(1) The Purchasers shall not at any time carry on or suffer to be carried on the property or any part thereof any trade or business whatsoever or permit the same to be used for any other purposes than for one private dwelling house.

(2) No building or erection other than one private dwellinghouse shall be erected on the property.”

3. Mr and Mrs Fogg applied to the Tribunal on 9 March 2017 for the modification of the covenants so as to allow them to construct the house for which they had planning permission. There was some confusion about the ground on which the application was made. No ground was specified in the application but in the publicity notice dated 22 August 2017 the application was said to seek the discharge of the restrictions on ground (a) of section 84(1) of the Law of Property Act 1925. Following correspondence with the Tribunal the applicants confirmed that their application was for the modification of the covenants under ground (aa) and the hearing proceeded on that basis.

4. There are four objections to the application:

- (i) Mr Roger Warboys and Mrs Diane Warboys of Manor House, Church Street, Fen Drayton;

- (ii) Mr Tony Wilderspin and Mrs Ann Wilderspin of Stone Court, Church Street;
- (iii) Mr Simon Kerr and Mrs Susan Kerr of Croston, Church Street;
- (iv) Mr David Spencer and Mrs Ann Spencer of Mill View, Horse and Gate Street.

5. The applicants presented the application in person. Mr Fogg gave evidence of fact.

6. Mr Philip Brown of counsel appeared for Mr and Mrs Wilderspin and Mr and Mrs Kerr and called Mrs Susan Kerr and Mr Tony Wilderspin as witnesses of fact. Mr Stephen Lee, BSc, MRICS, an associate partner in Barker Associates LLP, produced expert valuation reports in respect of both Stone Court and Croston, but he was not called to give oral evidence and his reports were therefore not subject to questioning by the applicants or the Tribunal.

7. Mr and Mrs Warboys and Mr and Mrs Spencer did not appear at the hearing and were not represented.

8. I made an accompanied inspection of the application land, Stone Court, Croston and Mill View on 12 March 2018. I was unable to go inside Manor House but I inspected the property externally and walked around the neighbourhood generally.

Facts

9. Fen Drayton is a small rural village approximately 10 kilometres north west of Cambridge just to the north of the A1. Approaching the village from the east along Honey Hill the application land is located on the left hand side of Horse and Gate Street a short distance from its junction with Church Street.

10. The corner property at the junction is Mill View which is separated from the application land by the rear garden of Croston. Croston adjoins the application land to the east and fronts onto Church Street as it turns westwards to run parallel with Horse and Gate Street. The Cobbles, the existing house on the application land, is therefore at the opposite end of its plot to the house at Croston.

11. There is a flat roofed double garage to the rear of The Cobbles with access to Church Street. It was built in apparent breach of covenant (2) by the applicants' predecessor in title when the original garage attached to The Cobbles was converted into a utility room. The garage is apparently no longer used to house cars and the door is becoming overgrown.

12. Adjoining The Cobbles to the west, fronting Horse and Gate Street, is The Red House, which does not have the benefit of the covenants. To the west of the rear garden of The Cobbles,

immediately south of The Red House, is Stone Court which fronts onto Church Street. To the west of Stone Court, also fronting Church Street, is Manor House.

13. Both Croston and Stone Court are two-storey detached houses. The boundaries between the application land, Croston and Stone Court comprise 2m high close-boarded fencing.

14. The proposed dwelling would be a three-bedroom chalet style house fronting Church Street with walls made of facing brickwork and a sloping roof with clay pantiles. The front elevation would be set back 5m from Church Street, some 2m closer to the street than the front elevation of Croston. Stone Court is set further back such that most of the proposed dwelling would be in front of it, although the integral garage and bedroom one above would extend 2m further than the main rear elevation.

15. There would be no windows in the east elevation facing Croston other than an obscure glass window in the ground floor WC. A kitchen window and the front door would face Stone Court but otherwise there would be no windows in the west elevation. The north elevation of the proposed house would face The Cobbles and, to the side, the rear gardens of Croston and Stone Court. At first floor level there would only be high level Velux roof lights and obscured glazing.

16. The proposed house would be 3.2m from Croston and 3.4m from Stone Court and 1m and 0.3m from their respective boundaries. The ridge height would be 7.2m on the east elevation and 6.5m on the west elevation, i.e. the roof over the garage and bedroom one would be lower. The chimney on the east elevation would be a metre higher (8.2m).

17. Manor House Farm is approximately 25m to the west, and Mill View the same distance to the east, of the application land.

18. St Mary's Church is approximately 50m south west of the application land and is currently visible from all the objectors' houses. The proposed development would not interfere with the view of the church from either Manor House Farm or Stone Court.

The case for the applicants

19. The applicants want to modify the restrictions to allow them to develop the house for which they were granted full planning permission in 2015. They acknowledge that this has now expired. Mr Fogg said that he had not sought to renew the planning permission until the outcome of the application was known.

20. The overall effect of the proposed development would be to enhance the appearance of Church Street and remove what the Chair of the Planning Committee described as "that dreadful garage".

21. Mr Fogg explained that the applicants were now both in their 70s and found it difficult to maintain their garden. As they did not wish to move the proposed development and the creation of a smaller garden would be “a reasonable answer to our problem.”

22. Mr and Mrs Kerr bought Croston in 1990 and for some 18 years did not have any view of the church because of a tall conifer hedge between the two properties. In that time Mr and Mrs Kerr had not asked the applicants to reduce the height of the hedge because it was obstructing their view or the access of light. The applicants removed the hedge of their own volition because it had become difficult to manage and out of consideration for their neighbours. Mr Fogg doubted the sincerity of Mr and Mrs Kerr’s objection given that in the past Mrs Kerr had enquired whether the applicants would consider selling the adjoining land to them to build a house for her parents.

23. Mr Fogg said that the proposed development would not overlook its neighbours since there were no windows in the elevations facing Croston and Stone Court and there was, in each case, a 2m high close boarded boundary fence.

24. Mr Fogg was concerned that Mr Lee had not been called to give evidence. He denied that the proposed development would diminish the value of Croston and Stone Court as suggested by Mr Lee, whose estimate of the effect of the development he considered to be arbitrary and based upon an exaggerated view of the amenity which they currently enjoyed.

25. Mr Fogg criticised Mr Lee’s “Impact Representation Images” which showed the proposed development superimposed on photographs of the existing outlook from Croston and Stone Court. These images did not accurately represent the proposed development which, said Mr Fogg, was shown simply as a “big slab”.

26. Mr Fogg stressed that the proposed development was only one and a half storeys tall, with the first floor rooms being accommodated in the roof space. The building was therefore lower than either Croston or Stone Court. There would not be an increase in traffic since there was already a garage fronting Church Street.

The case for the objectors

27. Mrs Kerr understood that The Cobbles and Croston were deliberately positioned at opposite ends of their respective plots so that each was adjacent to the garden of the other, thereby creating a feeling of space and airiness. The covenants, which were mirrored by similar covenants on Croston and Stone Court, helped preserve the peaceful amenity of this part of the village.

28. If the application was allowed Mrs Kerr said she would need to turn on the light in the kitchen during the day because the eastern elevation of the proposed house would be completely overbearing. They would not be able to see the evening sun and would lose daylight. The view of St Mary’s Church would be lost. There would be another family living in close proximity

creating more noise and traffic. The building work would take a long time and would cause considerable disturbance.

29. Mr Wilderspin expressed similar concerns about the effect of the proposed development on his amenity. He said early morning sunlight would be lost as would the privacy and sense of spaciousness currently enjoyed by Stone Court. The west elevation of the proposed house would be very close to the boundary and would block the view from the ground floor living room window as well as overshadowing the garden. There would be more disturbance from occupants and additional traffic generated onto Church Street which was not a through route and was used by residents for on-street parking in the evenings.

30. In his written evidence the objectors' expert valuer, Mr Lee, said it was not "reasonable to apply a figure to cover the disturbance of construction" caused by the proposed development. Nor did he think there were any grounds for claiming a loss of amenity or enjoyment to either property because of increased traffic generation, particularly since the garage could revert to regular use at any time. But somewhat ambiguously he then said the "disturbance of additional parking" should be "borne in mind" (Croston) and that it would be "reasonable to apply a small figure" to cover such additional disturbance (Stone Court).

31. In Mr Lee's opinion the most detrimental impact on the value of Croston would be the loss of the view towards the church combined with the reduction in evening sunlight caused by the proximity of the new building. There would also be a potential increase in occupational disturbance since Croston would in future adjoin two gardens rather than one.

32. Mr Lee referred to the sale of two comparable houses in the vicinity: Thorn House, located directly opposite the application land in Church Street and sold in June 2017 for £525,000; and a semi-detached house in The Rosary which was under offer at £360,000. Mr Lee estimated the present value of Croston to be £450,000 and thought that if the application were granted its value would diminish by £50,000 (11%).

33. Mr Lee gave a similar analysis of the impact of the proposed development on the amenity and value of Stone Court. But unlike Croston, he thought there would be no problem with the intensification of the occupation since Croston's plot was only half as long of that of the Cobbles and therefore it would continue to be adjoined by only one neighbour.

34. Mr Lee considered the greatest impact of the proposed development on Stone Court would be the loss of view, in this case to the east. (The view of St Mary's Church from Stone Court would be unaffected.) He concluded that the enjoyment of Stone Court would be significantly reduced. The proximity of the proposed house would mean Stone Court would feel enclosed and overshadowed.

35. Adopting the same comparables as before Mr Lee estimated the open market value of Stone Court at £425,000 which he thought would be reduced by £25,000 (6%) if the application was granted.

36. Mr Brown submitted that it was for the applicants to prove ground (aa). When the application was brought there was planning permission to develop a new house at the rear of The Cobbles, but it had now lapsed and the applicants had not made any enquiries or submitted any evidence about the prospects of its renewal.

37. There was no doubt that the covenants conferred benefits on the objectors by preventing any further building on the application land, i.e. they preserved valued views of St Mary's Church; maintained the quiet enjoyment and open character of this peaceful neighbourhood; prevented disruption from building works; secured daylight and sunlight to both Croston and Stone Court and protected them from an overbearing development next door; and restricted further pedestrian and vehicular activity.

38. Mr Lee had recorded the effect of these practical benefits and concluded that they were of substantial value. This was not a case where the objectors were hoping to cash in opportunistically. They had no desire to move and would have to live with the adverse consequences of the proposed development. Mr Brown relied on *Re Gaffney's Application* (1978) 35 P&CR 440 where the member, Mr J H Emlyn Jones FRICS, said at 442 that a depreciation of £1,500 in the value of a property worth £45,000 or 3.33% could not be said to be substantial. In the present case the likely diminution in value was considerably more than this: 6% and 11%.

39. In addition to the financial effect on the value of their houses Mrs Kerr and Mr Wilderspin had described the substantial adverse effect upon the amenity and enjoyment of Croston and Stone Court. No monetary payment could compensate them for the loss of the current advantages afforded by the covenants.

40. Mr and Mrs Warboys' objections made no reference to loss of amenity other than the possibility of on-street parking in Church Street being exacerbated if the application was allowed. Mr Warboys' father, Edward John Warboys, was the original covenantee and, said Mr Warboys, he had imposed the covenants because the planners had restricted the extent of development of the land being sold to the construction of four houses. Mr Warboys said the covenant was imposed "so that in the future nobody could financially gain on something we could not benefit from."

41. Mr and Mrs Spencer objected on the ground that the proposed development would block their view of St Mary's Church "which is understood to be referenced in the covenant."

Discussion

42. The applicants no longer have planning permission for the proposed development and have not taken any steps to renew it. It is possible over the intervening three years there has been a change in planning policy but, if so, it has not been identified. The planning permission was granted by the local planning authority and not on appeal and I consider on balance that the prospects for the renewal of the planning permission are good and that the proposed development is a reasonable user of the land which is impeded by the covenants.

43. The two properties most affected by the proposed development are Croston and Stone Court which adjoin the application land to the east and west respectively. The proposed dwelling would be situated ahead of the front elevation of both properties; in the case of Stone Court almost entirely so. The new dwelling would be under 3.5m from each house, 0.3m from the boundary of Stone Court and 1m from that of Croston. The frontage of the application land is about 13m wide compared with some 19m for Croston and Stone Court. The proposed dwelling looks cramped on its plot by comparison with the existing houses. It would dominate the view from their side elevations and gardens. At present there is a shed adjoining the front boundary with Stone Court and a single-storey double garage adjoining the boundary with Croston. In each case the 2m high close boarded fence largely blocks them from view. But the construction of a chalet style house would have a much greater impact on the amenities of Croston and Stone Court than do the existing buildings on the application land.

44. Mr Lee's expert report contained photographic montages of the likely visual impact of the proposed development on the outlook from Croston and Stone Court. It is unfortunate that he was not called to give oral evidence because I would have questioned their accuracy. In fairness to Mr Lee he acknowledged they were not based on detailed measurements but I agree with Mr Fogg that they gave an inaccurate, exaggerated and unduly pessimistic view of the impact of the proposed development.

45. Nevertheless in my opinion the proposed building would be overbearing and would create a sense of enclosure instead of the relatively open and spacious feel that presently exists. The outlook from both properties would be materially affected as well as the amount of light they receive. In words which Carnwath LJ held in *Shephard v Turner* [2006] 2 P&CR 28 at 621[23] were appropriate to describe a "substantial" practical benefit, the impact of the new house on its neighbours would be "considerable, solid, big". In the case of Croston there is the further detriment of a loss of a view of St Mary's Church, although I consider Mr and Mrs Kerr have exaggerated the significance of it. Only the west elevation at ground level faces that direction and the view is not a clear one. There is only an oblique view of the church from the upper floor windows. (The best and most direct view of the church is from the first floor of Mill View where it is framed between Croston and Stone Court, a view which would be lost if the application were granted.)

46. There is no such view of the church from Stone Court and Mr Lee describes the easterly outlook from that property in unjustified purple prose:

“This view provides a sense of distance, space, and delight in observing weather and light conditions, the sky scene, changes of season, etc, all of which have a value in the enjoyment of being in and around the property.”

47. There would be no loss of a worthwhile view from Stone Court but there would be a clear intrusion upon their open outlook. On the other hand I do not think either Croston or Stone Court would be overlooked by the proposed development with only one window (kitchen) facing the latter property.

48. There is likely to be some occupational disturbance from the new house to Croston and Stone Court given its proximity to both properties, particularly since it only has a small rear garden with a maximum depth of 8m. There would also be additional vehicular movements on Church Street with the possibility of on-street parking being exacerbated. I bear in mind the presence of the garage on the application land at present, and the potential for it to be brought back into use, but the addition of a further house is still likely to bring more vehicles to Church Street.

49. Taken as a whole I consider that by impeding the reasonable user the covenant secures practical benefits of substantial advantage to Mr and Mrs Kerr (Croston) and Mr and Mrs Wilderspin (Stone Court). That alone would be sufficient for the application to fail. But Mr Lee also gave written evidence of the effect of the proposed development on the value of Croston and Stone Court. He concluded the former would be reduced by 11% and the latter by 6%. The applicants did not have the opportunity to cross-examine Mr Lee about this evidence but I am satisfied that his open market valuations of the two houses are reasonable and from my site inspection, whilst I do not think the effect of the proposal would be as great as he suggests, I consider that the value of Stone Court and Croston would each be diminished by at least 5% (£21,250 and £25,000 respectively). The application would therefore also fail because the covenants secure practical benefits of substantial value as well as of advantage.

50. I do not consider the covenants secure any practical benefits of substantial advantage or value to either Mr and Mrs Warboys (Manor House) or Mr and Mrs Spencer (Mill View) but it is not necessary for all the objections to succeed for the application to fail.

Determination

51. I am not satisfied that ground (aa) has been established and I therefore refuse the application.

52. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal’s Practice Directions dated 29 November 2010.

Dated: 17 April 2018

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)