IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 312 (LC)
Case No: LP/19/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS - Costs – application to discharge – subsequent agreement to modify restriction to enable planning permission to be implemented – costs awarded to objectors.

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

BETWEEN:

DAVID JOHN MEAGHER AND JACQUELINE ANN TAYLOR **Applicants**

DANIEL WHITAKER, RICHARD WHITAKER AND PAUL WHITAKER (AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ROY MARTIN WHITAKER DECEASED) **Objectors**

Re: 3 Millcroft Cottage,
Millcroft Lane,
Delph,
Oldham
OL3 5UX

Peter D McCrea FRICS

DECISION ON WRITTEN REPRESENTATIONS

The following cases are referred to in this decision:

Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)

Lamble v Buttaci [2018] UKUT 0175 (LC)

DECISION

Introduction

1. This short decision concerns liability for costs incurred by the parties to an application to the Tribunal to discharge restrictive covenants under section 84 of the Law of Property Act 1925 ("the Act") in circumstances where, prior to the Tribunal hearing the application, the applicants and objectors reached an agreement to settle the dispute, subject to making written representations on costs.

2. John Meagher and Jacqueline Taylor ("the applicants") are the owners of 3 Millcroft Cottage, Millcroft Lane, Delph, Oldham, OL3 5UX ("the application property"). The objectors are Daniel, Richard, and Paul Whitaker in their capacity as the personal representatives of the estate of Mr Roy Martin Whitaker deceased. In summary, the applicants ask to be awarded 50% of their costs against the objectors owing to what they say was the objectors' unreasonable conduct of the proceedings, while the objectors claim all of their costs against the applicants.

3. I am grateful to counsel – Mr Andrew Francis for the applicants and Mr David Gilchrist for the objectors – for their helpful written submissions.

Brief facts and chronology

4. The application property is located in the hamlet of Millcroft in the Lancashire countryside. It is part of the former Millcroft Farm, which dates from the 18th century. The former farm buildings now comprise five dwellings: The Farmhouse, Millcroft House (owned by Mr Paul and Mrs Gina Duddle), Millcroft Cottage (owned by Ms Olivia Hauck), Millcroft Barn, and the application property. The Farmhouse and Millcroft Barn are both owned by the Whitaker family, and the Farmhouse has the benefit of the restrictions which are sought to be discharged. It is unclear whether Millcroft Barn also benefits, but nothing turns on that for the purpose of this decision. Mr and Mrs Duddle and Ms Hauck submitted but subsequently withdrew objections to the application.

5. By a Transfer made on 24 July 2013, the application property was transferred by Roy and Lynn Whitaker to their son and daughter-in-law, Daniel and Louise Whitaker. Part 12.5 of the Transfer contained a series of restrictions under which the purchasers covenanted:

> "12.5.2.1 not to use the Property for any purpose other than as a private dwelling house and grounds.

12.5.2.2 not to carry out any alterations or additions to the exterior of the building erected upon the Property nor to erect any new building or structure of any nature upon the Property without the prior written consent of the Transferor

12.5.2.3 not to keep upon the Property any caravan boat or trailer or any unlicensed or unroadworthy vehicle

12.5.2.4 not to do or omit to do any act or thing on or about the Property the doing or omission of which shall or may be or grow to be an annoyance nuisance damage danger or disturbance to the Transferor or the owners or occupiers of any part of the Retained land

12.5.2.5 not to obstruct the driveway"

6. Shortly afterwards, by a conveyance dated 16 August 2013, the application property was sold by Daniel and Louise Whitaker to the applicants, who covenanted to observe and perform the restrictions in the 2013 Transfer. The applicants entered into the covenants in 12.5.2.2 and 12.5.2.3 inadvertently - their former solicitors accept that they failed to notice that, having struck out these covenants from the travelling draft transfer, they had been re-inserted in the final version which applicants signed.

7. On 9 July 2014, the applicants obtained planning permission to build two single-storey extensions to the appeal property (an open-fronted porch and a garden room at the front of the property and an enclosed porch and utility room at the rear) plus a detached garage. That permission has now expired.

8. In November 2014 the applicants' new solicitors wrote to Mr Roy Whitaker, explaining that the applicants had entered into covenant 12.5.2.2 in error, that they had planning permission for development as described above. Mr Whitaker was asked whether he would be prepared to discuss the release or modification so that the planning permission could be implemented. The letter noted that "our clients have since sought your consent to the proposed development and that you have raised some concerns and objections."

9. Correspondence and discussions ensued, but in essence Mr Whitaker's stance was that he did not wish the restrictions to be modified. On 2 February 2016, his solicitors wrote to the applicants (who by that point were representing themselves) saying that Mr Whitaker had made it clear that he would not give consent. Relations between the parties quickly deteriorated, although a meeting took place on site on 21 February 2016. The outcome of this meeting is disputed, as I outline below. Sadly, by November 2016 Mr Whitaker had died and conduct of the matter passed to the personal representatives of his estate, for whom Mr Whitaker's solicitors continued to act.

10. In September 2016, the applicants submitted a further planning application which largely replicated the front porch/garden room and rear porch/utility room ("the two residential

extensions") for which planning permission had previously been granted, but in this application the detached garage was replaced by a single storey attached garage. The application was refused by the local planning authority on 31 October 2016, but on appeal in April 2017 the Planning Inspectorate issued what it termed a split decision – granting permission for the two residential extensions but refusing that for the attached garage. On 16 May 2017, the applicants submitted a further revised planning application for a garage.

11. On 26 May 2017 the applicants applied to the Tribunal for the discharge of all of the restrictions in part 12.5 of the Transfer, relying on grounds (a), (aa), (b) and (c) of s.84(1) of the Act. It is relevant to note at this point that the application indicated that:

> "it is the removal of point 12.5.2.2 that is the essence of this application but we feel that it is necessary to remove all restrictions so as not to be bound to the covenant holder".

The application did not request the modification of the restrictions as an alternative to their complete discharge.

12. On 8 August 2017 the revised planning application for a garage was refused by Oldham Council. The applicants appealed to the Planning Inspectorate. On 10 August solicitors for the objectors filed an objection to the application to the Tribunal.

13. By November 2017 the parties were on the road to agreement. In a letter of 14 November, the applicants suggested rather than discharging the restrictions they should be varied to allow the two residential extensions, the detached garage (for which they awaited the appeal decision), some work to the garden and an alteration to the drive. On 22 November, solicitors for the objectors indicated that they would permit modification to an extent which would allow the construction of "a small enclosed porch" on the southern elevation, and the porch/utility room on the northern elevation, together with a garage on or close to the eastern elevation. This proposal was unacceptable to the applicants as it did not accord with the planning permission and outstanding application.

14. During the correspondence the applicants suggested mediation, but the objectors' solicitors rejected this as being unlikely to lead to a settlement given the parties' positions.

15. Meanwhile expert evidence had been exchanged in accordance with the Tribunal's pre-trial timetable. Having read the evidence of the objectors' expert, on 8 January 2018 the applicants wrote to the objectors' solicitors:

> "to make it clear that presently the only remedy sought in this Application is for the modification of the covenant at para 12.5.2.2 of the Transfer to enable the proposed porch/utility and porch/garden room and garage to be built. Your clients' evidence and that of [the objectors' expert] seems to be based upon the now incorrect assumption that we sought the discharge of all of the covenants at 12.5 of the transfer dated 24 July 2013."

16. The applicants went on to say that, given the wording of their application to the Tribunal, they could see why the objectors would think they were meeting a case for blanket discharge, and if necessary would they would make an application to amend their case.

17. By this point, the planning inspector had dismissed the appeal against the refusal of planning permission for the garage. The objectors' solicitors' reply of 29 January expressed some surprise at what they considered the applicants' late change of position and, noting that the planning appeal had been dismissed, asked the applicants to confirm whether they now only sought modification to allow the two residential extensions. If that were the case, it was anticipated that the objectors would agree to modification, subject to their costs being paid.

18. This proposal was rejected by the applicants on 25 February, saying that had the objectors honoured a verbal agreement said to have been reached at the February 2016 meeting, the application would have been unnecessary, consequently there was said to be an argument that the applicants' costs should be paid for by the objectors.

19. The application was listed for hearing before me on 12 June 2018. However, a few weeks before the hearing, the parties agreed a modification of clause 12.5.2.2 of the Transfer to permit the erection of the two residential extensions. The only outstanding issue was costs, which the parties agreed would be determined by the Tribunal by way of written representations.

The evidence

20. The applicants submitted a large bundle of evidence including a witness statement, 44 pages of supporting exhibits, and 200 pages of inter-party correspondence. Much of the bundle comprised without prejudice or irrelevant material, peppered with mutual accusations of bad faith, non-cooperation and alleged intimidation or harassment. Although I have read it all, it is unnecessary for me to detail the majority of this material as it is of little or no relevance to this decision. I make no criticism of Mr Francis, whose submission formed a small part of the bundle.

21. It is understandable that lay parties to a dispute may be tempted to submit an excessive amount of material to the Tribunal, although it serves simply to increase their own and others' costs. It is nevertheless regrettable that the bundle in this case included a purported transcript, written by the applicants, of the February 2016 site meeting. This meeting was clearly held on a without prejudice basis to explore settlement, and an audio recording of the meeting was made without the objectors' knowledge. They dispute the accuracy of the transcript, and given the clandestine way in which it was procured, and the privilege which attaches to those discussions in any event, I have placed no weight on it.

Submissions

22. For the applicants, Mr Francis submitted that the terms agreed by the parties showed that the applicants had succeeded in the major part of their application. Ordinarily, the starting point in

Tribunal's Rules and Practice Direction is that each party should bear its own costs. However, owing to what were said to be the objectors' unreasonable actions, the applicants should be awarded 50% of their costs.

23. Mr Francis submitted that in assessing unreasonable conduct, the three-stage enquiry outlined in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) should be adopted. The unreasonable conduct he relied on was the objectors' failure to adhere to a verbal agreement made on 21 February 2016; their attempts to force the applicants to discontinue the application; and their reluctance to engage in ADR.

24. Mr Gilchrist highlighted that the application to the Tribunal was for discharge, not modification, of all of the restrictions. The application had failed and accordingly paragraph 12.5(3) of the Tribunal's Practice Direction should apply, under which the objectors should be awarded their costs. The applicant's position only altered in January 2018, when they sought modification of clause 12.5.2.2 to enable the two residential extensions and the garage to be constructed. But it wasn't until 25 February 2018 that the applicants wrote to the Tribunal and the objectors stating that in the light of planning permission for the attached garage being refused they would only be seeking modification to allow the two residential extensions to be built. The objectors agreed to this on 26 March 2018, on the basis that the applicants pay the objectors' costs. Thereafter, the parties corresponded to agree a consent order subject to the determination of costs.

25. Mr Gilchrist submitted that the objectors had plainly acted reasonably, and had agreed to settle the dispute within a reasonable time after the applicants' confirmation that they only sought modification of clause 12.5.2.2 to build the two residential extensions.

Discussion

26. I can deal with the issue of costs quite briefly, since the appropriate order seems to me to be quite clear. The Tribunal has recently summarised the approach taken by its Rules and Practice Directions to cost in applications under s.84 of the Act in *Lamble v Buttaci* [2018] UKUT 0175 (LC) (at [101-108]) and I will not do so again here. It also rejected (at [110]) the general application of the principles identified in *Willow Court* to proceedings under the Act. To be fair to Mr Francis, his submissions in this case pre-dated the publication of the Tribunal's costs addendum in *Lamble*.

27. Whilst Mr Francis submitted that the thrust of the application, drafted by lay applicants, had throughout focussed on clause 12.5.2.2 in order to implement the planning permission, in my judgment the objectors could only treat the application as it was presented - specifically applying for the discharge of all of the restrictions. Indeed, as outlined at paragraph 11 above, the application specifically sought to go beyond modification of clause 12.5.2.2 "so as not to be bound to the covenant holder". The applicants were openly seeking to achieve a position in which none of the restrictions remained. Had they succeeded this would have allowed them, subject to

planning requirements, to use the appeal property for commercial uses, to have a caravan or trailer on the land, or make external alterations, all of which the restrictions prevented.

28. The agreement reached between the parties permits the modification of one restriction to allow a specific development. When this is contrasted with the application to the Tribunal, which sought discharge of all of the restrictions, I am satisfied that the application has failed to a significant extent and that the objectors are, substantially, the successful party, who in accordance with the Tribunal's usual practice should be awarded their costs unless they have acted unreasonably.

29. In my judgment there is nothing in the objectors' conduct that would justify imposing on them a costs sanction. It is not unreasonable for the beneficiaries of restrictive covenants to wish to rely on their legal rights and to object to their removal; before an award of costs against them, or a deprivation of their costs if they have otherwise succeeded, would be appropriate, something more is required in the form of unreasonable behaviour. As for the specific allegations, I am not satisfied that the meeting in February 2016 resulted in an agreement from which the objectors subsequently resiled. Whilst relations between the parties became increasingly strained, there is no evidence that the objectors attempted unreasonably to force the applicants to abandon their request. The objectors' family had made it plain from the outset that they did not wish the covenants to be discharged, yet in my view they were met with a campaign of correspondence from the applicants who wouldn't take no for an answer.

30. As for the objectors refusing to participate in mediation, I do not consider there is anything in this to assist the applicants. The parties had fallen out at an early stage, and I consider it understandable that the objectors thought mediation would be unhelpful. The position taken by the applicants at that stage was an extreme one, and while it is possible the gap may have narrowed with the assistance of a mediator there was no obligation on the objectors to relinquish their legal rights, or even to discuss doing so.

31. I have considered whether, given their success in achieving a modification, the applicants should be entitled to a deduction in the costs payable to the objectors. However, in reality, as soon as they modified their position the objectors agreed to their proposal.

32. Accordingly, I see no reason to depart from part 12.5 of the Tribunal's Practice Directions. The applicants shall pay the objectors costs of the application, which in the absence of agreement shall be determined by the Registrar on the standard basis.

Dated: 20 November 2018

P D McCrea FRICS