IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 240 (LC)
Case No: LP/18/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Discharge – pub on housing estate – restriction on use to hotelier and licensed victualler – objectors seeking to keep pub open – possibility of pub closing – held that the restriction does not secure practical benefits to the objectors – Tribunal's discretion to modify - application allowed – Law of Property Act 1925 s84(1)(aa)

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

BETWEEN:

JAMES HALL AND COMPANY (PROPERTY) LIMITED — **Applicant**

- and -

(1) PAMELA MAUGHAN
(2) SOPHIE HARTFIELD AND KEVIN HAMILTON
(3) SUSAN MAUGHAN
(4) JOHN TINKLER — **Objectors**

Re: "The Aclet"
Brooklands
Bishop Auckland
County Durham
DL14 6PW

Hearing date: 12 May 2017

P D McCrea FRICS

North Shields IAC, Kings Court, Royal Quays, North Shields, NE29 6AR

- -

Justin Kitson, instructed by Shoosmiths LLP, appeared for the Applicant
Sophie Hartfield appeared for herself and the other Objectors

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The following cases are referred to in this Decision:

James Hall and Company (Property) Ltd v Pamela Maughan and Ors [2016] UKUT 513 (LC)
Re Bass Ltd's Application (1973) 26 P&CR 156
Re Hextall's Application (1998) 79 P&CR 382
Gilbert v Spoor [1983] Ch.27
Re O'Reilly's Application (1993) 66 P&CR 485

DECISION

Introduction

1. The Aclet is a detached public house with guest accommodation, located on the edge of a 1950's housing estate, just south of the town centre of Bishop Auckland, County Durham. It is situated on a reasonably large plot of land ("the application land") which is comprised within title no. DU165750 at HM Land Registry. It is owned by Marston's Pubs Limited ("MPL"), part of Marston's plc which owns around 1,700 pubs in the UK. Whilst The Aclet appears to have a loyal clientele, including local residents and visitors, it has not been especially profitable in recent years, and was placed on MPL's disposal list in 2009.

2. In June 2015, having had no interest from pub operators, MPL entered into a conditional sale contract with James Hall and Company (Property) Ltd ("the applicant"). The applicant is, among other interests, a wholesaler and national distributor for SPAR, the convenience store operator. It wishes to convert The Aclet into a SPAR convenience store.

3. However, there is an obstacle to MPL's plan. A conveyance of the application land dated 19 April 1966 made between the Urban District Council of Bishop Auckland (the Council) and J W Cameron and Co Limited (the purchaser), contained various restrictions, one of which ("the restriction"), contained in paragraph 3 of the second schedule to the conveyance, restricted the use of the application land as follows:

> "Except with the consent of the Council not to use or permit to be used the property or any part thereof or any building thereon for the purpose of any shop trade or business or profession or manufactory nor to use any building for the time being erected on the property for any use other than for the carrying on of the business of Hotelier and licensed victualler."

4. The conveyance cannot be found, but neither the applicant nor objectors take any point on this. It is agreed that the restrictions which are on the charges register to the title accurately set out those in the conveyance of the application land.

5. The conditional contract obliged the applicant to make an application to the Tribunal for the discharge of the restriction, which it did on 9 July 2015, relying upon grounds (aa) and (c) of section 84(1) of the Law of Property Act 1925 ("the 1925 Act").

6. The application initially generated over 200 objections, but since only four households on the estate filed evidence of their entitlement to the benefit of the restriction, the Registrar stuck out the other objections, and directed that the four households file and serve a statement explaining why they believed they were so entitled.

7. In a decision dated 14 November 2016 (*James Hall and Company (Property) Ltd v Pamela Maughan and Ors* [2016] UKUT 513 (LC)[1]), the Tribunal (His Honour Judge

[1] http://landschamber.decisions.tribunals.gov.uk//judgmentfiles/j1290/LP-18-2015.pdf

Huskinson) noted that whilst the conveyance stated that the restriction was for the benefit of other land of the Council on the "Woodhouse Close Estate, Bishop Auckland or any part or parts thereof", there was no evidence as to the extent of the ownership of the Council at the date of the conveyance. The Tribunal concluded that as at 19 April 1966 the Woodhouse Close Estate included each of the four houses now owned by the objectors who therefore enjoy as annexed to that house the benefit of the restriction. The objectors listed in this decision[2] were admitted to oppose the application.

8. The applicant was represented by Mr Justin Kitson of counsel, who called Mr Andrew Bangs, an employee of the applicant. Mr Henry Plant of Marston's plc submitted a witness statement but was not available to give evidence. Ms Sophie Hartfield represented herself and the other objectors. Mr Kevin Hamilton, Ms Susan Maughan and Mr John Tinkler attended the hearing but did not give evidence.

9. On the afternoon before the hearing, I made an unaccompanied external inspection of The Aclet and the wider estate.

Statutory provisions

10. In so far as relevant to the basis of the application, section 84 of the 1925 Act provides as follows:

> "(1) the Upper Tribunal shall … have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied –
>
> …
>
> (aa) that (in a case falling within sub-section (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
>
> …
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction: and 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 –
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> …

[2] Ms Hartfield was admitted under her former name of Cook

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall 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."

Evidence

Mr Plant

11. Mr Henry Plant is an estates manager at Marston's plc. In a witness statement, he said that Marston's had purchased The Aclet in August 2005. Trade had struggled since acquisition, with eight different landlords, none of whom had succeeded in generating a viable return. Due to its poor performance, the property was put on Marston's disposal list in 2009. Having had no interest after two years, a decision was made to market the property for sale to an alternative type of business operator. Marston's were approached by the applicant, which entered into a sale contract, conditional upon the release of the covenant.

12. Mr Plant said that The Aclet was a large property with high overheads and running costs. Marston's considered that an investment of £250,000 was required to bring the property up to a required standard, but the likely profits from its current use did not justify that level of investment. In the years prior to the application, the annual profit of The Aclet was around £20,000. This had increased to £40,000 in the last financial year, but Mr Plant was unsure whether this was as a result of a new management team, or as a result of the local residents' campaign to "use it or lose it". It might be a combination of both. However, in his view, even if a profit of £40,000 could be maintained, this would not justify the capital investment required to give the business the best chance of sustainability in the longer run.

13. If the covenant was not discharged, the property would remain on Marston's disposal list. One option would be to close the public house and board up the site. This would be reviewed periodically, but given the level of investment required and the profit levels over the last few years, Mr Plant consider that closure was a possibility.

14. On 8 December 2015, Marston's was notified that a request had been made to the County Council to have the property listed as an Asset of Community Value but this application was subsequently withdrawn.

Mr Bangs

15. Mr Andrew Bangs is employed by the applicant and has responsibility for the management of property assets within its group. He said that the applicant is a Lancashire-based family business, employing more than 2,000 staff, which operates 110 SPAR stores, and services around a further 500. In addition, the group acquires or develops property, principally to create either stand-alone SPAR stores or petrol filling stations with adjoining SPAR stores.

16. Mr Bangs said that the applicant intended to change the use of The Aclet to a SPAR community convenience store having retail space of around 3,000 ft². It was satisfied from sales projections, and a review of local competition, that the store would be viable.

17. In the event that the application was successful, the applicant anticipated employing around 34 full and part-time staff. In his oral evidence Mr Bangs stressed that the applicant intended the proposed store to be a community hub, employing local people, and with an "offer" tailored to the local community, including hot take-away food. The applicant wanted to support local causes and events and be engaged in the community.

18. Mr Bangs made reference to the Bishop Auckland master-plan issued by Durham County Council in December 2016 within which two key priorities related to the creation of businesses and investment. He noted that there was to be new hotel accommodation in Bishop Auckland and a desire to attract investment into the town to support further regeneration.

19. The applicant had not made a planning application for change of use, since a change of use from use class A4 (public house) to A1(retail) was, in the absence of a listing as an Asset of Community Value, permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015[3] ("the 2015 Order"). At this stage, the applicant did not envisage major internal or external works of conversion but would submit a planning application if this was required. If permission was not granted, the applicant would convert the property as a convenience store in such a way that did not require planning permission.

20. Mr Bangs endorsed Mr Plant's evidence that if the applicant did not proceed to purchase the property, there was a considerable risk that The Aclet would close, which would be a missed opportunity for investment in the community and job creation.

Ms Hartfield

21. Ms Hartfield gave evidence on behalf of herself and the other objectors, all of whom live close to The Aclet. The objectors had submitted a variety of written statements and documents. It is unnecessary to outline them all, but in essence they said that The Aclet was the centre of their community. Ms Hartfield said that she chose to live on the estate because of the attraction of The Aclet. Many of the residents had been relocated by the council from the Eldon estate, at which time they were provided with assurances that the local pub, church, and school would have covenants on their title deeds to ensure their continued availability for the community. Ms Hartfield said that there was an agreement to this effect, but could not produce a document.

[3] SI 2015 No.596

22. The Aclet's clientele was wide, including locals, visiting business people, contractors and tourists. Some of them were frail, and incapable of venturing further than The Aclet, such as Mr Tinkler. To some of the residents, The Aclet was "their life", and should it close, then some people might simply not go out.

23. Ms Hartfield accepted that the pub might close, but said that the new management were performing very well, and that the recent increase in profits was down to them, rather than as a result of any local campaign. The local residents had received a quote from a builder that £50,000 would bring the property up to reasonable order. She believed that, in time, another pub operator would be willing to purchase it.

24. Within a three-minute walk from The Aclet, there was a hairdresser's, a chip shop, a hot food takeaway, a baker's, a local convenience store and a community centre. A further store was not required. Ms Hartfield stressed that The Aclet offered accommodation at very reasonable prices, with ample car parking.

25. She said that it would be completely unfair for the covenant, which was imposed to protect local people, to be discharged. In summary, she said that The Aclet was not just a pub, it was the centre of the community; it was a source of support for many residents; and should the restriction be discharged, all that would be lost.

Submissions and discussion

26. Whilst the applicant's statement of case relied upon grounds 1(aa) and 1(c) of section 84 of the 1925 Act, Mr Kitson, sensibly, did not pursue the application under ground 1(c) with any enthusiasm, and it only attracted a very brief mention in his skeleton argument. He accepted that ground (1)(c) is usually relevant where there are frivolous or vexatious objections. I am entirely satisfied that the objectors have acted neither frivolously nor vexatiously. Their concerns are heartfelt and entirely genuine. In the absence of the applicant pressing the point, I find without more that the application under ground (1)(c) fails.

27. As regards the application under ground (1)(aa), Mr Kitson framed his argument by reference to the questions posed in *Re Bass Ltd's Application* (1973) 26 P&CR 156.

Is the proposed user reasonable?

28. Mr Kitson submitted that in considering whether the proposed user of the application land is reasonable, it is relevant to have regard to its current use as a public house. A shop is similar to a public house in terms of both how it is used by the public, and the effect on the local environment. I accept that in principle.

29. The restriction restricts the use of the land to a hotel and licensed victualler – which as far as the latter is concerned is similar to that of the proposed convenience store, save that it will sell food and be licensed to sell alcohol for consumption off the premises rather than on the premises. The proposed user is closely allied to the use envisaged by the restriction. I also accept that.

30. The application is not made with reference to a planning permission, since the proposed use is one which can be achieved under the 2015 Order. Mr Kitson submitted that planning

rights can be determinative of whether a user is reasonable, relying on the decision of the Lands Tribunal (George Bartlett QC, President) in *Re Hextall's Application* (1998) 79 P&CR 382. However, what the President found persuasive when considering whether a user was reasonable was that the local planning authority had resolved to grant planning permission, subject to an agreement under s106 of the Town and Country Planning Act 1990.

31. That is somewhat different, in my judgment, from general permitted development rights. In *Re Hextall's Application*, the merits or otherwise of the proposed user had been considered as part of the planning process, and had been deemed acceptable by the planning authority. In this case, the use of The Aclet, in planning terms, can simply be changed without any reference to the local planning authority. This is relevant later in this decision, however I do not consider the point to be fatal to the reasonableness of the proposed user in this instance and in my judgment, the proposed user of the application land as a convenience store is reasonable.

Do the covenants impede that reasonable user?

32. It is clear that the restriction impedes the user, both by restricting the use of any building erected upon the land to the business of a Hotelier and licensed victualler, and by specifically prohibiting use as a shop.

Does impeding the proposed use secure to the objectors practical benefits?

33. Mr Kitson very fairly referred to the comments of Eveleigh LJ in *Gilbert v Spoor* [1983] Ch.27:

> "The words of section 84(1A)(a), in my opinion, are used quite generally. The phrase 'any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression 'any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects upon a broad basis."

34. He submitted that despite the requirement to construe practical benefits in a wide sense, restricting the use of the application land to that of a hotel or public house did not provide a practical benefit to the objectors for the following reasons:

(1) Durham CC is the original covenantee, and was not an objector. In any event the Council holds its covenant in the capacity of a public body, it is not believed to own any of the properties in the vicinity of the application land and there is no evidential basis to suppose that there would be any diminution in value of the council's financial or economic interests.

(2) There could not be a practical benefit to the objectors in circumstances where the area in which the application land is situated is needy of regeneration and investment. Indeed, there is a practical *dis-benefit* in that the proposed change of

use that the restriction prevents meets the needs of the Bishop Auckland master-plan.

(3) There could be no practical benefit when The Aclet was not trading economically and was likely to be closed and boarded up.

(4) There were a considerable number of other public houses in the vicinity, and a justified community need for a convenience store on the application land, both in terms of service provision and jobs.

(5) Whilst understandable, the objections related principally to nostalgic recollections relating to the objectors' past use of The Aclet, the way in which it is run (as opposed to the existence of a public house per se) and the need for a place in the community to go. However, The Aclet was struggling and was likely to close which suggested that it is not providing the "community hub" referred to. Many other community hub services were available locally, including the community centre on Proudfoot Drive.

(6) Had the use of The Aclet been considered to be of importance to the objectors and others in their community, the Council could have nominated it as an Asset of Community Value but chose not to do so, notwithstanding its knowledge of the proposal by the applicant to change its use.

35. It seems to me that the difficulty for the objectors is that they are, in effect, seeking to rely upon a negative covenant to achieve a positive result, in an attempt to keep The Aclet trading. The most useful authority on this point, not referred to by counsel, is *Re O'Reilly's Application* (1993) 66 P&CR 485. Mr O'Reilly had bought a plot of land from Rochester Council, subject to a restriction which prevented use other than as a car park. He wished to have the restriction discharged or modified to enable him to construct six dwellings. The Lands Tribunal (HH Judge Marder, President) said this (at 489):

> "I consider that in order to secure a practical benefit for the purposes of subsection 1(A) the restriction must itself in consequence of its wording and effect be capable of providing a benefit. It may well be a desirable objective of the local authority to make off-street parking available. I have no doubt that this was the intention of the local authority in imposing the restriction on sale. It is clear that the applicant has so far offered off-street parking to those who wish to use the application site, and that a diminishing number of residents in the locality have chosen to make use of the facility. It is equally clear that the applicant could cease to use the land for this purpose at any time and would not thereby be in breach of covenant. It follows, as was submitted, that such practical benefit as there may be in providing off-street parking is not a benefit which is secured by the restriction. I am satisfied, therefore, that in impeding the proposed user of the application site the restriction does not secure to persons entitled to the benefit of it any practical benefit."

36. The objections to this application suffer the same difficulty. As Mr Kitson submitted, and his witnesses surmised, it would be quite open to MPL to simply close The Aclet, which would

not breach the restriction. It seems to me from the evidence that it is more likely than not that it will be forced to close in the foreseeable future. Accordingly, in my judgment, the restriction does not secure practical benefits to the objectors in the way that they would like. I have not overlooked the additional wording of the restriction preventing the use of the application land as a shop. Whilst the objectors, as a secondary objection, submitted that a further shop was not required, it is the continuation of The Aclet that is their principal aim and the benefit on which they rely, and the restriction against a shop does not secure that benefit to them.

37. Since I am satisfied that the restriction does not secure practical benefits to the objectors, the application succeeds in principle. It is therefore unnecessary for me to consider the remaining questions posed in *Re Bass's Application.*

The tribunal's discretion

38. I indicated during the hearing that in the event that the application had merit, I might be minded to modify the restriction rather than simply discharge it. On reflection that is the correct course of action, especially in the light of the proposed change of use not requiring planning permission. There is no other documentary evidence in respect of what the applicants actually want to do with the building. Whilst the objectors have not taken the point, as an expert Tribunal I would be uncomfortable in simply discharging the covenant, leaving the local residents open to any manner of development in the event that the proposed convenience store does not transpire.

39. Following the hearing I invited the applicant to suggest proposed wording for the modification of the covenant to enable the proposed development to proceed in the event, without at that point deciding, that I was minded to modify the restriction.

40. Solicitors for the applicants submitted the following amendment:

> "Not to use or permit to be used the property or any part thereon for any use other than currently described in classes A1, A3, A4, A5 and/or C1 of the Town and Country Planning (Use Classes) Order 1987 (as amended)."

The property is currently used for drinking, hot food (consumed on the premises) and hotel accommodation which are all uses currently described in classes A3, A4 and C1. The evidence before me was that the applicant's proposed uses are for retail and hot food (to be consumed off the premises) – i.e. uses currently described in classes A1 and A5.

41. The objectors were given an opportunity to respond, but did not do so.

42. In my judgment, the applicant's proposed wording casts the net too widely. Class A1, for instance, encompasses a wide range of uses including funeral parlours, and a use within class A5 could simply be a hot-food takeaway. I consider an appropriate modification of the covenant, which would encompass both the existing operation of The Aclet and the proposed convenience store to be as follows:

> "Except with the consent of the Council not to use or permit to be used the property or any part thereof or any building thereon for the purpose of any profession or manufactory nor to use any building for the time being erected on the

property for any use other than for the carrying on of the business of Hotelier and licensed victualler, or as a retail convenience store including the sale of food and drink for consumption off the premises".

Determination

43. The application under ground (1)(aa) succeeds, and an Order shall be made by the Tribunal on the terms above provided, within three months of this substantive decision, the applicant has notified the Tribunal in writing of its acceptance of the terms of the proposed modification.

44. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs, and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010

Dated: 8 June 2017

P D McCrea FRICS