IN THE UPPER TRIBUNAL **(LANDS CHAMBER)**

Neutral Citation Number: [2019] UKUT 171 (LC)
Case No: LP/7/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Discharge or modification – Residential property – Covenants regulating user – Covenant against alterations – Law of Property Act 1925, s. 84 (1) (a) and (c)

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

BY

(1) GARY OWEN

(2) HEATHER LYNN RICHARDS

Applicants

Re: 141a Dunstans Road,
East Dulwich
SE22 OHD

His Honour Judge David Hodge QC

Sitting at the Royal Courts of Justice, Strand, London WC2A 2LL
on
23 May 2019

The applicants appeared in person
Mr Benjamin Dominic Stinson appeared in person for the objectors, Mr Benjamin Dominic Stinson and Ms Ellen Grace Hamblin (his wife)

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No cases are referred to in this decision

No cases were referred to in the submissions

DECISION

Introduction

1. This is an application by Mr Gary Owen Richards and his wife, Mrs Heather Lynn Richards, to discharge or modify restrictive covenants affecting their home, a freehold property known as and situated at 141A Dunstans Road, East Dulwich, London SE22 0HD and registered with title absolute under Title No SGL 410507. The covenants were imposed by a transfer dated 20 July 1984. Although not identified as such in the application, a letter to the Tribunal from the applicants dated 6 May 2019 makes it clear that the application is made under the grounds contained in s. 84 (1) (a) and (c) of the Law of Property Act 1925, and this was confirmed by them at the hearing. There is no application under paragraphs (aa) or (b) of s. 84 (1). At all times, the applicants have represented themselves.

2. The applicant is opposed by Mr Benjamin Dominic Stinson and his wife, Ms Ellen Grace Hamblin, the owners and occupiers of the adjoining residential property, 141 Dunstans Road, which is registered with title absolute under Title No SGL 389215. It is common ground that Mr Stinson and Ms Hamblin are the only persons who enjoy the benefit of the restrictive covenants imposed by the 1984 transfer. At all times, the objectors have represented themselves, with Mr Stinson attending the hearing to give evidence and address the Tribunal on his own behalf and on behalf of his wife.

Factual background

3. Nos 141 and 141A Dunstans Road originally comprised a single double-fronted, two-storey Victorian residential property situated on the south-east side of Dunstans Road slightly to the north-east of its junction with Goodrich Road and a little to the north-east of Goodrich Community Primary School, which is located on the opposite side of Dunstans Road. From the south-west, Dunstans Road slopes down towards Goodrich Road, but from its junction with Goodrich Road heading north-east Dunstans Road is a relatively quiet, level, tree-lined suburban road. The property which originally comprised both 141 and 141A was acquired by Ms Nichola Teresa Mary McAuliffe on 26 October 1983, and she became the registered proprietor on 8 November 1983. She apparently converted the property into two self-contained freehold residential units, divided vertically and accessed from the road through the front garden and a single central front door which leads into a communal hallway with separate internal doors serving 141A on the left and 141 on the right. Ms McAuliffe sold off 141A to Mr Larion Fraser Myakicheff and Ms Nicola Marguerite Bassett-Powell by a transfer dated 20 July 1984 but she retained title to No 141 (and the hallway). It is this transfer which imposed the restrictive covenants on 141A which the applicants seek to discharge or modify. No corresponding covenants were imposed on No 141 for the benefit of No 141A. The covenants are registered against the title to No 141A (as entry No 3 in the Charges Register); but they are not mentioned in the register of title to No 141 (although it does contain reference to the 1984 transfer).

4. The restrictive covenants are in the following terms:

(1) Not to use the premises other than as a private dwellinghouse in the occupation of a single family

(2) Not to keep more than one domestic pet on the premises at any one time

(3) Not to play any musical instrument or loud music after 11.00 pm without the permission of the owner or occupier for the time being of the adjoining premises

(4) Not to alter the structure or external appearance of the property hereby transferred or to erect any walls fences hedges or garages without the consent of the transferee or her successors in title

5. The applicants purchased 141A from the original purchasers in 1999. Their evidence (which the Tribunal accepts) is that they were not alerted to the existence or the terms of the covenants by the conveyancing solicitor who had acted on their purchase at that time; and that the title deeds had been sent to their mortgagee. They only first became aware of the existence of the covenants when they put their property on the market for sale and a prospective purchaser dropped out in 2017 because of the existence of the covenants. Since then, a second purchaser has withdrawn from purchasing No 141A because of the objectors' refusal to release the covenants. Had the applicants' attention been drawn to the existence and the terms of the covenants at the time, they say that they would not have proceeded with the purchase of No 141A.

6. The objectors purchased No 141 on 14 September 2017 with the assistance of a mortgage from Clydesdale Bank plc. Their evidence (which again is accepted by the Tribunal) is that they too were not made aware of the existence or the terms of the covenants at the time of their purchase. They first became aware of them when they were approached by the applicants to release the covenants to assist them in their efforts to sell No 141A. Initially the objectors agreed to such release; but they later withdrew such agreement when they took professional legal advice and were alerted to the potential benefits of the covenants to themselves and the need to obtain the agreement of their mortgagee to any release. The objectors have no wish to be unreasonable in relation to their enforcement of the covenants; but they wish to retain the degree of control over activities on the adjoining property which the existence of the covenants confers on them.

The applicants' case

7. The applicants' case is that the covenants have become over-burdensome, unduly restrictive and disproportionate in the context of a freehold (as distinct from a leasehold) property. From their terms, they are said to reflect the personal sensitivities of the original common owner, who imposed them when she sold off No 141A and retained No 141; but she is no longer on the scene. The existence and the terms of the restrictive covenants have caused two potential sales of No 141A to fall through in the last two years because of their unduly restrictive and onerous nature, which is said to be more akin to the degree of control one

would expect in the case of a leasehold property. The applicants rely on the lack of reciprocity as between Nos 141 and 141A, with the owners of the latter enjoying no corresponding degree of control over activities affecting the former property despite both properties having a similar footprint. The applicants say that the covenants were breached by the former owners of No 141A in 1989 (when alterations were made to the ground floor layout,t with planning permission, but apparently without any written consent from the owners of No 141) and, inadvertently, by the applicants themselves in 2007 when they altered the first floor of No 141A (with planning permission but without any consent, or objections, from the then owners of No 141). The applicants also point to alterations which were carried out to the ground floor of No 141 in 2016 to which they were unable to object (and to which they agreed) which are said to have adversely affected No 141A, resulting in the applicants having had to install sound-proofing to mitigate noise which they say was intruding upon their enjoyment of their own property. The applicants seek to have the covenants removed or modified so as to have a 'true' freehold property, unencumbered by the restrictive covenants (which do not affect No 141) and which are preventing the applicants from selling their house so as to enable them to move on and ensure that both properties enjoy the equal rights that would be expected of a freehold. In the course of their oral submissions, the applicants asserted (without producing any supporting evidence) that planning laws were more robust now than they had been when the covenants were first imposed in 1984, and that Dunstans Road was within a conservation area (although neither they nor Mr Speed could say when the conservation area had been created or extended to Dunstans Road).

8. In addition to their joint witness statement dated 6 December 2018, the applicants rely upon an undated letter (addressed to, and received by the Tribunal on 11 December 2018) from Mr Martin Speed, the Senior Branch Manager of the Lordship Lane branch of the Acord group of estate agents, who has been engaged in marketing No 141A Dunstans Road for sale by the applicants on and off since October 2015, and also a letter to the Tribunal dated 19 October 2018 from their conveyancing solicitor, Ms Helen Spurgeon of Angel Wilkins LLP. Ms Spurgeon confirms the loss of a sale of No 141A as the result of the refusal by the owners of No 141 to consent to the removal of covenant number (4). Mr Speed confirms Ms Spurgeon's account; and he also refers to the loss of an earlier sale due to the inability to have more than one pet on the property and also to convert the loft into a habitable room (which is said to be "a standard addition to a high number of Victorian houses in East Dulwich"). Mr Speed concludes that: "…the restrictions on this property have a very negative impact on the property's value and saleability. If the house cannot be converted to a three bedroom house, this restricts its value unfairly to a two bedroom property only. For a freehold house to have a restriction in place for both extension and for pets is unfair and unreasonable as both of these matters would be standard normally."

The objectors' case

9. The objectors oppose the application. They deny that the covenants are over-burdensome, unduly restrictive or disproportionate. They assert that the covenants protect the integrity, enjoyment and value of their property and are common to freehold properties. Restriction (1) is said to ensure that No 141A remains a single private residence. If it were to be removed, its owners could (a) use No 141A for commercial, industrial or other purposes,

many of which could cause increased noise, odours, and flow of people (particularly through the shared hallway), resulting in annoyance and disturbance and loss in the value and marketability of No 141 or (b) sub-divide No 141A into multiple occupation, increasing the number of residents (with like consequences). Restriction (2) is said to prevent annoyance and disturbance to the objectors and loss in the value and marketability of their property by limiting the number of pets at No 141A. If restriction (3) were to be removed, the owners of No 141A could be noisier later at night, with similar consequences. If restriction (4) were to be removed, the objectors would be unable to prevent alterations or works of construction that could adversely affect the structural integrity of the property (including their part of it), or existing boundary features and the amount of light enjoyed to their windows and garden, resulting in annoyance and disturbance to them and loss in value and marketability of their property.

The hearing and view

10. The hearing took place in London on 23 May 2019 and lasted less than half a day. The Tribunal heard from both of the applicants, who confirmed the terms of their joint witness statement . The Tribunal also heard from Mr Martin Speed, who confirmed the contents of his letter. There was effectively no challenge to any of their evidence, which the Tribunal accepts. Mr Speed confirmed that the release of these "very restrictive" covenants would make it easier to sell No 141A; and he pointed to the proximity of a very good primary school over the road which would be attractive to potential purchasers with children who might want the ability to convert the loft space into a third bedroom, something which he said was common in the area and would have no detrimental effect upon neighbouring properties. In response to a question from the Tribunal about whether it would assist the applicants' efforts to sell No 141A if a proviso were to be introduced into restrictions (3) and (4) preventing the consent (or permission) of the owner of No 141 from being unreasonably withheld, Mr Speed expressed the opinion that it would help but that it might give rise to potential disputes about what would be reasonable and how any consent might be qualified; and he referred to a comment from the buyer who had pulled out of the purchase of No 141A to the effect that he could not buy a property if he had no complete control over what he could and could not do with it. The applicants' view was that any such qualification would only serve to create more ambiguity about what could and could not validly be done and would complicate matters still further.

11. Mr Stinson confirmed the terms of the statement dated 12 December 2018 which he had made jointly with his wife and fellow objector. He gave evidence along the lines that the Tribunal has indicated in paragraph 6 above. Again, there was no real challenge to Mr Stinson's evidence, which the Tribunal accepts.

12. Throughout, the hearing was conducted in a spirit of friendliness and neighbourliness. The Tribunal expressed the hope that this would continue whatever the outcome of this application.

13. The Tribunal visited the neighbourhood unaccompanied and viewed the frontages of Nos 141 and 141A Dunstans Road and their neighbouring properties on the afternoon of the hearing, just as pupils were leaving Goodrich Community Primary School for the day. It had been agreed that it would be unnecessary for The Tribunal to view the interiors of either property because the plan attached to the July 1984 transfer spoke for itself. The Tribunal found the area to be as it has described it at paragraph 3 above. Nos 141 and 141A form part of a terrace of properties extending north-east from No 143 (on the north-east side of the junction of Dunstans Road and Goodrich Road) to No 125. However, Nos 125 to 137 are different in appearance to Nos 139 -143, the former (unlike the latter) each apparently possessing (as originally constructed) an additional second-floor attic with a front window within a pediment at roof level. No 143 (a corner house on the junction with Goodrich Road) has a single frontage whilst Nos 141/141A and 139 each have a double frontage with a central front door and no attic windows. From the Tribunal's observations of the neighbourhood, it would appear that many properties have undergone attic conversions to provide additional habitable living accommodation served by rooflights although none of Nos 143, 141/141A or 139 would appear to have undergone such a transformation. Some properties have had a section of front fencing removed and a dropped kerb created so as to provide a space for parking in their front garden. The Tribunal formed the view that it would not be unreasonable for any owner(s) of No 141A to wish to carry out alterations of this kind, which would be in keeping with the character of the neighbourhood.

Determination

14. This application is brought solely under s. 84 (1) (a) and (c) of the Law of Property Act 1984. There is no application under paragraphs (aa) or (b) of s. 84 (1). So far as material for present purposes, therefore, the power of the Tribunal under section 84 (1) of the Law of Property Act 1925 to discharge or modify restrictive covenants affecting land may be exercised only where it is satisfied that (a) by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete, or (c) the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. By s. 84 (1B) the Tribunal is required to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area, as well as the period at which and the context in which the restrictions were created or imposed, and any other material circumstances. Although the Tribunal was not referred to the development plan, and there was no planning evidence, its observations of the area lead the Tribunal to conclude that any necessary planning permission would readily be granted for an attic conversion to provide an additional bedroom(s) for No 141A within the roof space and/or for the creation of a parking space within the existing front garden of the property. The restriction was imposed 35 years ago, in 1984, on the occasion of the sale-off of No 141A by, and for the benefit of, the original vendor, who has now parted with all interest in the benefitted land at No 141. Although there were no words in the 1984 Transfer expressly annexing the benefit of the covenants to No 141, such annexation was statutorily effected by s. 79 of the Law of Property Act 1925. The Tribunal takes all of those factors into account. The Tribunal also accepts, and takes into account, the applicants' unchallenged evidence that the existence and terms of the restrictions have caused sales of No 141A to fall through and that their continued existence has, and will have, a very negative (but unquantified) impact on the value and saleability of No 141A. The Tribunal accepts that

inconvenience to the applicants, as the owners of the land burdened by the restrictions, and loss to its value, are material considerations on an application under s. 84 (1) of the 1925 Act.

15. However, whilst the Tribunal has considerable sympathy for the unfortunate position in which the applicants now find themselves, through no fault of their own, it can only operate within the statutory framework of s. 84 (1) of the Law of Property Act 1925 and within the context of the existing application (which includes no application under paragraph (aa) of s. 84 (1)). As the editors of *Preston & Newsom: Restrictive Covenants Affecting Freehold Land*, 10th edn (2013) observe (at para 13-02): "Many applications include Ground (a) but few succeed." On the evidence, and from the Tribunal's own inspection, it cannot be said that the restrictions have been stultified by changes in the surrounding area since 1984: it remains residential in character. In the Tribunal's judgment, the objectives which the covenants sought to achieve in 1984, of ensuring that the owners and occupiers of No 141 would still be able to retain an acceptable level of control over activities in the adjoining property, No 141A, are still capable of attainment. It cannot be said that the covenants no longer serve the purposes originally contemplated of them; they still afford protection, and they remain of value, to the owners and occupiers of No 141 as the persons entitled to the benefit of the restrictions. Those benefits are the ones identified by the objectors and summarised at paragraph 9 above. Nor can it sensibly be said that their objections to the discharge or release of the covenants (or any of them) are in any way, proprietorially speaking, frivolous, still less vexatious. Restriction (1) is sensible and reasonable in the context of an immediately adjoining house the size of No 141A, which is accessed through a common hallway, as is a restriction on the number of pets to be kept at No 141A at any one time. Restriction (3) is also justified in the context of a pair of immediately adjoining residential properties which share a common hallway. Restriction (4) confers upon the owners and occupiers of No 141 an appropriate measure of protection against any harmful or undesirable development of No 141A. The fact that the original common owner of Nos 141/141A, and the original vendor of No 141A, is no longer on the scene does not render the restrictions obsolete or of no value to the present and future owners and occupiers of No 141, nor does it mean that they would suffer no injury if the restrictions were to be discharged. Whilst, from the perspective of the owners and occupiers of No 141A, it is clearly unfortunate that there is no element of reciprocity, and that they do not have the benefit of corresponding restrictions affecting No 141, this too does not render the restrictions obsolete since that was the position from the moment the covenants were first imposed; nor does it mean that their discharge would not harm the persons entitled to the benefit of the restrictions. The Tribunal is entirely satisfied that no case has been made out for their discharge under either of paragraphs (a) or (c) of s. 84 (1).

16. No specific modifications of the covenants were proposed by the applicants. However, they represent themselves; and during the course of the hearing one specific modification was suggested by the Tribunal, and addressed by the parties, namely the introduction into restrictions (3) and (4) of a proviso preventing the consent (or permission) of the owner of No 141 from being unreasonably withheld. In the Tribunal's judgment, no injury would be suffered by the persons entitled to the benefit of the covenants by the insertion of such a proviso; and none was identified by the objectors, who have always expressed a wish to be reasonable neighbours. Whilst the prohibitions contained in restrictions (1) and (2) are phrased in absolute terms, restrictions (3) and (4) are in terms qualified, with restriction (3)

expressly contemplating that permission may be given by the owner or occupier for the time being of No 141 and restriction (4) expressly contemplating that consent might be given by "the transferee" – clearly an error for the transferor – or her successors in title. In such circumstances, the courts would readily imply from the language and context of the transfer a term that such permission, or consent, should not be unreasonably withheld. In the Tribunal's judgment, the objectors, as the persons entitled to the benefit of the restrictions, will suffer no injury if those two restrictions are modified to make explicit that which is implicit in the restrictions; and no harm or injury was identified by the objectors. Such a modification may go some, albeit a limited, way towards overcoming the difficulties being experienced by the applicants in disposing of No 141A by way of open market sale.

17. The Tribunal also considers that no harm would be suffered, or injury caused, to the objectors, as the persons entitled to the benefit of the restrictions, if restriction (2) were to be modified by the insertion of a proviso "without the permission of the owner or occupier for the time being of No 141 (such permission not to be unreasonably withheld)". If it would be reasonable to refuse permission for more than one pet (such as two cats or two dogs or a cat and a dog), then the restriction will continue to bite; but if it would be unreasonable to refuse such permission, then the Tribunal cannot see that the owners or occupiers of No 141 would suffer any injury by any consequential relaxation of the restriction.

Order

18. For those reasons, the Tribunal therefore orders and directs that the restrictions imposed by the Transfer dated 20 July 1984 referred to in entry No 3 of the charges register of Title No SGL 410507 are to be modified as follows (but not further or otherwise):

(1) Restriction 2 is to be modified by the addition of the words "without the permission of the owner or occupier for the time being of No 141 Dunstans Road (such permission not to be unreasonably withheld)"

(1) Restriction (3) is to be modified by the addition of the words "(such permission not to be unreasonably withheld)" and

(2) Restriction (4) is to be modified by the addition of the words "(such permission not to be unreasonably withheld)".

David R. Hodge

His Honour Judge Hodge QC

31 May 2019