UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 342 (LC)

UTLC No: LC-2021-418

Derby Civil Justice Centre
St Mary's Gate, Derby

19 December 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE – garden of house in residential suburb – "one house" restriction – expired outline planning permission for second house – whether practical benefits of substantial value or advantage – s84(1)(aa) Law of Property Act 1925 – application refused

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

BETWEEN:

JOCELYN MAY SUTTON

Applicant

-and-

STEVEN AND HELEN BAINES

Objectors

Re: Land at 39 Muswell Road
Mackworth
Derby
DE22 4HN

Mr Peter D McCrea FRICS FCIArb

Hearing date: 6 December 2022

The applicant and objectors represented themselves

The following cases are referred to in this decision:

Re Bass Ltd's Application (1973) 26 P&CR 156

Re Snooks' Application [2014] UKUT 623 (LC)

Introduction

1. This is an application by Mrs Jocelyn Sutton, the owner of 39 Muswell Road, Mackworth, Derby. The property has a large side garden ('the application land') upon which Mrs Sutton wishes to build a second house. She is prevented from doing so by a "one house" restriction contained in a 1970 conveyance, and so applies to the Tribunal to have the restriction discharged.

2. Mrs Sutton's neighbours, Mr Steven and Mrs Helen Baines, live at 5 Putney Close, Mackworth. Their garden adjoins the application land, and they object to the application owing to the effect it would have on their property.

3. I heard the application at South Derbyshire Justice Centre on the morning of 6 December 2022. Both the applicant and the objectors represented themselves. The applicant relied on expert evidence from Mr Geoff Ruddle, of local estate agents Everington and Ruddle, and the objectors on expert evidence from Mr Malcolm Kempton FRICS, of Kempton Carr Croft based in Maidenhead. That afternoon, accompanied by the parties, I inspected the application land, and viewed it from Mr and Mrs Baines' garden, and from their ground and first floor rooms.

Facts

4. Mackworth is a suburb on the west outskirts of Derby, some two miles from the city centre. Originally a local authority housing estate, much of Mackworth is now in owner-occupation through the Right-to-Buy scheme. In the 1950's the former Borough Council disposed of a series of plots in the south-west corner of Mackworth on long-term building leases, with each lease benefitting from mutual covenants.

5. Plots 186 and 187 on the south side of Muswell Road were let together to Mr John Wagg under a lease dated 29 October 1958. While this was a double plot, Mr Wagg built one house – now known as 39 Muswell Road – the majority of which was on plot 187, but part of which, together with an outbuilding, was on plot 186.

The restriction

6. Two decades later, Mr Wagg bought out the freehold interest from the Council. The relevant restriction was imposed by a conveyance dated 31 December 1970 under which Mr Wagg covenanted:

> '3. For the benefit and protection of the property now or formerly belonging to the Corporation… or any part or parts thereof and so that the benefit of this covenant shall accordingly be annexed to and run with the said property or any part or parts thereof the Purchaser hereby covenants with the Corporation and separately with the person or persons who at the date of this conveyance is or are the estate owner or estate owners of any part of the [remainder of the land comprising the building scheme] and with each of such persons

so as to bind the property hereby conveyed and every part thereof for all time and the owner or occupiers thereof for the time being that the Purchaser and all persons deriving title under him (including occupiers) will at all times hereafter perform and observe the stipulations contained in the First Schedule hereto…'

7. The First Schedule to the conveyance contained the following restrictions:

> '(a) Not to use the said property for any purpose other than use as a single private dwellinghouse'

The application

8. The application is to discharge the restriction, relying on ground (aa) of Section 84(1) of the Law of Property Act 1925. There is no application to modify the restriction.

9. In summary, ground (aa) is satisfied where the restriction impedes some reasonable use of the land for public or private purposes, and the Tribunal is satisfied that, in so doing, the restriction secures "no practical benefits of substantial value or advantage" to the person with the benefit of the restriction, or the restriction is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for any loss or disadvantage which that beneficiary of the restriction will suffer from the proposed discharge or modification.

10. In determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal is required to take into account the statutory development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area. It must also have regard to the period at which and context in which the restriction was imposed and any other material circumstances.

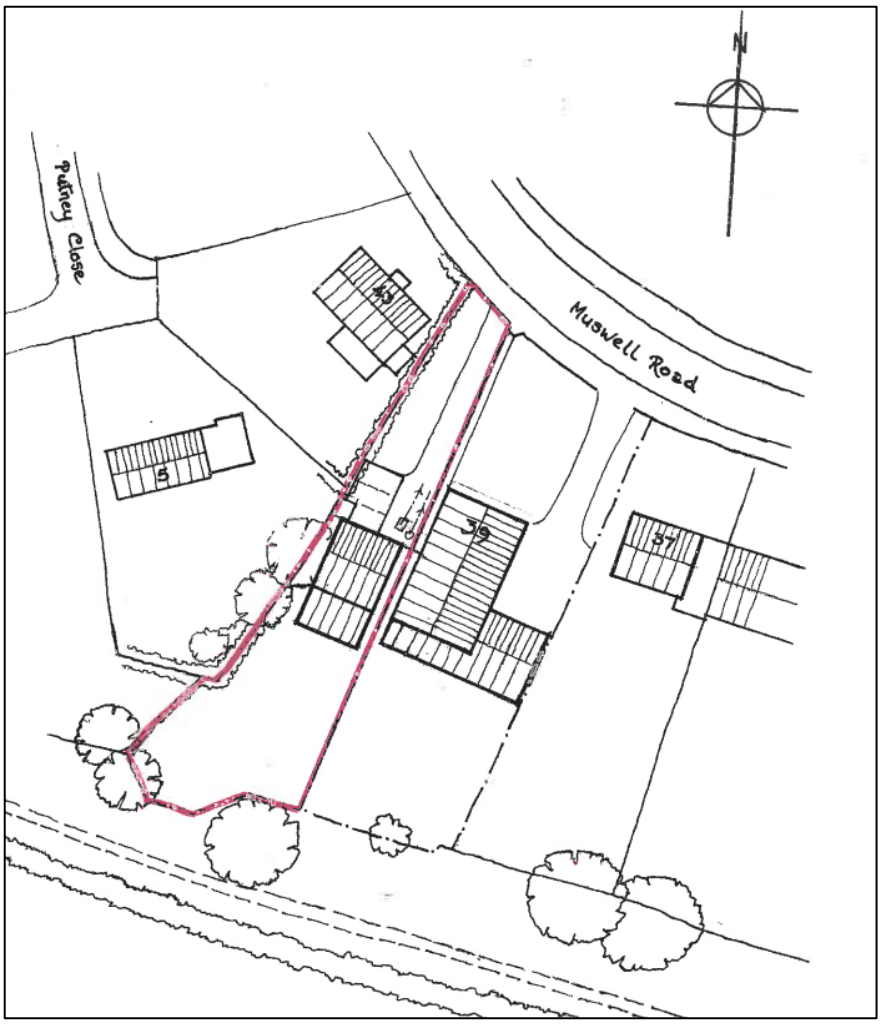
Evidence

11. Mrs Sutton said that she bought 39 Muswell Road in April 2010. She extended it upwards and refurbished it to provide long term placements for people with learning disabilities. She had planned to use the application land as a garden, seating area and allotment, but her builder left before completing the build. The sale of the application land seemed to be good way of raising the funds to complete the refurbishment of her house.

12. Today, the outbuilding has been demolished and the application land, which has been fenced off from Mrs Sutton's garden, is simply an overgrown site.

13. In November 2014, Mrs Sutton's architect obtained outline planning permission from Derby City Council (DER/08/14/011081/PRI) for the erection of a single house on the application land. The development was to be in accordance with a plan which showed the house being located further back into the site than number 39. Indicative plans suggested a two storey, three bedroomed property. It is shown on the plan below, upon which the application land

is edged, Mrs Sutton's house is to the east, and the objectors' property, 5 Putney Close, adjoins the rear part of the application land to the west.



14. The outline consent was conditional upon an application for reserved matters being submitted within three years, and development being commenced within two years of the approval of the last reserved matter. This was not done, and the consent therefore lapsed.

15. Mrs Sutton has now proposed an alternative development, located further to the front of the site, the front elevation of which would be in line with that of Number 39.

16. Mrs Sutton relied upon evidence from Mr Geoff Ruddle, a local estate agent. In Mr Ruddle's view, outlined in his brief written report and his oral evidence, the value of 5 Putney Close, which he put at £315,000, 'would not in any way be impacted by the erection of a single dwelling' on the application land, subject to the new dwelling not being [taller] than 39 Muswell Road, and not having more windows overlooking 5 Putney Close than those of 39 (currently two first-floor opaque glazed).

17. Mr and Mrs Baines detailed a list of ways in which they felt the proposed discharge of the restriction would adversely affect their property, which largely focussed on the effect that

the development would have on their privacy in both their garden and to the rear of their house, and the effect of feeling 'hemmed in'. Their evidence was plainly heartfelt and I accept that they have real concerns about the application.

18. They relied on the expert of evidence of Mr Malcolm Kempton FRICS. Mr Kempton is not local to the area (he recently gave evidence to the Tribunal as an expert on office values in the Thames Valley), but relying on his discussions with local agents, he valued the objectors' property at £290,000. Later, in the valuers' statement of agreed facts, he agreed Mr Ruddle's valuation at £315,000.

19. As for the effect on the objectors' property of the restriction being discharged, in Mr Kempton's view it was not possible to assess the diminution in value because the actual development which may or may not take place was unknown. Based on the information before him, the diminution in value could easily be as much as 20%-25% of the overall value, but could be more depending on the type of development finally constructed.

20. Mr Ruddle maintained his opinion during his oral evidence, but candidly accepted that he had not dealt with or given evidence in a covenant case in the past, nor was he familiar with section 84 of the Act. To his credit, he accepted that Mr Kempton's view, outlined in the preceding paragraph, had force.

Discussion

21. Applications under ground (aa) are often formulated around the questions posed in *Re Bass Ltd's Application* (1973) 26 P&CR 156. Whilst no substitute for the statute, it is convenient to deal with the application by considering those questions.

22. The first question is whether the proposed 'user' (using the term in the Act, but which refers to use rather than the person using) is reasonable, which I have assumed is the construction of a house on the application land. While there is no current detailed planning permission, there is an expired outline consent. And the original building scheme envisaged one house per plot, although Mr Wagg bought two plots as one. In answering the first question in *Re Bass* in its widest sense, the erection of a house in a residential area seems to me to be a reasonable one.

23. The second question is whether the restriction impedes that user; it is common ground that it does.

24. The third question is whether the restriction secures to the objectors practical benefits. In my view it plainly does. While many of the things that the objectors complain about could equally occur without the restriction being breached, for instance a very large extension of Mrs Sutton's existing house, that seems to me to be improbable. It is clearly a practical benefit to the objectors to be able to prevent a second house being built nearer to their own property.

25. The next question is whether those practical benefits are of substantial value or advantage. Here the application runs into difficulties. The problem for Mrs Sutton is that she has applied for a blanket discharge. As the experts now agree, that makes it difficult to assess the effect on the objector's property. There is no current planning permission, and by discharging the restriction the Tribunal would leave the objectors liable to whatever planning permission Mrs Sutton, or anyone to whom she sold the land, could obtain. That might be something along the lines of the previous outline consent, or the later proposal. But it might equally be for something else. It follows that the issue of substantiality, which the applicant must prove, has not been made out.

26. That being the case, the application must be refused.

27. At the hearing, Mrs Baines submitted that I should discourage any further applications to the Tribunal, if Mrs Sutton were to reapply with firmer proposals and a valid planning permission, as the tribunal did in *Re Snooks' Application* [2014] UKUT 623 (LC) at [38].

28. Property disputes between neighbours are invariably stressful for the parties, and whilst I acknowledge and understand the objectors' desire to avoid further litigation, I do not consider it appropriate to close the door to any further applications. In *Re Snook*, the application was also unsuccessful on other grounds, which is not the case here. However, that should not be construed as even a provisional view as to any future application which would, as always, be determined on its merits.

Disposal

29. The application is refused. This decision is final on all matters except the costs of the application.

30. As paragraph 15.11 of the Tribunal's Practice Directions of 19 October 2020 indicates, the objectors will normally be awarded their costs, unless they have acted unreasonably. If the issue of costs cannot be agreed between the parties, they may make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

P D McCrea FRICS FCIArb

19 December 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the

Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.