Vulnerable protection of public houses

A recent decision by the Upper Tribunal (Lands Chamber) has interestingly given a reminder that when attempting to convert a public house to another use it is not just a question of considering two regimes – assets of community value and planning. The recent case was concerned with an application to discharge or modify a restrictive covenant under section 84 LPA 1925. It was also a reminder to defenders of public houses that each regime has its own criteria by which to reach an outcome and the hoped for protection of the public house may be weaker than believed.

James Hall and Company (Property) Limited v Pamela Maughan and Others[1] concerned the Aclet pub just south of the town centre of Bishop Auckland. It had been subjected to a restrictive covenant when sold by the Council in 1966. This limited the use of the property to the carrying on of the business of hotelier and licensed victualler. The recent history of the pub is a familiar story which is repeated with many pubs throughout the country. It was acquired in 2005 by a major brewer but has been on its list of pubs to be sold for some time. Since acquisition the pub has struggled and as is often the case the publican has changed on a regular basis. The profits earnt from running the pub have been small and no-one has shown an interest in taking over the pub as a going concern. It was said in evidence by the Brewer's estates manager to need £250,000 spent on it. The closing and boarding up of the pub was a real option.

Yet for all this there was a loyal clientele drawn in the main from the local community. The evidence from the objectors was that for the frail it was "their life" and that it was not just a pub but the centre of the community. It was their contention that a further store was not needed in the area. The evidence had the same character as that usually found in appeals against the listing of a pub as an asset of community value. In December 2015 a nomination of the pub to be listed as an ACV had been made but then withdrawn. No explanation was given in the judgment for the withdrawal. At that time the ability to make changes to the use of the pub or to demolish it under the Permitted Development Rights ("PDR") regime still applied to pubs which had not been nominated or listed as an ACV so the withdrawal of the

[1] [2017] UKUT 240 (LC)

nomination was important. For such period as a pub is nominated or listed as an ACV such rights were then suspended.[2]

The Brewer found a purchaser who wanted to convert the pub to a Spar convenience store and entered a conditional sale to purchase. The condition to be satisfied was the making of an application for the discharge of the restrictive covenant. There was no condition requiring planning permission to be obtained because the purchaser was relying on the ability to change the use to retail under the PDR regime.

The judgment in this case was given on 12th May 2017. The suspension of the rights under the PDR regime was extended on 23rd May 2017 to all pubs whether or not nominated or listed as an ACV[3]. This date was chosen taking into account the following restriction imposed by the 2015 statutory order which applied to all pubs whether or not nominated or listed as an ACV. Before commencing any development (including demolition) the developer must first send a written request to the local planning authority to ascertain whether the building has been listed. No development can be commenced before the expiry of 56 days following the request. Once the period has expired the development must then be completed within one year. There is no requirement that such written request must be publicised by the local authority. In consequence although the request is made local residents and community groups will not necessarily be alerted so that when the proposed development occurs after the expiry of the 56 day period it comes as a shock and may be described as a change having occurred overnight.

In the judgment there is no statement as to whether such a request had been made to the Council with regard to this pub. It is stated[4] that a planning application would be made if required by any proposed major works but if refused then the pub would be converted as a convenience store in such a way as did not require planning permission. If a request had not been made more than 56 days before 23rd May 2017 then the blanket suspension in the 2017 statutory order will apply to the Aclet.

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[2]Parts 3 and 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596

[3] Regulations 3 and 4 of the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2017/619

[4] At para. 19

An application was made for the discharge of the restrictive covenant[5] under section 84(1)(aa) (impede reasonable use) and (c) (not injure persons entitled to the benefit) LPA 1925 but the applicant only really relied on the ground in (aa). The judgment considered the questions posed in re Bass Limited's Application[6] as follows:-

1. Is the proposed user reasonable? – a right to make a change of use conferred by the PDR regime was found not to carry the same weight in respect to answering this question as the grant of planning permission changing the use[7]. The absence of any consideration of the proposed new use by a local authority meant that the issue had to be considered by reference to the individual facts of the case. It was accepted that sale of food and alcohol for consumption off the premises was allied to a hotel and licensed victualler and so was reasonable.

2. Do the covenants impede that new use? – they clearly did.

3. Does impeding the proposed use secure to the objectors practical benefits? – it was accepted that for these purposes the phrase has a wide meaning[8] but notwithstanding this the restrictive covenant was held not to secure practical benefits. The reason for this was that the benefit which the objectors were seeking to secure was the use of the property as a pub. In this case compliance with the covenant could be achieved by the owner closing the pub and this was found to be more likely than not with the Aclet[9]. The restrictive covenant did not secure a positive obligation for the objectors as the owner could not be compelled to run the business of a pub at the property.

In consequence the Tribunal, Mr. McCrea FRCIS, found that the restrictive covenant did not secure practical benefits for the objectors and so there was no need to consider the additional questions in re Bass. However, rather than discharge the covenant it was modified so as to permit use of the property as a retail convenience store.

From the perspective of restrictive covenants the decision serves to emphasise that the protection provided is negative in character. If objectors are seeking to achieve a benefit requiring a positive obligation then this will not be achieved by a restrictive covenant. It is not

[5] It was first necessary to decide whether any objectors were entitled to the benefit of the restrictive covenant. Four were by HHJ Huskinson [2016] UKUR 513 (LC).
[6] (1973) 26 P&CR 156
[7] Para. 31
[8] Eveleigh LJ in Gilbert v Spoor [1983] Ch. 27
[9] Para. 36

possible to determine from the decision whether the outcome would have been different if the change of use had required a grant of planning permission. Would this be a matter exclusively for the planning committee or would it be material to hear evidence as to the likelihood of such a grant being obtained?

Similarly would the outcome have been different if the nomination of the pub as an ACV had not been withdrawn. It is well established that the bar is fairly low when determining whether a property, and in particular a pub, qualifies as an ACV. In this case it would have meant that if listed as an ACV the need to obtain a planning permission would have had to be addressed. However, an ACV listing does not mean that planning permission will not be granted for a change of use.

An example of planning permission being granted with regard to a listed pub is the Alexandra pub in Haringey. It had loose associations with the Davies brothers of Kinks fame and had been listed as an ACV. A planning application was made for the conversion of the pub into two three bedroomed dwellings. It was refused by the council but on appeal[10] the planning inspector overturned the refusal. As regards the ACV listing the inspector, Mr. N Taylor, stated that the "relevant ACV legislation sets out specific tests which are narrower than the planning considerations before me. The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development. Accordingly, whilst I afford it some weight in this case it is not determinative."[11] Unlike ACV nominations the financial viability of the pub is a relevant consideration on a planning application.

It was found that the concerns of the objectors in this case were "heartfelt and entirely genuine". They believed that the covenant was there to provide the local community with protection regarding their local pub. As with a number of planning outcomes in relation to ACV listed pubs this decision shows that the anticipated protection conferred may fall a long way short of what is expected.

Lessons

1. Restrictive covenants do not secure a positive outcome and if this is the only benefit sought then this may result in the modification or discharge of the covenant.

[10] APP/Y5450/W/14/3001921 - 12th May 2015
[11] Para. 22

2. A failing pub business will not block an ACV listing but will be relevant with regard to both a planning application and a section 84 application.
3. The protection afforded by an ACV listing or restrictive covenant in relation to a local pub will be vulnerable to a planning application or section 84 application.
4. The impact of the loss of rights under the PDR regime in relation to a pub and the need to obtain a planning permission on a section 84 application similar to that in the Aclet case remains to be considered.

Christopher Cant