[2020] UKUT 171 (LC)

Sheppard v Martin Grant Holdings Ltd and another

Upper Tribunal (Lands Chamber)

Peter McCrea FRICS

12 June 2020

Property – Restrictive covenant – Modification – house on 1980's estate – planning permission to demolish garage and build second house on plot – parties agreeing no injury under ground (c) – assessment of sum to reflect diminution in price originally paid because of inclusion of restrictions - sub-para (ii) of Section 84(1) of Law of Property Act 1925 – application granted – compensation of £4,000 awarded

The claimant owned a property at 5 Bluebell Road, Lindford, a house on a modern estate in Hampshire. The claimant had planning permission to demolish a domestic garage in the curtilage of the property and build an additional house, but restrictive covenants attached to the property prevented its implementation.

The objectors to the application are a neighbour, Mr Roger Turner, who owns number 1 Bluebell Road; and Martin Grant Holdings Ltd ("MGH"), the holding company in which there are now vested the remaining assets of the original developer of the estate, Martin Grant Homes Ltd. These are estate roads and several areas at the boundary of the estate where access to adjoining land could be gained.

The application was scheduled to be heard at the Royal Courts of Justice on 25 March 2020 but following the outbreak of the Covid-19 pandemic, the parties agreed that I could determine the application on the written material submitted. They also agreed that a site visit was not necessary, as the lie of the land is self-evident from the photographs and plans supplied.

Mr Neil Sheppard was represented by his father, Mr Michael Sheppard, and I shall refer to them as the applicant and Mr Sheppard respectively. Although having originally submitted expert evidence, the applicant later withdrew the expert report from these proceedings. MGH were represented by Mr Thomas Cockburn of counsel, instructed by Herrington Carmichael, and relied on two expert reports by Mr Michael Bray FRICS. Mr Turner made brief submissions in support of his objection.

The facts in brief

Numbers 1, 3 and 5 Bluebell Road are three linked-detached houses situated in the centre of a 1980's housing estate in the Hampshire village of Lindford. When viewed from the front, number 5 is on the right-hand side. All three houses have single-storey integral garages to the right of the house, with those of numbers 1 and 3 linking them to the next house. To the right of the block is an area of public open space, separated from number 5's boundary by a public footpath.

The applicant bought number 5 in 2010, subject to restrictions on the title imposed by an earlier conveyance when the houses were built (number 5 then being known as plot 107) dated 16 September 1985, made between Martin Grant Homes Ltd ("the Company") and Daphne Hughes. Of the restrictions binding Ms Hughes and her successors in title outlined in the second schedule to the transfer, those that are said to be the subject of this application are as follows:

"2. Neither the Property nor any buildings erected there on shall at any time hereafter be used for any purposes or in any manner which will or may be or grow to be a nuisance or cause

damage to the Company or other the owners for the time being of the Estate or any part of parts thereof.

The Transferee shall not keep any pigs poultry or other noisy or otherwise offensive livestock upon the Property or carry on any activity whatsoever in such manner as to cause a nuisance or annoyance to the Company or other the owners for the time being of the Estate or any part or parts thereof.

No building structure fence wall or erection other than the dwelling-house garage (if any) and outbuilding (if any) being erected by the Company shall be erected on the Property without the consent in writing of the Company nor shall any caravan trailer or boat or commercial vehicle be placed thereon unless in a screened position to be approved by the company.

…

No building erected or to be erected on the property shall at any time hereafter be used otherwise than as a private dwelling house in one residential occupation or as a garage or outbuilding to be used only in connection with the said private dwellinghouse.

The Transferee shall not erect any structure or grow any plant that would exceed Nine hundred (900) millimetres in height on that part of the Property which forms the open plan front and side gardens on the said plan.

…

10. Not cause any obstruction to such land hatched black plan or to any driveways footpaths or accesses to the Estate."

On 31 March 2017 (renewed on 11 May 2020) the local planning authority, East Hampshire District Council, granted planning permission for the demolition of the garage of number 5 and the erection of an attached two-storey dwelling, positioned perpendicularly to number 5, facing the public open space. On the ground floor it would have a lounge, kitchen-dining area and w.c., with two bedrooms and a bathroom on the first floor. The existing drive would be split, with number 5 having two parking spaces in tandem, and the new property having two adjacent spaces. The existing rear garden would also be divided.

In August 2017, the applicant commenced negotiations with MGH to release the restrictions. MGH asked for £600 to "process" the application, which the applicant paid. Negotiations continued over the next eighteen months, with MGH putting the price of release at £34,632, subsequently reduced to £28,638, but the applicant offering £4,000 having taken professional advice. In February 2019, the applicant suggested the parties pursue alternative dispute resolution, which MGH rejected.

The application

The application to the Tribunal dated 6 April 2019 is simply stated: that the restrictions should be modified to permit the erection of a second house on the application land in accordance with the planning permission. It does not explain how each of the restrictions outlined above prevent this, nor does it suggest precisely how each restriction should be modified.

The application relies upon grounds (aa), (b) and (c) of section 84(1) of the Law of Property Act 1925. For the reasons I explain below it is not necessary to outline these grounds in any detail. The only provision to which it is necessary to refer is to the concluding words of section 84(1) which provide that:

"an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it."

The objections and remaining issue in dispute

I can deal briefly with Mr Turner's objection. He made two points. First, the three houses in the block were originally constructed as link-detached. The erection of the proposed house would make number 5 a semi-detached property, which may affect the value of Mr Turner's property at number 1. Secondly, he had concerns about access – any new vehicular entrance may encroach upon the present parking bay on the road.

Without meaning any disrespect to Mr Turner, I do not consider there is anything in those grounds of objection. In my judgment, number 5 being altered to a semi-detached house is highly unlikely to affect the value of number 1, and Mr Turner did not submit any expert evidence to the contrary. As to his second objection, the parking arrangements are secured by planning conditions, and the objection is, in my view, without foundation.

That leaves MGH's objection. MGH accepts that the value of its retained land would not be affected by the modification of the restrictions. No other form of injury to its retained land was suggested. Accordingly the application based on ground (c) of section 84(1) – that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction – is made out, and it is unnecessary for me to consider grounds (aa) or (b). The same concession means that there is no basis for an award of any sum under sub-paragraph (i) of the concluding part of section 84(1) (see paragraph 10 above).

The single issue between the applicant and MGH is the amount of compensation which should be payable under the less frequently used sub-paragraph (ii) of Section 84 (1) as a condition of modification. That sum is to "make up for" any effect which the restriction had, at the time when it was imposed, in reducing the price received by the original developer for number 5. There is so little of substance between the parties that it is disappointing that the matter has not been resolved by ADR as the applicant suggested. The parameters of the dispute are now very close: MGH now ask for £9,897, following Mr Bray's advice, while the applicant's figure remains at £4,000.

Evidence

Mr Bray's first report outlined his approach to calculating the compensation payable. His view that the value of MGH's retained land would be unaffected by the modification of the restriction made MGH's concession to the modification inevitable. The majority of his report dealt with the sum which MGH should be paid under sub-paragraph (ii) of section 84(1) to reflect the lower price which received when number 5 was first sold, which he considered was reduced because of the inclusion of the restrictions.

Mr Bray's method involved a residual valuation of the element of the applicant's land which had the benefit of planning permission. He assumed that the planning permission had been implemented, and having regard to comparable transactions, Mr Bray's view was that the newly completed property would be worth £300,000. Using the Nationwide house prices index between September 1985 and the date of his report, he reduced his presentday gross development value by a factor of 6.73 to arrive at a 1985 equivalent of £44,750. His assessment of the cost of building the new house in October 2019 was £122,000 - derived from the RICS Building Cost Information Service. Using BCIS index data, he reduced this by a factor of 3.52 to arrive at a build cost at September 1985 of £34,653. Deducting the adjusted build cost from the adjusted gross development value, Mr Bray's view was that the residual site value of the element of the garden to number 5 that would be built on, and hence (he said) the "loss" to MGH on the date the covenant was imposed, was £9,897.

Mr Sheppard mounted a number of criticisms of Mr Bray's method: the lack of a deduction for community infrastructure levy, the lack of reflection of any diminution in value of number 5 as a result of it losing a garage, losing land, and becoming semidetached rather than link detached. He produced versions of his assessment of value, based on email exchanges with local estate agents or builders. While I place little weight on this evidence, submitted

by the applicant's father and having regard to third party untested opinion evidence, as I outline below there is force in some of Mr Sheppard's criticisms.

With permission, Mr Bray produced a supplementary report to deal with Mr Sheppard's points. He said that community infrastructure levy was not payable in September 1985. He accepted that he had not allowed for the loss of the garage but said that he had considered the loss that would have been suffered as at the date of transfer. His explanation, which I do not entirely understand, was that the developers would have been entitled to alter or develop in a different way from their existing scheme. Had the covenant been placed on the subject land by a subsequent owner then he may have considered adjusting for diminution in value.

The applicant's figure of £4,000 was based on professional advice from the valuer who had originally been instructed in this application. While the applicant no longer relied on the valuer's expert report, he was content to adopt figure as his view of compensation.

Discussion

Unlike sub-paragraph (i) of section 84(1), which generally concerns the effect of modification or discharge on the objector's property or amenity, the less frequently used sub-paragraph (ii) is concerned with the value of the application land at the time the restriction was imposed.

It has been said that the use of "to make up for" suggests that the amount awarded may only go part of the way in establishing the loss to the covenantee. But I see no difference between that, and the same phrase used in sub-paragraph (i), where the loss or disadvantage to the objector is often calculated quite precisely without any such adjustment.

The fact that the current applicant is a successor in title to the original covenantor is of no relevance because it is the effect of the restrictions on the price that the covenantee originally received which is to be considered. There may be questions about the exercise of the Tribunal's discretion to award a sum under sub-paragraph (ii) where the land benefitting from the covenant has also changed hands since it was imposed, but I am satisfied in this instance that, as the holding company for the assets of the original development company, Martin Grant Homes Ltd, MGH is sufficiently closely related to the original covenantee that it should be entitled to the benefit of any sum assessed under this limb.

I am to consider the amount by which the original purchase price might have increased had the restrictions – or at least those restrictions which would prevent the proposed development in this application – not been entered into in the transfer. That begs the question – which of the restrictions? This is not an application for a blanket discharge; it is an application for modification of sufficient of the restrictions to allow a particular planning consent to be implemented. In the absence of any submissions from the applicant, in my view the relevant restrictions are the first part of paragraph 4:

"No building structure fence wall or erection other than the dwelling-house garage (if any) and outbuilding (if any) being erected by the Company shall be erected on the Property without the consent in writing of the Company

…"

And paragraph 7:

"The Transferee shall not erect any structure or grow any plant that would exceed Nine hundred (900) millimetres in height on that part of the Property which forms the open plan front and side gardens on the said plan."

The restrictions in paragraphs 3, 6 and 10 do not inhibit the implementation of the planning permission in a considerate manner.

The transfer document shows an original purchase price of £52,500. That price was paid for the newly built number 5, with its garage, with its drive and with its garden with return frontage to the public open space. The question to be addressed is how much more, if

anything, the purchaser might have paid had sufficient of the restrictions been removed such to allow the proposed second house on the site, subject to planning permission. But it cannot be assumed, as Mr Bray has done, that planning permission for the extra house would have been in place in 1985. It is the *hope* of gaining planning permission, and not being prevented from implementing that permission by restrictions, that is the subject of the valuation exercise. The remaining restrictions – those outlined above and others – remain and should be factored into the calculation (see for instance *Re Davies' Application* (LP/32/1999) where the Member, N J Rose FRICS, reduced an agreed £2,500 to £2,000 in the absence of any evidence as to apportionment).

What must surely also be assumed to have been in the mind of the 1985 vendor and purchaser is the effect on number 5 of the proposed development: it would lose its garage; it would become semi-detached; its garden would become long and narrow; and its smaller drive would still accommodate two cars but only in tandem. In my judgment, the 1985 purchaser would have been willing to pay a *maximum* of 5%, or £2,625, on top of the purchase price for the benefit of sufficient modification of the restriction to allow a second house to be built as now proposed, subject to planning permission.

It is necessary to finally consider whether this maximum of £2,625 should be adjusted to allow for the effect of inflation since 1985. Mr Cockburn submitted an extract from *Preston and Newsom*[1] which says, at para 14-21:

"the compensation under para.(ii) is "to make up for" any effect that the restriction had in reducing the original consideration. This has been interpreted as enabling the Tribunal to make an adjustment for inflation up to the date of the hearing"

Certainly, the Tribunal has on occasion made an inflationary adjustment. In *Re Davies* the Member, relying on the earlier unreported cases of *Re Groves' Application* (LP/50/1986) and *Re Dove's Application* (LP/28/1990) increased the figure of £2,000 to £2,450 by reference to changes in RPI, and adopted a similar approach in *Re Tates' Application* [2013] UKUT 0289 (LC).

But that is not always the case; no inflationary adjustment was made in *Re New Ideal Homes Limited's Application* (LP/16/1977), or in *Re O'Reilly's Application* (LP/53/1991).

In the more recent *Re O'Byrnes' Application* [2018] UKUT 0395 (LC), the Tribunal (HH Judge Behrens and Mr A J Trott FRICS), adopted the evidence of the parties in limiting compensation to the effect on the 2001 sale price without adjustment.

A definitive judgment on the principle of an inflationary adjustment must await a future application, but the movement of RPI since 1985 would suggest something in the order of a three-fold increase. Alternatively, if regard is had to actual house prices, Mr Bray's adopted Nationwide Index would suggest a six-fold increase. Both of these multiples would suggest that the compensation payable would be closer to or exceed MGH's figure than that of the applicant, depending on how close to my 5% maximum is the figure which forms the starting point.

However, the amount that would represent a "just" award, is a matter of judgment. It is for the objector to provide evidence to support the suggested impact if they can. I have not seen any evidence from them of sales records, whether semi-detached houses sold for less than linked-detached, whether there were any negotiations with Ms Hughes, or indeed any purchaser on the estate, as to the monetary effect of any of the restrictions. It is perhaps not surprising that these records are not available, given the passage of time, but they mean that there is no firm evidential basis for assessing the appropriate sum. With respect to Mr Bray, in my judgment he has valued on an incomplete basis, in only seeking to arrive at a residual value for that part of the land which would be developed. I am also conscious of the benefit which MGH has derived from the restrictions since 1985.

[1] Preston and Newsom: Restrictive Covenants Affecting Freehold Land 10th Ed

Taking all of the above into account, in my judgment the appropriate amount of compensation that the applicant should pay to MGH is the applicant's longstanding offer of £4,000.

Determination

I determine that the restriction set out in the second schedule to the Transfer dated 16 September 1985 between Martin Grant Homes Limited and Daphne Hughes shall be modified pursuant to ground (c) of section 81(1) of the Law of Property Act 1925. The second schedule shall take effect as follows:

"16. Notwithstanding clauses 4 and 7 above, a second dwellinghouse shall be permitted to be constructed in accordance with the planning permission granted by East Hampshire District Council on 11 May 2020 under reference 57044/001. Reference to that planning permission shall include (1) any subsequent planning permission that is a renewal of that planning permission or which permits the construction of a dwellinghouse not materially different from that permitted by that permission and (2) any other matters approved in satisfaction of the conditions attached to that or a subsequent permission."

An order modifying the restriction in the second schedule to the transfer dated 16 September 1985 referred to above shall be made by the Tribunal provided that, within three months of the date of this decision, the applicant shall have confirmed their acceptance of the proposed modification and shall have provided proof to the satisfaction of the Registrar that they have paid the sum of £4,000 to MGH.

This decision is final on all matters except costs. The parties are now invited to make submissions on costs, and a letter giving further directions for the exchange of submissions accompanies this decision. The parties' attention is drawn to paragraph 12.5(3) of the Tribunal's Practice Directions.

P D McCrea FRICS FCIArb
Dated: 12 June 2020