UPPER TRIBUNAL (LANDS CHAMBER)

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Location: Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – covenants restricting use to that of private dwelling house – application for use for holiday lettings – whether covenants secure practical benefits of substantial value or advantage – s.84(1)(aa) and (c), Law of Property Act 1925 – application dismissed

AN APPLICATION UNDER SECTION 84(1) OF THE LAW OF PROPERTY ACT 1925

BETWEEN:

PAUL GRAHAM COOK **Applicant**

-and-

JOHN STOVE LAMBOURN (1) **Respondents**

CHUN LAMBOURN (2)

Re: Turn O' Tide,
2 Glenway
Adit Lane,
Newlyn,
Cornwall,
TR18 5DY

Mr Mark Higgin FRICS

Heard on: 22 February 2022

Decision Date: 21 April 2022

John Sharples instructed by Stephens Scown, for the applicant
The respondent in person

The following cases are referred to in this decision:

Martin v Lipton [2020] UKUT 0008 (LC)

Introduction

1. Mr Paul Cook ("the applicant") is the freehold owner of Turn O' Tide, ("the property") a four bedroom bungalow in Glenway, Newlyn, Cornwall. He acquired the property on 26 July 2019 intending to use it as a second home, for holiday lettings and ultimately for his retirement.

2. Mr John Lambourn and his wife Chun "(the objectors") are the freehold registered owners of Glenway House, 4 Glenway, one of five houses including the property, which together are located on a small cul-de-sac about 0.35 miles south of Newlyn Town Centre.

3. Glenway House benefits from a covenant which was contained in a transfer of the property (together with other land) dated 28 April 1964. The covenant provides that "no building erected on the said property should be used for any purpose other than that of a private dwelling house". It is not necessary for me to recount the history of the covenants that relate to Glenway but I have noted that the Tribunal has previously considered whether Mr Peter Tonkin and Mr Peter Egleton who own 1 and 2 Glenway respectively, had the benefit of the covenant. It was decided that they did not and therefore only Mr and Mrs Lambourn were admitted as objectors.

4. The applicant applied to the Tribunal on 24 November 2020 for the modification of the restrictions on grounds (aa) and (c) of s.84(1) of the Law of Property Act 1925. The modification sought was to modify the existing covenant by adding the following:

> "save that this covenant should not prohibit the use of the property for the purpose of holiday lets"

or alternatively:

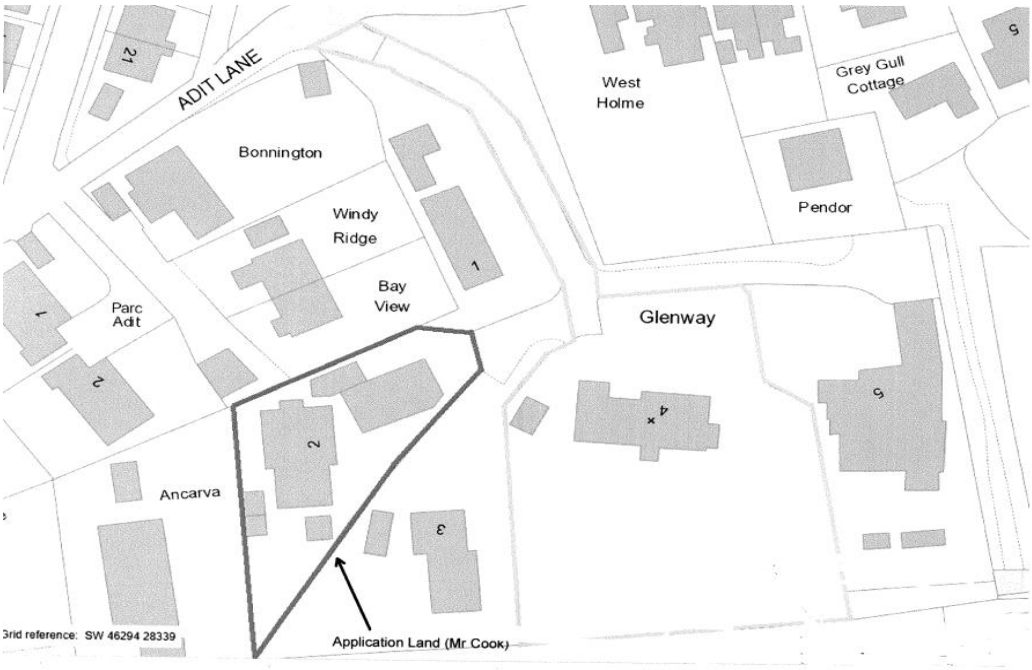
> "save that this covenant shall not prohibit the use of the property for the purpose of holiday lets for up to [xx] days/weeks/months in each year. Or in such other form and on such other terms as the Tribunal may think fit".

5. The applicant was represented at the hearing by Mr John Sharples who called Mr Cook as a witness of fact. He also called Mr Charles Huntington Whitely FRICS as an expert witness. The respondent made representations on behalf of himself and his wife and called Peter Egleton and Mr Nigel Davis as witnesses of fact. Mr Peter Tonkin provided a witness statement but was not at the hearing. I am grateful to counsel, the respondent, and witnesses for their assistance.

6. I inspected the property on the morning of 3 February 2022. I saw the internal parts, the swimming pool and sunroom. I walked around the gardens and I was able to observe the relationship between the property and the other houses in Glenway. I then visited Glenway House where Mr Lambourn showed me the interior of his house and the surrounding gardens.

The Factual Background

7. Newlyn is a seaside town and fishing port situated on Mounts Bay. The town is joined to Penzance and together with Longrock effectively forms a conurbation that stretches along the southern coast of Cornwall for approximately 3.75 miles. The property is situated on a small cul-de-sac which in layout is akin to an inverted 'T'. Access to Glenway is from Adit Lane, a narrow road linking the upper parts of Chywoone Hill with the harbour. The plan below shows the property (outlined with a black line) occupying a site which is approximately triangular in shape. It is not possible to discern the topography from the plan but there is a steep uphill gradient from the front to the rear. The bungalow containing the living accommodation is situated at the upper most part of the site and has views over Newlyn towards Mounts Bay. It is annotated on the plan with the number '2'. The rear garden is mostly laid to lawn and contains a storage shed and a detached UPVC framed sunroom. A large paved patio adjoins the front of the bungalow and it too has views over the surrounding area. The lower part of the site contains an indoor swimming pool under a pitched, trussed roof, and the pool building is equipped with sliding glass doors opening onto a small patio area. The remainder of the site is set out for parking and can accommodate four cars.



8. Internally, there are four bedrooms, a large kitchen/dining area and lounge. In addition, the property benefits from a reduced height basement store and ancillary accommodation associated with the pool. In its current configuration the property sleeps seven.

9. Glenway House is a large, detached house arranged over basement, ground, first and second floor levels. The living accommodation is on the ground and first floors with the second floor providing attic storerooms. It is shown on the plan marked with the number '4'. It too occupies a sloping site and is situated towards the front of its plot, facing north and aligned at a right angle to the entrance to the property.

The Statutory Provisions

10. Section 84(1) of the Law of Property Act 1925 gives the Upper Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The conditions relied on by the applicants in this case are (aa) and (c).

11. Condition (aa) of section 84(1) is satisfied where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures "no practical benefits of substantial value or advantage" to the person with the benefit of the restriction, or that it is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.

12. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to take into account "the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

13. Where condition (c) is relied on, the Tribunal may discharge or modify a restriction if it is satisfied that doing so will not injure the persons entitled to the benefit of the restriction. The Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it. If the applicant agrees, the Tribunal may also impose some additional restriction on the land at the same time as discharging the original restriction.

The Application

14. The application was made primarily under ground (aa) but also under ground (c). The applicants' stated objective was to modify the covenant to allow the use of the property for holiday lettings. Mr and Mrs Lambourn do not agree that the proposed use is reasonable, but it is common ground that the proposed use would be impeded by the Covenant unless it is modified.

15. The issues in the reference are therefore whether in impeding the proposed use of the property for holiday lettings, the Covenant secures for Mr and Mrs Lambourn some "practical benefit of substantial value or advantage" (ground aa) or, alternatively, whether any injury would be caused to the objectors if the proposed modification was made (ground (c)).

The Objections

16. Mr and Mrs Lambourn had set out in their response and statements a comprehensive list of concerns including that the modification would diminish Glenway as a 'natural green haven', cause loss of privacy, lead to an increase in traffic, undermine security at Glenway House, destroy the benefit of the scheme created by the covenant, hamper their role as 'guardians of the covenant', reduce the stock of housing in the locality and extinguish a settled community. Mr and Mrs Lambourn also questioned whether modifying the covenant would create an unfavourable precedent and whether they could refuse to be compensated. I will examine each of these aspects in detail when I consider the factual and expert evidence.

Evidence of the Applicants

17. Mr Cook purchased the property in July 2019 intending to use it as a second home but also to let it on a commercial basis for holidays. Before completing the purchase, he explained his plans to his solicitor, but he was not advised at that time that operating the property as a holiday letting business would be in breach of the covenant. Had he known of the covenant he said, he would not have made the acquisition. After carrying out some minor improvements he started to let the property at the end of December 2019 and in January 2020 Mr and Mrs Lambourn advised him that by using the property in that way he was in breach of the covenant which they were entitled to enforce.

18. A formal letter of claim was received from Mr and Mrs Lambourn's solicitor in February 2020, setting out their objections to Mr Cook's use of the property. Mr Cook then took immediate steps to cancel seventeen outstanding bookings and ceased to market the property for future lettings. In an attempt to resolve the dispute, he undertook give Mr and Mrs Lambourn seven days' notice of any bookings but in fact, since that time, the property has only been used by friends and family both with and without Mr Cook being present. None of these stays involved payment and no complaints were received from Mr and Mrs Lambourn.

19. Mr Cook regarded the use of the property for holiday lets as a reasonable one, there being a number of other properties in the immediate vicinity which were similarly used. In his view Newlyn and Penzance were popular holiday destinations with both indigenous and foreign tourists. He had carried out research into the number of properties available for holiday lettings in Newlyn by searching on the three websites most commonly used for holiday bookings in the town. According to Mr Cook this showed that there were 165 properties in the vicinity of the property available for holiday lettings. This number did not include those used as second homes which were not let to the public. Print outs of web pages were produced to support these claims but did not show the complete list of properties. At the hearing Mr Cook admitted that maps from these web sites adduced as evidence showed far

fewer than 165 properties, and none near Glenway. The majority appeared to be located close to the harbour and town centre. Part of Mr Cook's case was that the use of local housing had altered greatly since the covenant was put in place. He said that in 1964 almost all properties were owner-occupied but now a substantial proportion were used as holiday home or for holiday lettings. Details were provided of development that had surrounded Glenway over the same period, but nothing was adduced that substantiated the argument that holiday letting properties were prevalent in the environs of Glenway.

20. When formulating his plans for the property he had engaged Ocean Holidays as his letting agents and they conducted checks on potential visitors including examination of reviews of guests on other platforms. They also prohibited stag or hen parties with a view to restricting the clientele to small family groups. Mr Cook said that the level of rent sought, and the size of the property would naturally eliminate the types of guest who would perhaps be unruly.

21. Mr Cook did not believe that use of the property by holidaymakers would have any practical, measurable impact on Glenway House. He did not consider that holidaymakers would be noticeably noisier than owner-occupiers/tenants and their guests. He said that in his experience this type of guest tend to spend more time away from the house, enjoying the attractions of the local area, than owner-occupiers. He thought that the distance between the two houses, and the large numbers of trees and shrubs would mean that it would not be possible to hear, see, or smell whatever might be going on at one from the other. He concluded that 'any difference in behaviour' would not impact on Glenway House.

Evidence of the Objectors

22. Mr Lambourn purchased Glenway House in 1997. He explained that in becoming the registered owner he was subject to the restrictions in the 1961 covenant that the houses in Glenway could only be used as private dwellings. Mr Lambourn said that in 1964 part of Glenway which included the property was sold and the restrictions contained in the 1961 covenant were incorporated into a new covenant. He considered himself bound by the 1961 covenant and empowered to enforce the 1964 covenant. He objected to the removal or modification of what he described as his "enforcement powers".

23. Mr Lambourn's views were strongly held and he found himself in the position of having to represent both himself and his neighbours against Mr Cook's proposed modifications which he characterised as "a selfish attack on our community and way of life which will only cause disturbance and nuisance to us for the rest of our lives". In his witness statement Mr Lambourn made a series of unfounded allegations about Mr Cook's motives in buying the property. They are not pertinent to his case and there is no need for me to dwell on them any further.

24. Mr Lambourn was cognizant of grounds (aa) and (c) and his view was that use of the property for holiday lets was not reasonable and the covenant did not therefore impede a reasonable user and considered that his own objection demonstrated that his position was correct.

25. Mr Lambourn's case under ground (c) was more extensive. The proposed modification would, he considered, cause injury by replacing harmony with conflict, imposing stress worry and anxiety, engendering a sense of helplessness, and causing a loss of neighbours of 20%, all resulting in a loss of community and positive relationships that arise from it. It would also give rise to additional management and extra monitoring.

26. Amongst his concerns, he first emphasised the loss of housing stock arising from properties being used as holiday lets, second homes and Airbnbs as a particular problem. He colourfully described the process as "this scourge Cornwall is experiencing". At the hearing I asked him for evidence to demonstrate that the housing stock in Newlyn had been depleted by sales to those using properties as second homes or holiday lets. He was unable to provide any but thought that holiday lets amounted to about 20% of the available stock.

27. The second of Mr Lambourn's concerns related to security. He provided scant details of the risks that he perceived would arise were the covenant to be modified. At the hearing he said it might be necessary to install a gate at the entrance to Glenway. However, he did not elaborate on exactly how security in Glenway would be compromised by the use of properties for holiday letting. At present there are no impediments to access at Glenway.

28. Mr Lambourn also identified noise and disturbance as activities that the covenant protects against. He was not specific as to the nature of the activity that might transpire or why it was more likely to occur as the property was used as a holiday let. The essence of his objection was pithily expressed as "everyone in Cornwall knows what an upset holiday let next door is".

29. The final aspect of Mr Lambourn's many objections was that modifying the covenant would render it open to further applications by creating a precedent effect which might ultimately result in more development in Glenway.

30. Mr Peter Egleton, owner of 3 Glenway also gave evidence at the hearing. His house occupies a triangular shaped site between the property and Glenway House. He explained that he had inherited his house from his uncle in 2015. He benefited from the covenant indirectly and supported Mr and Mrs Lambourn's travails to prevent its modification. Mr Egleton is a builder by occupation and since acquiring his property had renovated it on an intermittent basis, living in it for a few weeks at a time and then returning to his home and business in the London area. In his witness statement Mr Egleton remarked that he had seen at first hand all of the problems that living next to a holiday let can bring including uncontrolled noisy children, dog fouling on his property and foul-mouthed adults arguing in the garden. At the hearing he denied that he had exaggerated the severity of these issues but confirmed that he had not sought to complain to Mr Cook or to the letting agents.

31. Mr Nigel Davis who is a Penzance Town Councillor for the ward of Newlyn, Mousehole and Paul, also gave evidence on behalf of the objectors. Mr Davis's evidence was wholly concerned with the loss of housing stock to holiday lets, second homes and Airbnbs. He explained that traditionally there had been sufficient housing to meet local needs. In Mousehole, which is a little further south than Newlyn, he considered that the village was almost entirely used for holiday homes in one form or another. He said there was no

community to speak of and it was over-crowded in summer with short stay visitors. It the winter it is deserted. Mr Davis said that in terms of addressing the housing shortage and halting the disintegration of communities 'every house lost to holiday lets is a really significant setback'.

32. Mr Davis thought that there were about 15,000 holiday letting properties in Cornwall and towns such as St Ives had planning policies preventing new-build properties being used as holiday lets. However, nothing similar had been put in place in Newlyn. He thought that there were about 3,000 households in Newlyn, and he considered Mr Lambourn's reckoning of about 20% being holiday lets or second homes to be a fair summation of the situation in the town. It was unfortunate that given his position, he was not in possession of better data.

33. Mr Peter Tonkin is the owner of 1 Glenway. He was unable to travel to London for the hearing and in the circumstances, I asked Mr Lambourn to read out his statement. Mr Tonkin has lived at 1 Glenway since 1993 and explained that he enjoyed the tranquillity of sitting on his patio next to the pond at the front of his house. The patio is separated from the roadway by a low granite wall and he is not bothered by the occasional resident neighbour passing by. His concern was that this peaceful and neighbourly environment would be diminished by 'rowdy holiday-making strangers passing up and down the drive just a few feet from me'.

Expert Evidence for the Applicants

34. Mr Charles Huntington-Whitely is a director in the Exeter office of Strutt and Parker and specialises in agricultural and residential properties. He has experience of providing advice in relation to restrictive covenants and especially their modification or discharge.

35. Mr Huntington-Whitely began by addressing the question of whether the proposed use was reasonable. He noted that many properties in Newlyn were used as holiday lets and concluded that the question could be answered in the affirmative. He dealt with the related question of whether the covenant impeded the use summarily, concluding that holiday lettings were contrary to the use of the property as a private dwelling, and therefore the proposed use was impeded.

36. Mr Huntington-Whitely then turned to an examination of whether impeding the proposed use secured practical benefits to the objectors. He was mindful of Mr Lambourn's grounds of objection in his statement of 31 October 2021 which I set out in paragraph 16 above.

37. He began by considering the proximity of the property to Glenway House. He observed that they were about 25m apart at their closest points and that the property is elevated above Glenway House. He noted that the orientation of Glenway House was towards the north with views to the northeast over Newlyn. From his inspection he noted that the property could only be seen from Glenway House from a first floor bedroom window and a small window in the attic storeroom.

38. Mr Huntington-Whitely also observed that the property was visible from the garden of Glenway House but at the time of his visit was obscured by vegetation growing on the boundary between Glenway House and No.3 Glenway. He thought that the time of year when the trees and shrubs would be in full leaf and the property most obscured, would coincide with the main holiday letting months.

39. On the basis of these observation Mr Huntington-Whitely concluded that there would be no loss of practical benefits in relation to the view, peace and quiet, loss of light and character of the neighbourhood should the covenant be modified in the sense sought.

40. At the hearing I asked Mr Huntington-Whitely how he had reached his conclusions as he had adduced no evidence or reasoning to support his views. His response was that the matter was highly subjective and that his findings were based on his inspection.

41. Surprisingly, having already considered 'peace and quiet' and concluded it would be unaffected, Mr Huntington-Whitely then embarked on an analysis of the noise that might emanate from the property were it to be used for a holiday letting. He said that he did not consider the fear that holiday makers might be noisier that permanent residents as a reasonable anxiety. His rationale for this stance was that a permanently resident family could be noisy, and it did not logically follow that holiday makers would be noisier. Paradoxically, he then went on to conclude that it was possible that holiday makers might make more noise than a permanent family and that therefore a very marginal loss of practical benefit for Glenway House might arise if the covenant was modified in the manner applied for.

42. He also believed that there would be no increase in what he intriguingly termed 'unnatural smells' emanating from the property. At the hearing he explained that he had cooking smells from barbeques in mind.

43. Mr Huntington-Whitely then turned his attention to traffic movements, namely whether the use of the property for holiday lettings would result in an increase. He thought it was unlikely that more than seven people would stay at the property because there was insufficient sitting and eating space to accommodate more than this number. Similarly, it was possible that a family of seven might want to live there permanently and equally plausible that it could be attractive to a smaller family who would use any spare bedrooms for guests.

44. Mr Huntington-Whitely concluded that it would be likely that a residential occupier would have two cars and that the same would be true of a holiday maker if the property was fully occupied. The judgment to be made was therefore whether in consequence of modifying the covenant higher numbers of traffic movement would result. He concluded that they might be a marginal increase, but such additional movements would have no effect on the enjoyment and the amenity of Glenway House. He did not explain how he had arrived at this position.

45. Mr Huntington-Whitely also confirmed that he did not agree with Mr Lambourn's assertion that a 'stream of unannounced, unchecked strangers' entering Glenway presented a security risk. He also rejected Mr Lambourn's claim that holiday lets at the property would be

detrimental to Glenway as a green and natural haven away from the centre of Newlyn. He noted that no development or alterations were envisaged at the property and therefore views to it or from it would be unchanged. His conclusion about practical benefits was that the covenant did secure very marginal benefits, but these related solely to the removal of worry about additional traffic and noise.

46. Mr Huntington-Whitely briefly dealt with the question of whether the proposed use was contrary to the public interest although the relevant question is whether, by impeding the proposed use, the restriction itself is contrary to the public interest. He was aware that the use of residential properties for holiday lettings was contentious, opponents arguing that it reduced the supply of properties available to local people and inflated prices to unaffordable levels. He explained that his understanding was that for a proposed use to be contrary to the public interest, it needed to be so important and immediate that it would cause serious interference to those benefiting to the covenant. Having considered the circumstances at Glenway House, the use of the property for holiday lettings could in his view, in no way be seen as being so important that it would cause interference to be judged as being against the public interest.

47. Having exhausted the considerations under ground (aa) Mr Huntington-Whitely went on to consider whether ground (c) was engaged, in other words whether the modification sought would injure the objector. Mr Huntington-Whitely explained that injury in this context has potential for a wide meaning. He concluded that the only possible injury, in addition to the points he had already raised about substantial value or advantage, could be the 'thin end of the wedge' argument. He noted that Mr Lambourn had already referred to this argument in his witness statement where he contemplated the consequences of further holiday letting activity in Glenway. Mr Huntington-Whitely was unable to be definitive, but it was his belief that modification of the existing covenant at the property would not set a precedent for the modification of the covenants binding the other properties in Glenway so as to give rise to further holiday lettings. He offered no insight in to how he had arrived at this view.

48. The final aspect considered by Mr Huntington-Whitely was whether the modification of the covenant on the property would affect the market value of Glenway House. He approached this aspect from two directions. Firstly, from the prospective of a hypothetical sale and purchase. Putting himself in the shoes of the willing buyer he believed it would be unlikely that the benefit of the covenant would be known and in all probability the assumption would be made that no covenant existed given that such restrictions are unusual and that holiday letting activities is common place in both Newlyn and Cornwall. He went on to consider whether the buyer, on discovering that there was an existing restrictive covenant in place which limited the usage of the neighbouring property, would consider that Glenway House was more valuable as a result. Mr Huntington-Whitely's conclusion was that the buyer would consider the advantages and disadvantages associated with the covenant and consequently would conclude that the value was not enhanced.

49. The second direction from which Mr Huntington-Whitely approached this issue was on the basis of his knowledge and experience. He explained that he had valued houses in popular holiday destinations throughout Devon and Cornwall and occasionally such houses had the benefit of a restrictive covenant. Whilst acknowledging that each case needed to be considered on its own characteristics his view was that the market value of a property that

benefited from a restrictive covenant in the form found at Glenway House was no different in value to one without the covenant except in exceptional circumstances. He did not explain what he considered to be exceptional circumstances but did say that those pertaining to Glenway House could not be considered as such.

Discussion and Determination

50. I have no doubt that Mr Lambourn is sincere in his belief that the level of second home ownership and holiday lettings are problematic in Cornwall. The evidence produced was anecdotal and the best I could discern from it was that as much as 20% of the total housing stock in Newlyn was used for purposes other than family living. It could be said, and indeed was said by Mr Sharples, that in this particular context the loss of one further unit would be immaterial. I am sure that this is true of Newlyn as a whole but in relation to the residents of Glenway it clearly represents a more alarming proposition. When I visited Glenway I was struck by its self-contained nature. From Adit Lane it is difficult to see into and once inside it has the feeling of an enclave. Compared to other parts of Newlyn where there is a very dense pattern of development dating from Victorian times, Glenway is verdant, spacious, and quieter. In those circumstances the transition of one house to a different form of occupation involving a loss of permanent occupants would be more noticeable than in other parts of the town.

51. That is not to say that change is not on the horizon, I understand that the remaining occupant of No.5 is very elderly and it would appear that Mr Egleton will be a permanent resident at some point in the future. The loss of the sense of community referred to by Mr Lambourn is more likely to occur when the occupants of one of the five properties in Glenway change every couple of weeks rather than after years or even decades as is the case at the moment.

52. I do not share Mr Lambourn's view that additional traffic will be a problem. There is no reason to conclude that holiday makers will undertake more journeys than residents. Similarly, I do not believe his concerns over security to be well founded. It is improbable that holiday makers would rent a house in Newlyn with a view to indulging in petty crime and equally unlikely that their presence would encourage others to do likewise.

53. Mr Sharples said that Mr Lambourn's claim that modification of the covenant would harm the environment of Glenway was not understood or made out. It is self-evident that the physical environment would be unaltered since no development was planned but Mr Lambourn's reference was intended in a wider sense and included matters such as seclusion, privacy and self-containment. Insofar as these constitute the environment, it is not unreasonable to conclude that they will be impacted by modification of the covenant.

54. Arguments about the setting of unfavourable precedents or 'the thin end of the wedge' are often advanced by objectors in cases involving the modification or discharge of restrictive covenants. Mr Lambourn believed that modification would make it more likely that other owners could successfully apply to modify the covenant to permit holiday lettings. However, irrespective of the result of this application the restriction would continue to bind every other house in Glenway and would continue to bind the property itself in its modified format.

55. In Martin v Lipton [2020] UKUT 0008 (LC) at [72], Deputy President of the Tribunal, Martin Rodger QC, said:

> "Applications of this type are fact sensitive, and it cannot be assumed that the outcome of one case will be mirrored in the outcome of a different application, even one seeking a very similar modification on the same Estate".

56. That is not to say that were the covenant to be modified it would not make it more likely that another application might succeed. On the facts of this case, where the arguments in favour of modification might apply equally to any of the five properties in Glenway it seems to me that were this application successful then the prospects for additional applications to succeed are likely to be improved. In this regard, Mr Lambourn is therefore correct.

57. I have some doubts about Mr Huntington-Whitley's conclusion about the effect that modification of the covenant would have on the value of Glenway House. I readily acknowledge his long experience and his view that holiday letting properties are so commonplace in Cornwall that generally there is no value implication if a neighbouring property is so used. However, my view is that in the circumstances at Glenway, the impact would be more profound. In making this comment I am conscious that the property and Glenway House are not immediately adjacent to one another. However, they are close enough that sound from the pool or patio for instance, would easily be heard in the garden of Glenway House.

58. In my judgment there is a significant prospect that the presence of holiday makers will give rise to disputes in Glenway. Noise from the pool, cooking smells from barbeques in the garden or on the patio, and inconsiderate parking are all likely to be more commonplace when the property is let on a short-term basis. Holiday makers are less likely to be interested in cultivating a mutually beneficial relationship than permanent residents although it would be wrong to tar them all with the same inconsiderate brush. However, any disruption will be wearisome when experienced on a regular basis and with a constantly changing cast of visitors more likely to occur than with permanent residents. Mr Cook is prepared for the Tribunal to impose such conditions as it sees fit if it is minded to modify the covenant and I have no doubts about his willingness to be a good neighbour. Unfortunately, for most of the time, he will be an absent neighbour and while he may be prepared to pick and choose who he lets to, his successors may not exercise the same care. A modification that stipulated which types of holiday makers would be permitted to stay in the property would, in my view, be unworkable.

59. I have reached the conclusion that the covenant in its present form eliminates the uncertainty about what might be permitted in the future and provides assurance to Mr and Mrs Lambourn that the way in which Glenway currently functions will be preserved. It is clear to me that modification of the covenant in the way sought by Mr Cook will result in a burden on the very person it was intended to benefit. The imposition of what amounts to a business use on a residential setting will erode the attributes of Glenway that are valued and enjoyed by Mr and Mrs Lambourn and the other owners. These include the sense of tranquillity, privacy, freedom from nuisance and the sense of certainty that all the houses will continue to be occupied as private dwellings. I take the view that the

practical benefits conferred by the covenant are of substantial advantage and the requirements of section 84(1)(aa) are not satisfied. For the same reasons I am satisfied that the modification would cause injury to those entitled to the benefit of the restriction and that ground (c) is not made out. I therefore refuse to grant the modification.

Mark Higgin FRICS

Member

Upper Tribunal (Lands Chamber)

21 April 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.