

UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Numbers: LP/5/2020

RESTRICTIVE COVENANTS – DISCHARGE – OBSOLETENESS – Law of Property Act 1925, s. 84(1)(a) - Restriction against building or alterations without prior approval of plans and specifications by the vendors’ surveyor – Whether covenant obsolete following death of vendors – Covenant discharged

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

BY

(1) MR FRANCIS PAUL SAVAGE
(2) MRS MARGARET JOAN SAVAGE

-and-

Applicants

60 KENT ROAD (MAINTENANCE) LIMITED

Objector

Re: 60a Kent Road,
Harrogate,
HG1 2EU

Determination on written representations

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No cases are referred to in this decision.

Introduction

1. This is the determination of a preliminary issue on an application dated 21 January 2020 by Mr Francis Paul Savage and Mrs Margaret Joan Savage under s. 84(1) of the Law of Property Act 1925 to discharge or modify a restrictive covenant affecting their freehold property at 60a Kent Road, Harrogate HG1 2EU and registered under Title No NYK253406. The substantive application seeks the discharge of the restriction under paragraphs (a), (aa) and (c) or alternatively the modification of the restriction under paragraphs (aa) and (c) of s. 84(1).
2. The applicants' property ("**60a**") is a detached bungalow which is situated to the north-west of a large, detached house at 60 Kent Road which has been divided into apartments. Further to the east there is a freehold mews house. All three properties originally formed part of the same freehold property. 60a was sold off on 18 May 1961 by the conveyance which imposed the relevant restriction. A mews house was sold off by a later conveyance dated 6 September 1991.
3. The conveyance dated 18 May 1961 by which 60a was sold off was made between (1) Margaret West Wood, Walter Alleyne Lewis Hill and Marion Gwendoline Kyles (as vendors), (2) Midland Bank Ltd (as mortgagee) and (3) Stewart Russell Gordon and his wife Kitty Gordon as purchasers. Clause 3 imposed restrictive covenants for the benefit of the vendors' retained land as set out in the second schedule. That schedule included restrictions as follows: "*(a) No building shall be erected on the property hereby conveyed other than one bungalow with suitable offices and outbuildings. (b) No building of any kind other than a garage shall be erected on the south side of the beech hedge shown on the said plan. (c) No trade manufacture or business shall be carried on upon the said property or any part thereof nor shall any building erected thereon be used for any purpose other than that of a private residence. (d) No building shall be erected on any part of the said property nor shall any alteration be made to the external appearance of any building erected thereon otherwise than in accordance with plans and specifications to be submitted to and approved by the Vendors Surveyor and until such approval shall have been obtained no building or alteration shall commence. The Purchasers shall pay to the said Surveyor a fee of Two pounds two shillings in respect of the plans and specifications of each building or alteration submitted for approval whether such plans and specifications are approved or not.*" Later restrictions include reference (in paragraph (f)) to "*the Vendors or the owners or occupiers for the time being of the remainder of the said larger piece of land or to any adjoining or neighbouring owner*" and (in paragraph (i)) to "*the Vendors and their successors in title owners for the time being of the part of the remainder of the said larger piece of land for the time being remaining unsold or otherwise undisposed of*". The applicants have expressly confirmed that their application relates solely to the restriction at paragraph (d) of the second schedule to the 1961 conveyance.
4. An approved publicity notice was delivered by hand on 6 May 2020 to the individual leasehold apartment owners, to 60 Kent Road (Maintenance) Ltd, the management company (whose members are the apartment leaseholders) which owns the freehold reversion to 60 Kent Road, and to the freehold owners of the mews house (as certified by

the Certificate of Compliance dated 16 June 2020). Only one notice of objection has been received. This was from the management company on 4 June 2020.

5. On 11 November 2020 the applicants filed submissions objecting to the management company's entitlement to the benefit of the relevant restriction. On 13 January 2021 the Tribunal (Mr Martin Rodger QC, Deputy Chamber President) admitted the maintenance company to oppose the application. The Tribunal was satisfied (1) that the maintenance company had the benefit of the restrictions in the second schedule to the 1961 conveyance, to the extent that they remained capable of being enforced, by virtue of the principle of annexation and (2) that the interests of justice required that the maintenance company should be admitted to oppose any application advanced on the basis that paragraph (d) of the second schedule to the 1961 conveyance was no longer capable of being enforced. The Tribunal directed that it would determine as a preliminary issue whether, as the applicants argued, the restriction in paragraph (d) of the second schedule to the 1961 conveyance was no longer capable of being enforced by reason of the deaths of the original vendors and was accordingly obsolete and should be discharged. The preliminary issue was to be determined on the basis of written representations only. Directions were given for the applicants to file and serve witness evidence, which they duly did in the form of a witness statement from Mr Savage, the first applicant, dated 3 February 2021. The objector was given permission to file submissions on the preliminary issue by no later than 5 March 2021. No such submissions have been served, whether by the due date or at all.

Representations

6. The evidence of Mr Savage establishes (by reference to photographs of graveyard memorials and to probate records) that all three vendors who joined in the conveyance of 60a dated 18 May 1961 have long since passed away. Mrs Margaret West Wood died on 17 March 1991. Mr Walter Alleyne Lewis Hill died on 2 February 1976. Mrs Marion Gwendoline Kyles died on 8 April 1987.
7. The applicants submit that, in contrast to the restriction in paragraph (a) of the second schedule to the 1961 conveyance, the restriction in paragraph (d) does not operate absolutely to prohibit the erection of any building, or any alteration of the external appearance of any building, but rather requires the submission to and the approval of plans and specifications by the vendors' surveyor together with the payment of a specified fee of two guineas. The covenant does not provide that the approval of any plans and specifications can be undertaken by the vendors' successors in title or the owners or occupiers for the time being of the land retained by the vendors following the 1961 conveyance or by any surveyor appointed by any such person or persons. The applicants say that this should be contrasted with the provisions of the restrictive covenants set out at paragraphs (f) and (i) of the second schedule to the 1961 conveyance. The applicants submit that the consequence of the deaths of all three of the vendors without any reservation to their successors in title or the owners or occupiers for the time being of the retained land of any power to approve any plans and specifications submitted for approval by the owners of 60a is that that particular restriction is discharged. As a consequence of that, the applicants say that the restriction is now obsolete and should be discharged accordingly.

8. The objector has submitted that the paragraph (d) restriction does not have a limited shelf life. Whilst it is not stated that the benefit of the restriction is to pass to the successors to the original vendors, it does not explicitly state that its benefit is to cease on the death of the last of the vendors. The motivation to preserve the site as it is is said to be as relevant today as it was in 1961. The repeated breaches of the restriction in extending, altering and developing 60a is said to be no precedent for the removal of the restriction; quite the opposite, which is why the maintenance company objects to the s. 84 application.

Determination

9. The Tribunal notes that this is not in terms an application to determine that the paragraph (d) restriction is no longer enforceable. By s. 84(2), the jurisdiction to do so is vested in the High Court and not in this Tribunal. There is a body of case law authority (discussed at paragraph 6-029 of *Preston & Newsom: Restrictive Covenants Affecting Freehold Land*, 11th edn. (2020)) to the effect that where there is a restriction against building or making alterations without the prior approval of plans or specifications, and the power of approval is no longer exercisable because the person with such power is no longer in existence, then the restriction automatically lapses. The alternative would be to hold that the restriction has become absolute. This latter alternative will generally be less likely to accord with the true underlying intention of the parties to the restriction than the former. However, in such a case, I see no reason why it should not be open to the Tribunal, if it is otherwise appropriate to do so, to determine that the restriction became obsolete when the person with the power of approval ceased to exist and to order the discharge of the restriction under s. 84(1)(a) accordingly. Authorities to this effect exist and are noted at paragraph 13-007 of *Preston & Newsom*.
10. In the present case, the power of approval was in terms vested in the Vendors' Surveyor. It was not vested in the Surveyor of the Vendors or their successors in title to the retained land, whether the whole or any part of it. This is significant in the context of a schedule of restrictions which, in other contexts, acknowledges the propriety of extending recognition to the interests of successors in title to the original vendors or other affected landowners or occupiers. It is also necessary to bear in mind the absolute nature of the restrictions in paragraphs (a) and (b), and the fixed fee of two guineas (with no allowance for the effects of inflation) payable to the vendors' surveyor. All of this, in my view, points to the restriction in paragraph (d) being time-limited to the lifetimes of the vendors. With the death of the last of the original vendors of 60a, the power to approve any plans and specifications lapsed; and with it the restriction itself became obsolete.
11. The Tribunal therefore determines that the restriction in paragraph (d) of the second schedule to the 1961 conveyance is no longer capable of being enforced by reason of the deaths of all three of the original vendors. It is accordingly obsolete and should be discharged under s. 84(1)(a) of the 1925 Act.

Date: 26 April 2021

David R. Hodge

His Honour Judge Hodge QC

Sitting as a Judge of the Upper Tribunal (Lands Chamber)