LP/6/2007

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – costs – successful application to stay substantive application made on first day of hearing – subsequent High Court Order that objectors not entitled to benefit of restriction – whether unsuccessful objectors entitled to costs incurred before Tribunal proceedings stayed

IN THE MATTER OF AN APPLICATION FOR COSTS ARISING FROM AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

by

MRS JUDITH ROWENA FLETCHER

Re: "Pheasants"
Ferry Lane
Mill End
Henley-on-Thames
Oxfordshire
RG9 3BL

Before: N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 28 November and 18 December 2008

Phillip Jones, instructed by Rawlins Davy Plc, solicitors of Bournemouth, for the applicant
Martin Hutchings, instructed by Clarks Legal LLP, solicitors of Reading, for the objectors Mr and Mrs Bell

The following case is referred to in this decision:

City Inn (Jersey)Ltd v Ten Trinity Square Ltd [2008] EWCA Civ 156

The following cases were referred in argument:

Mahon v Sims [2005] 3 EGLR 67
City Inn (Jersey) Ltd v Ten Trinity Square Ltd [2007] EWHC 1829 (Ch)
Winter & anr v Traditional & Contemporary Contracts Ltd [2006] EWCA Civ 1740; [2007] 2 All ER 343
Bank of Credit & Commerce International SA (In Liquidation) v Ali & ors (Costs) Ch D, Lightman J, 4.11.99
Brawley v Marczynski & anr [2002] EWCA Civ 756; [2003] 1 WLR 813
Dearling v Foregate Developments (Chester) Ltd [2003] EWCA Civ 913
Re The Girls' Day School Trust (1872) [2002] EGLR 89
Re The Chapman (1981) 42 P & CR 114

DECISION

1. On 26 January 2007 Mrs J R Fletcher applied to this Tribunal for the modification of a restrictive covenant affecting freehold land at Mill End, Henley-on-Thames, which had been imposed by a conveyance dated 16 June 1956, so as to permit the erection of a two-storey dwelling with additional roof terrace and a garden pavilion, in accordance with planning permission which had been granted by Wycombe District Council on 22 November 2005. Mr and Mrs A J Bell, who own the neighbouring property, objected to the application.

2. The application was listed for a three day hearing commencing on Monday 7 April 2008. At 5.00pm on the previous Friday, 4 April, the objectors were informed that the applicant intended to seek a stay of the application, pending resolution of an intended High Court application for a declaration that the covenant had been discharged on the death of the original vendor of the application land. On 7 April 2008 I made an order staying the substantive application, as I was bound to do under rule 16(b) of the Lands Tribunal Rules 1996. I ordered the applicant to pay the costs thrown away as a result of the adjournment.

3. The objectors acceded to the High Court application, which was determined in favour of the applicant by Order of Master Teverson dated 4 August 2008. The effect of that Order was that the objectors were not entitled to object to the proposed development and so the application in this Tribunal has been rendered nugatory.

4. Mr Hutchings for the objectors now seeks an order that the costs incurred by his clients in connection with the Tribunal proceedings should be borne by the applicant. He relies on the following grounds. The application for a stay was made far too late in the day. If the correct procedure had been followed under rule 16, very significant costs would have been saved. The Tribunal had made it clear that any issues as to enforceability should be resolved at an early stage. The applicant had given repeated assurances that she would not be referring the matter to Court. The objectors are retired and reliant on pensions and savings income to fight the Tribunal case. By the time the High Court application was issued they had spent approximately £100,000 on unrecovered costs in connection with the Tribunal application and they could not continue the battle in another forum. By analogy with court proceedings, the very late withdrawal of an admission should (at the very least) be visited with an adverse costs order. There was no good reason or excuse for the delay in making the rule 16 application. The eventual decision to make such an application was made for tactical reasons, in order to avoid an almost inevitable adverse costs order following a substantive hearing which was most unlikely to achieve the desired modification.

5. For the applicant Mr Jones, who did not appear at the hearing on 7 April 2008, submits that there are grounds on which it could be argued that the objectors should pay the applicant's costs. The circumstances in which the application came to be made, however, are unusual and it would therefore be fair and just for the Tribunal to make no order for costs.

6. When the application and notice of objection were submitted to the Tribunal in January and June 2007 respectively both sides believed, reasonably, that the objectors were entitled to the benefit of the covenant. On 6 March 2008, one month before the date listed for the hearing of the application in this Tribunal, the Court of Appeal delivered judgment in *City Inn (Jersey) Ltd v Ten Trinity Square London Ltd* [2008] EWCA Civ 156. In the light of that judgment the applicant's advisers considered that it would be worth challenging the objectors' right to the benefit of the restriction. Although paragraph 22.4 of the Tribunal's Practice Direction dated 11 May 2006 disapplies the general rule – that a successful party ought to receive its costs – in respect of applications under section 84 of the Law of Property Act 1925, the protection it gives to unsuccessful objectors does not assist the objectors in this case, because it is clear that they have never had the benefit of the restriction. They have, nevertheless, held up the applicant's development for about three years. The applicant is the clear winner, because it has been established that she can have her house built in accordance with her preferred design. Even if she were not the winner, she has already had to pay the objectors substantial costs because of her change of tack.

7. Mr Jones also relies on various aspects of the objectors' conduct in relation to the height of the proposed building, offers to settle, suggested without prejudice meetings and attempts at mediation. Moreover, the High Court Order determined that the restriction was discharged on 21 March 1974, when the original vendor of the application land died. Thus the objectors, contrary to their contentions going back to January 2005, are not entitled to the benefit of the relevant restriction.

8. Mr Jones submits that the legal position changed when the Court of Appeal gave judgment in *City Inn*. I do not think that is a true analysis of the position. The identification of the party entitled to the benefit of a restrictive covenant depends on the relevant factual matrix. Mr Jones accepts, inevitably, that the question of whether or not the benefit of the restriction vested in the successors in title of the original vendor was arguable before *City* was decided by the Court of Appeal and remained arguable afterwards, albeit he suggested that the applicant's case appeared to be significantly stronger in the light of that judgement.

9. I cannot tell, on the information available, whether the objectors are right to suggest that the applicant's application for a stay was made because she thought that the substantive application in this Tribunal would fail or because she was advised that her prospects of success in the High Court had been enhanced by *City*. I am satisfied, however, that the objectors' decision not to oppose the High Court proceedings was not made because they felt they were bound to lose. It was made in the light of the fact that they had been engaged in a lengthy battle with their neighbour which had already cost them in excess of £100,000. They were unwilling to spend the energy and money required to engage in further proceedings in the High Court and, possibly, the Court of Appeal, before returning to this Tribunal, against a party for whom, as had been made clear, legal costs were of secondary concern.

10. Shortly before the substantive hearing in this Tribunal was due to commence the applicant, having weighed up all the risks, decided to abandon her previous position and seek a stay of the proceedings in this Tribunal. There is in my judgment no good reason why she could not have done that when the Tribunal raised the question of the locus of the objectors in a letter dated 28 June 2007. Instead, in a reply dated 5 July 2007, the applicant's then solicitors stated that their client did not allege that the objectors were not entitled to the benefit of the restriction and did not propose to apply to the Tribunal under section 28 of the Law of Property Act 1969 or to the High Court under section 84(2) of the Law of Property Act 1925.

11. There was nothing to prevent the applicant changing her mind as she did. The reason the Tribunal seeks early clarification of the position, however, is in order to prevent costs being incurred in anticipation of a substantive hearing, which will be wasted if the objectors are subsequently held to have no right to object. In failing to contend, when invited to do so by the Tribunal, that the objectors should not be admitted, the applicant has caused them to incur substantial costs in dealing with the substance of the application. There is nothing to suggest that if the application has been pursued to a hearing the objectors would not have been successful. In those circumstances I consider that the abortive costs should be paid by the applicant. I would add that I have read the correspondence which was referred to in connection with the attempts at negotiation and mediation and I do not consider that the objectors' approach to these matters was less reasonable than that adopted by the applicant. Accordingly, I order that the applicant must pay the objectors' costs, such costs to be assessed in default of agreement on the standard basis by the Registrar of the Lands Tribunal.

12. The parties are now invited to make representations on the costs of the application for costs, and a letter on that accompanies this decision, which will become final when the latter costs question has been determined.

Dated 12 January 2009

N J Rose FRICS