**Serle Court**
Prepared by Kysen PR

| | |
|---|---|
| **Date** | 27 October 2017 |
| **Publication** | New Law Journal |
| **Type of publication** | Legal press |

New Law Journal
Leading on debate, litigation and dispute resolution

# No room for views

Covenants: conduct, consent & costs. Andrew Bruce provides a timely update

**IN BRIEF**

- Unattractive conduct does not deny relief under s 84 of the Law of Property Act 1925.
- Compensation of £21,000 does not justify a costs award.

In October 2011, Mrs Pauline Hennessey's home in Great Maplestead was gutted by fire. Rather than re-build a facsimile of the house, Mrs Hennessey decided to construct a larger, somewhat grander property that she would call 'High View' on the same location as her previous home. In order to finance this construction, Mrs Hennessey wanted to build two further detached houses in the garden of her property. Having finally obtained planning permission for her construction works in December 2015, Mrs Hennessey then had to deal with the restrictive covenant that burdened her land.

The covenant, which had been imposed in 1971 on Mrs Hennessey's predecessor-in-title, prohibited the erection of more than a single dwellinghouse on Mrs Hennessey's land ('the density restriction') and required that Mrs Hennessey obtain prior approval of her plans from the beneficiaries of the covenant ('the consent restriction'). Mrs Hennessey applied to the Upper Tribunal (Lands Chamber) under s 84(1) of the Law of Property Act 1925 for the modification of the covenant to permit her works to proceed. She relied upon ground (aa): the restriction did not secure practical benefits of substantial value and that money would be an adequate compensation for any loss arising from the modification of the covenant. Her application was opposed by Mr Gary Kent, the owner of a neighbouring chalet bungalow (called 'Piperbrook').

Mr Kent maintained that Mrs Hennessey's works would obstruct his views of the countryside out to Castle Hedingham in the distance to the west. In its decision in *Hennessey v Kent* [2017] UKUT 243 (LC) the tribunal allowed Mrs Hennessey's application.

The tribunal concluded that, although the density restriction secured a practical benefit to Mr Kent in protecting a view of the distant countryside from one window in the loft of Piperbrook (albeit that that loft could potentially be converted into a bedroom), that benefit was not substantial and could be compensated by an award of 5% of the value of Piperbrook (amounting to £21,000). Aside from this conclusion, the decision of the tribunal is noteworthy for the way in which it dealt with three specific matters *viz*: (i) conduct; (ii) consent; and (iii) costs.

> *"Mr Kent had no right to a view & Mrs Hennessey was entitled to obscure it"*

## Conduct

In 2012 Mrs Hennessey had visited Mr Kent to discuss her re-building plans. Mr Kent had expressed concerns about his views. Thereafter (in late summer 2012) Mrs Hennessey had planted a screen of Leylandii trees on the boundary of her land, the effect of which was substantially to block Mr Kent's view of the countryside and beyond. Despite considering this 'an unneighbourly act' the tribunal accepted that Mrs Hennessey did not flout any legal obligation by planting the trees on her land: Mr Kent had no right to a view and Mrs Hennessey was entitled to obscure it. The tribunal distinguished *Re: George Wimpey Bristol Ltd's Application* [2011] UKUT 91(LC) because in that case the applicant had adopted a deliberate strategy to force through the development in knowing breach of the restriction in order to change the character and appearance of the site and thereby persuade the tribunal to allow it to continue with the development. On balance the tribunal concluded that Mrs Hennessey's conduct (albeit unattractive) was not such as to cause it to deny her relief under s 84.

## Consent

In *Re: Wild's Application* [2012] UKUT (LC) 306 the Tribunal appeared to suggest (at para [68]) that, where a covenant requires consent (to a particular alteration or building plan), if the tribunal found that consent could not be reasonably withheld, the restriction would not impede the proposed works and the application under ground (aa) would fail. Although *Re: Wild's Application* was not specifically addressed in *Hennessey v Kent* and the Tribunal described the debate as 'inconclusive', the tribunal stated that, in principle, a covenant requiring the prior approval of plans is capable of impeding an intended use of land for building.

On the facts, the tribunal considered that as Mr Kent had arguable grounds for refusing consent (on the basis that he wished to preserve his views) the consent restriction was an impediment to the proposed use and could be modified under s 84. The tribunal was thus prepared to deal practically with the consent restriction, notwithstanding its lack of jurisdiction to make declarations about the reasonableness of refusals of consent. Rather than requiring Mrs Hennessey to go to court to obtain a declaration that Mr Kent had unreasonably refused consent, the tribunal assumed the restriction impeded the user and proceeded from there.

## Costs

In *Hennessey v Kent* the tribunal decided to make no order as to costs. Although Mrs Hennessey had successfully applied to modify the restrictive covenant, Mr Kent had not behaved unreasonably and therefore she was not entitled to recover any part of her costs from him (see para 12.5(3) of the Tribunal's Practice Directions 2010). However, Mr Kent maintained that, as he had received compensation, Mrs Hennessey ought to pay his costs (as is suggested will normally be the case in *Preston & Newsom's Restrictive Covenants Affecting Freehold Land* at 17-08). The tribunal did not accept this. Where the case was fought on the basis that the application under ground (aa) should be dismissed and that the tests set out in *Re: Bass's Application* (1973) 26 P&CR 156 have not been satisfied, it is wrong to classify the objector as the successful party when the tribunal ultimately concludes that the restriction ought to be modified. In such a case an order that each party bears their own costs is plainly appropriate.

**NLJ**

**Andrew Bruce**, barrister, Serle Court (*www.serlecourt.co.uk*). Andrew was counsel for Mrs Hennessey.