

O’Byrne Re Land at Tubney, Manor Farm [2018] UKUT 395 (LC) and Roberts v Parker and another [2019] EWCA Civ 121

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O’Byrne Re Land at Tubney, Manor Farm [2018] UKUT 395 (LC)

A property was subject to a covenant imposed by a 2001 transfer not to use it except for the 'Permitted Uses'. These were defined in the transfer as uses for the purposes of a single private dwelling house and for agricultural or forestry purposes.

The applicant applied to the Upper Tribunal (Lands Chamber) (UT) to modify the covenant (under section 84(1)(aa) of the Law of Property Act 1925) to allow a second dwelling house to be constructed. However, the party with the benefit of the covenant argued that even if the covenant were to be modified, a right of way granted by the 2001 transfer also only allowed that right to be used for the same Permitted Uses, so using it for a second dwelling house would exceed the scope of the right of way (which in turn meant there was no point in modifying the covenant).

The UT disagreed and (following existing Court of Appeal authority) interpreted the right of way to allow its use for the purposes of the restrictive covenant as modified from time to time. This case shows therefore that although there is no statutory power for the UT to modify easements, modification of restrictive covenants can indirectly result in the modification of related easements.

Roberts v Parker and another [2019] EWCA Civ 121

The respondent’s predecessor in title (S) bought a house in 1968. He already owned adjoining land (the Plot). The conveyance to S granted a right of way over the transferor’s adjoining private road 'for all purposes connected with the present and every future use of the land hereby transferred'. S also covenanted in the 1968 conveyance on behalf of himself and his successors in title as owners of the Plot not to build on the Plot and to pay towards the cost of maintaining the road. However, the restrictive covenant was unenforceable as it had not been properly entered on the title register.

The respondent (R) wished to build a house on the Plot, but needed to establish that the Plot had the benefit of the right of way granted by the 1968 conveyance. R argued that the grant should be read as benefiting “the land hereby transferred together with the Plot” because of the obligation imposed in the 1968 conveyance on the owner of the Plot to pay a contribution towards the maintenance of the road.

The Court of Appeal rejected this argument and held that the grant in the conveyance was unequivocal. The 'land hereby transferred' did not include the Plot and so the right of way could not be used for the benefit of the Plot independently of the house. If the Plot ceased to be used for a purpose ancillary to the use of the house, it could no longer be accessed by exercising a right of way across the private road.

The Court of Appeal also rejected R's argument that there was an implied easement granted by the 1968 conveyance for the Plot to use the right of way, since the unenforceable restrictive covenant clearly showed that the parties always intended that the Plot would be left undeveloped. Moreover, where there is an express right granted by a document, a further implied right will only arise in exceptional circumstances.

This case is a reminder of the general rule that an easement benefiting a property (A) cannot in substance be used to benefit adjoining property (B) (although use for B's benefit may be allowed if it can be said to be ancillary to the use for A's benefit).

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