

[2018] UKFTT 582 (PC)

REF/2017/0117

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) JS5 LIMITED
(2) ELLSWOOD PROPERTY MANAGEMENT LIMITED

Applicants

-and-

HOLDING & MANAGEMENT (SOLITAIRE) LIMITED

Respondent

Property Address: Flats 6, 8 & 9 (& parking spaces) Ellswood, Laindon, Basildon, SS15
4HE

Title Numbers: EX519754, EX535758 & EX531823

ORDER

The Tribunal orders as follows

(1) that the Chief Land Registrar do cancel the following Restrictions:

- (a) The Restriction entered on 26 October 1994 and registered at entry no.2 of the Proprietorship Register for 6 Ellswood, title no.EX519754;
- (b) The Restriction entered on 22 June 1995 and registered at entry no.2 of the Proprietorship Register for 8 Ellswood, title no.EX535758; and
- (c) The Restriction entered on 7 April 1995 and registered at entry no.2 of the Proprietorship Register for 9 Ellswood, title no.EX531823.

(2) any application for costs should be supported by a schedule of costs and made by 5pm on 18 September 2018, to be served on the Tribunal and the other parties

- (3) any submissions in response to any application for costs to be served on the Tribunal and the other parties by 5pm on 2 October 2018
- (4) any submission by a party applying for an order for costs in response to the submissions of the other party to be served on the Tribunal and the other parties by 16 October 2018

Dated this 21st day of August 2018

Andrew Bruce

BY ORDER OF THE TRIBUNAL



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Before: Judge Bruce
Sitting: Alfred Place, London
On: 16 August 2018

Applicant Representation: Mr Gary Pryce of Counsel
Respondent Representation: Mr Milton McIntosh, Solicitor

DECISION

Cancellation of Restriction – Management Obligations – Landlord & Tenant - Assignments

Introduction

1. The 1st Applicant ["JS5 Limited"], a company registered in England & Wales under company number 358095, is the registered leasehold proprietor of 3 flats at Ellswood, Laindon, Basildon, namely Flats 6, 8 & 9. These comprise 3 of 4 flats in a block. The block is part of a development which was constructed by Lazy Acre Investments Limited ["Lazy Acre"] at Robinia Close. Development work commenced in 1991 and

the block, 6-9 Ellswood, was constructed in or about 1994. Flats 6 & 7 are on the ground floor and Flats 8 & 9 are on the 1st floor¹.

2. The 2nd Applicant, Ellswood Property Management Limited ["Ellswood Management"], a company registered in England & Wales under company number 4996743, acquired the freehold of 6-9 Ellswood on 30 June 2004. Ellswood Management was registered as the freehold proprietor of 6-9 Ellswood under title number EX731550 on 3 August 2004. Ellswood Management's predecessor-in-title was the Respondent, Holding & Management (Solitaire) Limited ["Holding & Management"], a company registered in England & Wales under company number 1649347.
3. On 15 April 2016 JS5 Limited applied on Form RX3 to cancel the following Restrictions:
 - (a) The Restriction entered on 26 October 1994 and registered at entry no.2 of the Proprietorship Register for 6 Ellswood, title no.EX519754;
 - (b) The Restriction entered on 22 June 1995 and registered at entry no.2 of the Proprietorship Register for 8 Ellswood, title no.EX535758; and
 - (c) The Restriction entered on 7 April 1995 and registered at entry no.2 of the Proprietorship Register for 9 Ellswood, title no.EX531823.

The Restrictions are all in identical form, *viz.*

"RESTRICTION:- Except under an order of the Registrar no assignment transfer or other devolution of the Lease or underletting is to be registered unless a certificate is given by or on behalf of Holding & Management (Solitaire) Limited or its successors that the provision of paragraphs 10 and 13 of the Third Schedule to the registered Lease have been complied with"

4. On 13 May 2016 Holding & Management objected to the cancellation on the ground that, although it had ceased actively managing the block in 2004, it retained rights and obligations under the registered leases which entitled it to maintain the Restrictions.
5. The dispute was referred to the Land Registration division of the Property Chamber, First Tier Tribunal under rule 5 of the Land Registration (Referral to the Adjudicator to

¹ This Application does not concern Flat 7 as I was told that the registered leasehold title to Flat 7 contains no material restriction. This is because the lease to Flat 7 has recently been surrendered and upon the re-grant no restriction has been entered on the Register.

HM Land Registry) Rules 2003 and s.73(7) of the Land Registration Act 2002 on 26 January 2017.

Agreed Facts

6. At the outset of the hearing the parties' legal representatives agreed that there was no need for me to hear oral evidence. Rather they were content for the matter to be determined on the basis of the documents before the Tribunal and submissions. Both parties had provided chronologies and on the basis of these and their skeleton arguments the following matters seem not to be in dispute:
- (a) On 25 September 1991 Lazy Acre granted to Holding & Management an Option relating to land at Steeple View, Laindon, Basildon. The Option recited that Lazy Acre was proposing to develop and sell flats on its land, which was registered at HM Land Registry under title no.EX413364, and was granting Holding & Management an option to purchase that land for £1. Clause 3 of the Option provided that the Transfer to Holding & Management (pursuant to the exercise of the Option) should contain provisions that Holding & Management covenant to observe and perform the covenants of Lazy Acre in the leases of the flats.
- (b) On 5 August 1994 a 125-year lease of 6 Ellswood was granted to Miss Kelly Jane Poole. The other parties to the lease were Lazy Acre (defined as the "Developer") and Holding & Management (defined as the "Company"). The lease recited as follows:
- "(A) The Developer is the estate owner of the freehold interest in the Building specified in paragraph 5 of the Particulars being part of the land comprised in the title above referred to and the block of four flats (hereinafter called "The Block") erected or in the course of erection thereon*
- (B) The Developer is desirous of letting the flats and parking spaces in the Block subject to the regulations hereinafter mentioned to the intent that the Lessee for the time being of any of the said flats and parking spaces may enforce the observance of Regulations by the Lessee for the time being of every other flat and parking space*
- (C) So as to preserve and secure the proper and efficient management of the property the Developer has agreed with the Company to grant an option to the Company to purchase the freehold interest in the Block within 28 days of the completion of the grant of the last lease of flats and parking spaces in the Block on the Estate*

(D) The parties hereto have agreed that the Developer shall grant and the Lessee shall accept a Lease of one of the said flats and parking spaces and that the Company shall give the covenants hereinafter contained to the intent that such covenants shall upon completion of the Transfer hereinbefore referred to be annexed to the reversion expectant upon the determination of the leases of the flats and parking spaces in the Block"

The Lease provided that the initial rent was £40 per annum and that this was payable to the Company (i.e. Holding & Management). At cl.3 the Lessee gave usual tenant covenants to the Company and the Developer (i.e. Lazy Acre) as to payment of rent and service charges, repair and decoration, assignment and sub-letting and user. At cl.4 the Company covenanted with the Lessee and the Developer to carry out repairs and provide services at the Block during the term. At cl.5.3 the Developer (i.e. Lazy Acre) gave a covenant for quiet enjoyment. At para.13 of the 3rd Schedule (which Schedule comprised particulars of the Lessee's covenants) the Lease provided:

"(b) The parties hereto apply to the Chief Land Registrar for the entry on the Register of the title to this Lease of the following restrictions:- "Except under an order of the Registrar no assignment transfer or other devolution of the Lease or underletting is to be registered unless a certificate is given by or behalf of Holding & Management (Solitaire) Limited or its successors that the provision of paragraphs 10 and 13 of this Schedule have been complied with"

Paragraphs 10 and 13 of the 3rd Schedule provide that the Lessee will not assign or underlet without first procuring that the assignee or underlessee enters into a direct covenant with the Company to perform the covenants in the Lease and that the Lessee will give notice of any assignment or underletting to the Company.

- (c) On 26 October 1994 the Restriction was entered onto the Proprietorship Register for 6 Ellswood, title no.EX519754.
- (d) On 24 March 1995 a 125-year lease of 9 Ellswood was granted to Mr Thomas Coulter Chambers. The Lease was in like terms to that of 6 Ellswood.
- (e) On 7 April 1995 the Restriction was entered onto the Proprietorship Register for 9 Ellswood, title no.EX531823.
- (f) On 19 May 1995 a 125-year lease of 8 Ellswood was granted to Mr Richard Jeffrey David Bass. The Lease was in like terms to that of 6 Ellswood.

- (g) On 22 June 1995 the Restriction was entered onto the Proprietorship Register for 8 Ellswood, title no.EX535758.
- (h) On 26 March 1997 Holding & Management was registered as the freehold proprietor of land which included 6-9 Ellswood. I was not provided with a copy of this Transfer. Nonetheless it was agreed that the Transfer was made pursuant to the exercise of the Option by Holding & Management.
- (i) In late 2003 Ellswood Management instructed solicitors with a view to acquiring the freehold of 6-9 Ellswood from Holding & Management.
- (j) By letter dated 19 May 2004, agents acting for Holding & Management [namely Solitaire Property Management Company Ltd] wrote to Mr Snazell of Ellswood Management stating:
"...It is my intention that the 2003 year end accounts be issued to you before end of this month and if it be acceptable to you collectively that our management functions cease as at 30th June 2004 which is in effect the half year date...Subject to the settlement of all service charge and ground rent arrears by 30th June I would suggest that solicitors work toward transferring the freehold as soon as possible thereafter..."
- (k) By letter dated 29 June 2004 from Mr Snazell to Solitaire Property Management, Mr Snazell wrote:
"...I have now obtained signatures from each of the lessees, see letter attached, giving authority to you to send to me a copy of the transaction history for each person. This will enable me to prepare the opening accounts for Ellswood Property Management Company Ltd who as you know is purchasing the freehold..."
- (l) By a Transfer in Form TP1 dated 30 June 2004 Holding & Management transferred the freehold title to 6-9 Ellswood to Ellswood Management for the sum of £4,000. The Transfer provided:
"The Transferee so as to bind the property into whomsoever hands it may come hereby covenants with the Transferor that the Transferee will observe and perform the covenants contained or referred to in the registers of the above mentioned title including the covenants on the part of the lessor in each of the registered title to which the Title is subject so far as the same are subsisting and capable of taking effect and the Transferee shall indemnify the Transferor and its successors and assigns against all costs, claims, actions or demands arising out of any future breach, non-observance or non-performance thereof"

- (m) On 2 July 2004 Ellswood Management received a Completion Statement from its solicitors in respect of its acquisition of the freehold of 6-9 Ellswood. The Completion Statement recorded that Ellswood Management had received an allowance for monies in the service charge bank account (which allowance was set off against the purchase price of £4,000) of £1,104.46.
- (n) On 17 March 2011 JS5 Limited acquired the leases to 6, 8 & 9 Ellswood and on 27 April 2011 JS5 Limited was registered as the leasehold proprietor of those properties.

Relevant Principles

7. Rule 97 of the Land Registration Rules 2003 provides:

“(1) An application to cancel a restriction must be made in Form RX3.

(2) The application must be accompanied by evidence to satisfy the registrar that the restriction is no longer required.

(3) If the registrar is satisfied that the restriction is no longer required, he must cancel the restriction.”

Accordingly, the parties agreed that on this application, I must determine whether the Restrictions are no longer required. In doing so it is important to have regard to changes that have occurred since the registration of the Restrictions, the effect and utility of the Restrictions, the interpretation of the Restrictions and the views of the parties affected by the Restrictions.

Analysis

8. The Respondent's position at the hearing was that it was not advancing a positive case that Holding & Management continues to have management obligations in respect of 6-9 Ellswood². Rather, it contended that it *“might be liable”* under the covenants in the registered leases. The Respondent maintained that the covenants with it in the Leases were not *“real covenants”* in the sense of being landlord and tenant covenants that might run with the land, but rather personal covenants. As such they would only be enforceable by the original parties to the Leases, all of whom have now assigned away their interests in the relevant properties. There thus seemed to be no real risk of Holding & Management being sued upon the covenants in the

² This was different to the Respondent's pleaded position as, at para.12 of its Statement of Case, it asserted that: *“...the Company's rights and obligations under the Leases remain vested in the Respondent.”*

Leases and hence no real need for Holding & Management to maintain the Restrictions.

9. In any case, I consider the correct position to be as follows:

- (a) The Option provided that the Transfer to Holding & Management of the freehold of 6-9 Ellswood should contain provisions that Holding & Management covenant to observe and perform the covenants of Lazy Acre in the leases of the flats. This must have been intended to comprise all the lessor covenants of Lazy Acre in the Leases.
- (b) The Leases recited that Holding & Management gave its covenants in the Leases with the intention that those covenants should, upon completion of Holding & Management's acquisition of the freehold of 6-9 Ellswood, be annexed to the reversion expectant upon the determination of the Leases.
- (c) In the circumstances, I am satisfied that the Transfer pursuant to which Holding & Management was registered as the freehold proprietor of land which included 6-9 Ellswood on 26 March 1997 was intended to (and did) include provisions such that Holding & Management's covenants in the Leases were annexed to the freehold. The very purpose of Holding & Management acquiring the freehold was to enable it to better manage 6-9 Ellswood and the acquisition served to merge the rights and obligations of the "Developer" with those of the "Company" such that Holding & Management thereafter held all the rights and obligations of the lessor under the Leases.
- (d) Indeed this was the understanding of Holding & Management subsequent to March 1997 because it treated the ownership of the freehold as founding its rights to recover service charges, as evidenced by the letters referred to in subparagraphs 6(j) and (k) above. Had Holding & Management understood that its management role should continue subsequent to any transfer of the freehold it would not have transferred the balance of the service charge account to Ellswood Management on 30 June 2004 and would not have ceased providing any management functions thereafter.
- (e) The Transfer dated 30 June 2004 served to transfer to Ellswood Management all of the rights and obligations then subsisting in Holding & Management in relation to 6-9 Ellswood. Sections 141 and 142 of the Law of Property Act 1925 operated to transfer the benefit and burden (respectively) of all the landlord

and tenant covenants in the Leases to Ellswood Management. The fact that the Leases draw a distinction between the "Developer" and the "Company" does not serve to take the covenants outside the provisions of s.141 & 142 (contrary to the Respondent's submissions) because the covenants all related to a single entity as lessor, *viz* Holding & Management, following Holding & Management's acquisition of the freehold in 1997 and all related to the use, occupation and management of the leased land. Moreover the justification for Ellswood Management covenanting with Holding & Management to observe and perform "*the covenants on the part of the lessor*" in the Leases (at para.13 of the Transfer) was that the rights and obligations of the lessor had become vested in Ellswood Management by the Transfer. "*Lessor*" in this context necessarily refers to both the "Developer" and the "Company" where these phrases appear in the Leases because any conceptual duality in these roles had ended when Holding & Management had acquired the freehold of 6-9 Ellswood. Had it been otherwise the Transfer would have made clear reference to "*the covenants on the part of the ~~lessor~~ Developer*".

10. The purpose of the Restrictions was to ensure that any assignee of the term entered into direct covenants with the lessor to perform the tenant covenants in the Leases. The lessor, however, is no longer Holding & Management and Holding & Management has not performed any management function in relation to 6-9 Ellswood since it transferred the freehold to Ellswood Management. There can therefore be no benefit to Holding & Management in having direct covenants that tenant obligations as to payment of rent and service charges, repair and decoration, assignment and sub-letting and user will be complied with when Holding & Management has no proprietary (or other) interest in 6-9 Ellswood and no financial (or other) interest in the covenants in the Leases. Of course, it may be that Ellswood Management (as successor to Holding & Management) might benefit from the Restrictions, however I was told that Ellswood Management supported the application to cancel the Restrictions.
11. In the circumstances I am satisfied that the Restrictions are no longer required and therefore ought to be cancelled.

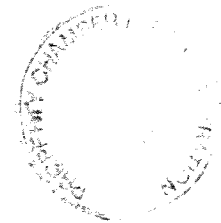
Disposition

12. For the reasons stated above, I am not satisfied that Holding & Management has made out its objections to the cancellation of the Restrictions. Rather, the Applicants have established that the Restrictions ought to be cancelled and I will accordingly direct that they now be cancelled.

13. Subject to the necessary applications and any submissions being made I would be minded to order Holding & Management, as the unsuccessful party, to pay the Applicants' costs. If any party wishes to apply for an order for costs they should make an application in writing, accompanied by a schedule of costs, by 18 September 2018. Such an application should be served on the other parties who will then have 14 days to respond to the application by way of written submission sent to the First Tier Tribunal's offices, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the office and the other party within 14 days of receipt of the submissions.

Dated this 21st day of August 2018

Andrew Bruce



BY ORDER OF THE TRIBUNAL

