

ENGLAND AND WALES / JUDGMENT

Duffield & Anor v Gandy

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Neutral Citation Number: [2008] EWCA Civ 379 IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE LANDS TRIBUNAL MR NJ ROSE
FRICS LP/36/2006 Case No: C3/2007/2164 Royal Courts of Justice Strand, London, WC2A 2LL Date:
17/04/2008 Before : LORD JUSTICE MUMMERY LORD JUSTICE TOULSON and MR JUSTICE
PATTEN

- ----- Between : ANDREW DUFFIELD & ANOR
- and - WINIFRED GANDY
- ----- (Transcript of the Handed Down Judgment of WordWave
International Limited A Merrill Communications Company 190 Fleet Street, London EC4A
2AG Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- Appellants Respondent Mr Paul Stinchcombe (instructed by Watson
Burton LLP) for the Appellants Ms Catherine Taskis (instructed by Blackett Hart & Pratt) for
the Respondent Hearing date: 4th April 2008
- -----

Judgment

Lord Justice Mummery : 1. 2. 3. 4. 5. A short point arises from a decision of the Lands Tribunal (Mr NJ Rose FRICS) dated 23 August 2007. Mr Rose dismissed an application to modify or discharge a restrictive covenant so as to allow a bungalow, for which the appellants, Mr & Mrs Duffield, have obtained planning permission, to be built on the north east corner of their freehold property at Riversview, Physic Lane, Thropton, Northumberland (the Property). The covenant prohibited the erection of a “residence” on the Property. The proposed development was opposed by owners of neighbouring properties, to which the benefit of the restrictive covenant was annexed. A conveyance dated 2 March 1936, to which a plan was attached identifying the Property as “Kitchen Garden etc.” contained this covenant: “For the benefit of the land hereby conveyed and so as to bind the Vendor’s adjoining land on the South East thereof the Vendor hereby covenants with the Purchaser and the persons deriving title under him that the Vendor will not at any time hereafter erect or allow to be erected any residence or manufactory on the Vendor’s said adjoining land on the South East but this shall not preclude the erection of a private garage hen houses or other erections of a similar character.” The Duffields’ neighbours, Mr & Mrs Gowland of “The Briars” and Mrs Gandy of “Overwreigh”, successfully resisted the

modification of the covenant. Only Mrs Gandy was an active respondent to this appeal. The application under section 84(1)(aa) was made on the ground that the restriction, in impeding the reasonable use of the land, “does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them.” It was common ground that the proposed user was reasonable, that the covenant restricted that user and that the restriction secured some practical benefits to Mrs Gandy. The issue was whether the practical benefits thereby secured were of “substantial value or advantage” to her. Mrs Gandy’s case was that the restriction protected the privacy of her property. It is not overlooked or disturbed by the presence of a close neighbour. In particular, if the restriction were modified or discharged, the privacy of her principal garden to the rear of “Overwreigh” would be disturbed by the proximity of an adjoining rear garden used by the occupants of the proposed bungalow. 6. Mr Rose upheld Mrs Gandy’s objections. “18. Mrs Gandy said that, when she first visited Overwreigh with her husband, she was told that the application site was subject to a restrictive covenant preventing any development upon it. That was a major factor in their decision to buy Overwreigh. They specifically wanted a house with a private garden, and the covenant meant that they would not have a house or garden immediately over the hedge on that side. Riversview itself was about 70 yards away from Overwreigh, and so had no real impact on it. Any family living in the proposed bungalow would be likely to use the back garden at the same time as she was using hers and there would only be a few feet between them. She would be aware of the presence of her new neighbours on the other side of the hedge. Each would be able to hear the other. They would be able to glimpse each other through the hedge. All of this would tend to make her feel uncomfortable and to some extent inhibited. The only parts of the garden that were really used as a garden space were at the back and the sides, because the slope was much less pronounced than at the front. She and her family would not be able to relax completely in their rear garden. Mrs Gandy said that she would be devastated if the covenant were discharged or modified to allow a new bungalow to be built on the other side of the hedge. Money would not be enough to compensate her for this... 19 I accept Mrs Gandy’s evidence. I bear in mind that she was disappointed when a new house, Appletree Cottage, was recently erected close to the south western boundary of her home. I find that the practical benefit of her preventing the erection of a dwelling house on the application site is of substantial advantage to her. It follows that ground (aa) has not been made out.” 7. 8. The principal point taken on the appeal is that garden use of the Property could be made regardless of the covenant. Garden use could be made of the area adjoining “Overwreigh” without any breach of the restriction and without the need to obtain any planning permission. Retention of the covenant would not, therefore, secure for Mrs Gandy, any practical benefits “of substantial value or advantage.” Mr Stichcombe, who appeared for the Duffields, submitted that Mr Rose misconstrued the covenant. As a result of this error of law, (a) he took an immaterial factor into account in arriving at his decision (i.e. his conclusion that the restrictive covenant afforded practical benefits of substantial value or advantage in relation to garden use of the Property); (b) he failed to consider the application by reference only to such practical benefits as would accrue from the restriction on erecting a residence; and (c) the reasons for his decision were legally flawed. Construction of the covenant 9. 10. The central issue on the appeal is whether Mr Rose misconstrued the covenant by reading the restriction as

preventing garden use of the Property. On a correct construction the covenant only prevents development of the Property by erecting a “residence or manufactory” on it. I agree with Mr Stinchcombe that the covenant does not specifically restrict the use of the Property as a garden. There is nothing in the covenant or in planning law to prevent the owners of the Property from using any part of it as a garden, including the part next to the rear garden of “Overweigh.” By the simple act of incorporating that part of the Property into their adjacent garden at Riversview the Duffields could use it in a way that was not caught by the restriction, but would intrude on the privacy of Mrs Gandy’s garden. 11. I do not, however, agree that Mr Rose proceeded on an erroneous basis in reaching the conclusion that retention of the covenant would secure to Mrs Gandy practical benefits of substantial value or advantage. As appears from the decision itself 12. 13. 14. 15. 16. (paragraph 19 quoted above) Mr Rose did not construe the covenant as a specific restriction on garden use of the Property. He correctly understood that the practical benefit of the covenant for her was in preventing the erection of a residence on the land. In terms of practical benefits for Mrs Gandy the value of the restriction on residential development of the Property is that her privacy would be protected not only from the erection of the bungalow itself, but also from use of an adjoining part of the Property as a garden ancillary to occupation of the bungalow. Counsel took the court through the transcript of the proceedings in detail. It is apparent that the effect of the covenant was specifically dealt with in evidence and in argument. The Duffields’ expert witness, Mr Simon Raworth, explained that the covenant did not prevent uses of the Property other than the erection of a residence or manufactory. It did not prevent the erection of garaging, hen housing and other agricultural buildings. He pointed out that the Duffields were at liberty to use the Property for garden purposes, such as barbecues or for children to play. I am satisfied from the terms of the decision itself, which are fortified by the transcript of the proceedings, that Mr Rose fully understood the correct approach to the application. He had to make a comparison between, on the one hand, the existing state of the Property subject to the covenant, and, on the other hand, the likely impact on Mrs Gandy if the Property was freed from the covenant so as to permit the proposed development. In particular, Mr Rose was aware that the covenant did not prevent the possibility of Property being used as a garden without the erection of the proposed bungalow. He did not ignore this possibility, which was expressly mentioned by Mr Raworth and by the Duffields’ representative at the hearing. It is also plain from the decision itself that Mr Rose correctly addressed the impact of “the bungalow.” He mentioned the overlooking that would result from the building of the bungalow, its distance from the boundary with “Overweigh”, and the position of the principal garden for the proposed bungalow, as opposed to the bottom of the Duffields’ Riversview garden. The relevant risk to Mrs Gandy’s privacy in her principal garden was from a garden for the proposed bungalow and the use that would be made of it by the occupants of the bungalow. In this way the restriction on the erection of a residence on the Property secured for Mrs Gandy practical benefits of substantial value and advantage in protecting the privacy of her garden from the anticipated use of an adjoining garden by the occupants of the proposed bungalow. It is nothing to the point that these benefits are derived from a restriction against the erection of a residence on the Property, rather than from specific restriction on garden use, which Mr Rose knew she did not have. In brief, Mr Rose did not ignore or fail to take into account the garden use of the Property that could be made

regardless of the restriction on the covenant. He correctly construed the covenant as securing a practical benefit of substantial value to Mrs Gandy by enabling her to prevent the development of the property by the erection of a residence, which would also involve ancillary use of a garden adjoining her property. In paragraph 18 of the decision Mr Rose compared the difference between the use or potential use of the Property by Riversview, which had no real impact on Mrs Gandy's privacy, and the use of a rear garden on the part of the Property very close to hers that would be made by the occupants of the proposed bungalow. On making the comparison of the two types of garden use Mr Rose was entitled in law to conclude that the practical benefits of the restriction were of substantial value or advantage to Mrs Gandy. Other garden use points 17. The other three alleged errors of law in the grounds of appeal all result from the main point that Mr Rose misunderstood the effect of the restriction. It was submitted that, in making its decision, he took account of an immaterial consideration (viz, the supposed practical benefits of preventing garden use of the Property): that he failed properly to consider the application by reference only to such practical benefits, if any, as would accrue only from the prevention of the erection of a building on the land and ignoring garden use; and that he failed even to address the argument and therefore gave inadequate, improper and unintelligible reasons for his decision to dismiss the application. 18. In my judgment, all three grounds fall with the rejection of the main argument on the garden use point. Result 19. I would dismiss the appeal. Lord Justice Toulson: 20. I agree. Mr Justice Patten: 21. I also agree.

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