

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – preliminary issue under s84(3A) – whether right to benefit had been lost as a result of transfer of that part of benefited land most likely to benefit – relevant conveyances not before the Tribunal – Objector admitted to object but decision as to entitlement left to final hearing.

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925 BY THE CROFT (BICKERSHAW) LIMITED

BY

THE CROFT (BICKERSHAW) LIMITED

Applicant

Re: 399 Bickershaw Lane, Bickershaw, Wigan

Before: His Honour John Behrens

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

on

25 July 2017

Andrew Williams (instructed by Berg) for the Applicant.

William Hanbury (instructed by Butcher & Barlow LLP) for Mr Smith, the Proposed Objector.

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No cases are referred to in this decision.

DECISION

Introduction

1. This is an application under s84(3A) of the Law of Property Act 1925 to determine whether Mr Brian Smith either on his behalf or as the executor of his mother's estate is entitled to the benefit of restrictive covenants contained in a conveyance dated 8 January 1988 ("the 1988 Conveyance") and to oppose the application by The Croft (Bickershaw) Ltd ("TCBL") to modify and/or discharge the covenants.
2. Mr Williams on behalf of TCBL acknowledges that Mr Smith is the owner of land which at one time could have benefited from the covenants. However, he contends that that right has been lost as a result of the current ownership of the benefited land.
3. Mr Hanbury on behalf of Mr Smith notes the concession and contends that that is sufficient to enable Mr Smith to oppose the application. In the alternative, he does not accept that the benefit of the covenant has been lost.

Conveyance

4. In order to understand the position, it is necessary to make reference to two plans – the plan attached to the 1988 Conveyance ("the plan") and a plan submitted by Mr Hanbury showing the ownership of various titles ("the title plan") including the titles of land owned by TCBL, Mr Smith and his mother.
5. In the 1988 Conveyance the Home Secretary sold to Mr Smith, his mother and Mr Kelly the land edged red on the plan for £65,000. The plan shows a rectangular piece of land with a building on it. The building is described as a "hostel or building"
6. Several features of the plan are relevant:
 1. to the east of the building and near the eastern boundary there is a dotted line marked AB extending in a northerly direction from Barracks Road to the northern boundary. This is referred to as a surface water pipe.
 2. to the west of the building and very close to western boundary there is a line marked CD also extending in a northerly direction from Barracks Road to the northern boundary. This is referred to as a drinking water pipe.
 3. A large irregularly shaped piece of land is shown edged green. This extends to the westwards from the northern boundary before turning north eastwards, eastwards, southwards westwards, northwards and westwards again. This is described as "the retained land".
 4. There is a building on the retained land roughly to the north of the hostel. It is described as "The Officer's Club".

7. Under Clause 1 of the Conveyance the vendor reserved in fee simple for the benefit of the retained land:

1. The right to free passage of water through all pipes in on or over the property serving the retained land together with all appropriate rights and easements for repairing maintaining renewing and maintain the same.
2. The surface water pipe and the drinking water pipe collectively referred to as “the Media”.
3. The right to renew alter and remove any of the Media
4. A right of entry on to the red land on 48 hours notice for the purpose of exercising rights in relation to the Media.

8. Several clauses impose covenants on the Purchasers. The clause relevant for present purposes is clause 4 which commences in the following way:

The Purchasers hereby jointly and severally covenant with the Vendor to the intent that the burden of this covenant may run with and bind the land five yards either side of the Media (hereinafter called “the specified land”) and every part thereof and to the intent that the benefit may be annexed to and run with the retained land and every part thereof that the Purchasers will ...

9. There are four restrictions. Nothing turns on the precise wording and they can be summarised:

1. Not to build on any part of the specified land without the Vendor’s consent.
2. Not without consent to excavate, or plant trees on the specified land.
3. Not to undermine the Media or interfere with the free passage of liquid through the Media.
4. Not to lower the surface of the specified land.

Ownership

10. The ownership of the red and green land has changed since 1988.

11. The red land was acquired by TCBL on 16 June 2014 and is held under Title No GM465016. It is shown marked green on the Title Plan. TCBL also acquired that part of the Retained Land immediately to the north of the red land. This is the piece of land upon which the Officer’s club once stood. It is held under title MAN 116630. Reference to the Title plan shows that the route of the drinking water pipe (CD) would extend into this part of the retained land. However, the position of the surface water pipe is less clear. This is because Ainscow Street appears to kink to the left at its northern extremity. It is not clear whether line AB would extend into this kink or into the south-eastern edge of MAN 116630.

12. The original transfer/conveyance of MAN 116630 from the Home Secretary has not been produced. Thus, it is not possible at this stage to know what if any rights were reserved in favour of the remainder of the retained land when it was sold. The Office copy of the register shows that it was acquired by TCBL (under a previous name) from HSBC plc on 3 December 2013 and that the transfer excluded the operation of s 62 of the Law of Property Act 1925.

13. The remainder of the retained land is owned by Mr Smith under 4 separate titles. On 8 June 1998 Mr Smith obtained land shown on the Title Plan as GM 412337. Much of this land does not form part of the retained land and is thus irrelevant. However, there is a narrow strip to the east of MAN 116630 leading to Ainscow Street which is part of the retained land. On 26 June 1991 Mr Smith purchased the narrow eastern strip of the retained land from a person who had purchased it from the Home Secretary in 1990. He holds this under GM 543488. The significant area of the retained land to the north east of Ainscow Street was owned by Mr Smith's mother under title GM728396. It is not clear when Mrs Smith acquired it. She was registered as proprietor on 13 August 1996. Following her death Mr Smith is the executor of her estate and thus has title in that capacity. On 15 August 2014 Mr Smith acquired from the Home Secretary a small strip of land adjacent to and parallel with the northern boundary of MAN 116630. He holds this under title MAN 235021. Finally, Mr Smith contends that he owns a small triangular strip of unregistered land to the north of GM 728396 and to the south of part of GM 412337. It is shown blue on the Title Plan. He has not produced title deeds for this strip and it is not clear whether it is part of the retained land or to the north of it like much of GM 412337. Fortunately, nothing turns on this strip of land.

History

14. The red land is the site of a pre-existing care home which has now been demolished. It is not clear on the evidence when the building on the red land was converted into a care home. At some time, the Officers' Club on MAN 116630 was demolished. On 31 July 2015 TCBL obtained planning permission for the erection of a 66-bed care home to be constructed on the red land and MAN 116630 after demolition of the existing care home.

15. On 8 June 2016 TCBL made an application to this Tribunal to discharge or modify the restrictive covenants to permit the development for which planning permission has been granted. The principal ground is that the covenants are obsolete under s 84(1)(a). However there are alternative claims under ss 84(1)(c) and 84(1)(aa).

16. Notice of objection was given on behalf of Mr Smith on 23 September 2016; A notice under rule 35(1) was served on behalf of TCBL on 7 October 2016. The principal point occurs in ground 2:

The media served exclusively the Officers Club Building which prior to its demolition stood in the Adjacent Land [MAN 116630]. The restrictions were imposed to protect the Media and for no other purpose. You do not own the Adjacent Land and have no entitlement to enter on the adjacent land for the purpose of connecting to the Media. In the circumstances you are not entitled to the benefit of the restrictions.

17. On 26 October 2016 a reply was filed on behalf of Mr Smith. In summary Mr Smith relied on the 1988 Conveyance and his title to much of the retained land. He submitted that proof of entitlement was clearly identified in the Conveyance.

Submissions

18. In his skeleton argument, Mr Williams submitted that the nature of the Media is such that the only part of the retained land capable of taking any benefit from the restrictive covenants was the land to which the Media connects. That is MAN 116630. He submitted that it was irrelevant that Mr Smith owned other land that was part of the retained land. That other land does not benefit from the covenants as a matter of practicality. He contrasted the case with a covenant preventing erection of houses which could benefit the whole of the retained land.

19. In his skeleton argument, Mr Hanbury drew my attention to the provisions of s 84(2) of the 1925 Act which enable the court (not this Tribunal) to determine on application who is entitled to enforce a restrictive covenant.

20. He contrasted the court's powers in an application under s84(2) to this Tribunal's powers in an application under s 84(3A).

21. S 84(3A) is concerned with directions in an existing application under s 84. It gives this Tribunal power to make any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application. He drew my attention to para 12-08 of the current edition of Preston & Newsom on Restrictive Covenants:

The directions given under [s.84\(3A\)](#) do not necessarily amount to a final decision that each objector who is admitted to the final hearing is entitled to the benefit of the restriction. The interlocutory test under [s.84\(3A\)](#) is whether the objector should be admitted "as appearing" to be entitled to the benefit of the restriction. Therefore, in a proper case, it is still possible to challenge the title of an objector at the substantive hearing, but in most cases the issues will have been canvassed fully at the interlocutory stage.

22. He submitted that each part of the retained land was entitled to the benefit of the covenants and thus Mr Smith, as the owner of much of the retained land, "appeared to be" entitled to the benefit of the restrictions and thus should be allowed to oppose the application.

23. At the oral hearing, much of this was repeated. However, Mr Williams accepted that at the date of the 1988 Conveyance each and every part of the retained land was entitled to the benefit of the restrictions but contended that that right was lost when the title to MAN 116630 separated from the remainder of the retained land. After that time, it was not possible for the owner of the remainder of the retained land to gain access to the pipes to make the necessary connections.

24. When it was pointed out that none of the relevant conveyancing documents relating to the separation of MAN 116630 were before the Tribunal, the submissions developed into an argument

over the burden of proof. Mr Williams submitted that the burden of establishing that Mr Smith was entitled to the benefit of the restrictions was on Mr Smith. It followed that it was for Mr Smith to produce the relevant documents. Failure to do so meant that he had not established an entitlement to benefit. Mr Hanbury accepted that the initial burden fell on Mr Smith. In his submission Mr Smith had discharged that burden by pointing to the provisions in the 1988 Conveyance and establishing title to much of the retained land. If TCBL wished to prove that the remainder of the retained land had lost the benefit it was for TCBL to produce the relevant documents which established that loss. The fact that TCBL is the owner of MAN 116630 is not conclusive. There may have been express or implied terms when the titles were separated which gave any necessary rights of access to the owners of the remainder of the retained land.

Discussion and conclusions

25. The starting point is that clause 4 of the 1988 Conveyance expressly provides that “the benefit may be annexed to and run with the retained land and every part thereof”. There is, in my view no reason for this Tribunal to substitute its view for that of the parties to the 1988 Conveyance. It follows that I disagree with the submission in ground 2 of the rule 35(1) notice that “The Media served exclusively the Club Building”.

26. I agree with Mr Williams that this Tribunal must look at the position as it is now. The question is whether Mr Smith has a present right to enforce the covenants.

27. I also agree with Mr Williams that the initial onus to establish that right falls on Mr Smith. That appears from several passages to which I was referred at the hearing including para 12-10 of Preston & Newsom:

It has been laid down distinctly by the Tribunal in a number of cases that an objector has no right to be admitted to oppose the application unless he is entitled to the benefit of the restriction and that therefore the onus is on him.

28. I agree with Mr Hanbury that Mr Smith has established a prima facie right by virtue of his ownership and the terms of the 1988 Conveyance. The crucial question is whether that right has been lost having regard to the nature of the Media and the separation of MAN 116630 from the remainder of the retained land. In my provisional view, it is for TCBL and not Mr Smith to establish that that right has been lost. In my view that cannot be done without sight of the relevant conveyancing documents relating to that separation. Furthermore, as I have indicated there is the possibility that Mr Smith might be able to connect to the surface water pipe via Ainscow Street.

29. In my view, it would be wholly unsatisfactory to decide this case on the burden of proof. The relevant conveyancing documents may well be readily available and the question of access via Ainscow Street should also be capable of an easy response.

30. As noted above, the direction under s 84(3A) does not necessarily have to amount to a final decision that Mr Smith is entitled to the benefit of the covenant. That is the course I propose to follow. I propose to admit Mr Smith as entitled to object but to leave open to the final hearing the question whether he is entitled to the benefit or whether the right has been lost.

31. That will enable all relevant further evidence including the relevant conveyancing documents to be obtained and enable the Tribunal to determine the matter on the merits rather than the burden of proof.

32. In the light of this decision (and despite the discussion at the hearing) the costs of this application will be reserved until after the decision at the final hearing. In the absence of a decision as to whether Mr Smith is in fact entitled to object it would be wrong to make any award as to costs.

33. Within 21 days of this decision the parties are invited to submit to this Tribunal details of any directions they seek in relation to the final hearing including the questions of whether they would wish the final hearing to take place in the North of England, time estimates and availability. The papers will then be put before the Deputy President who will make such directions as he thinks appropriate.

ADDENDUM ON COSTS

34. In para 32 of the decision I expressed the provisional view that costs should be reserved to the final hearing. Mr Hanbury invited me to reconsider that decision and award the costs of the preliminary hearing to Mr Smith. He raised a number of points in two emails that he sent to the Tribunal. They include:

- 1) the normal costs order in a preliminary *locus standi* hearing is for the applicant to pay the successful objector's costs in any event. This is reflected in the Tribunal's own guidance (explanatory leaflet T 608 at paragraph 7.2, page 13) and practice directions (at 12.5.2). It is also reflected in Preston and Newsom 10th edition at 17.05. With respect, Tribunal must give a reason for departing from normal practice. In the objector's submission, he has succeeded in establishing his entitlement to object. There is no reason in principle why the objector should have not have the costs of so doing.

- 2) In the event of the Tribunal concludes at the end of the substantive hearing that, in fact, the objector has no entitlement to the benefit of the covenant, having considered all the deeds and surrounding circumstances, it can depart from its normal practice of allowing the objector a "free run" (i.e. by making no order for costs) by penalising him for all or part of the costs. That is not a reason for depriving him of his legal costs of the preliminary hearing. The applicant could simply have accepted that, in principle, the objector was entitled to object but argued on proper analysis of the deeds he was not in fact entitled to the benefit of the covenant. That is not the position the applicant has adopted.

35. I am unpersuaded by these submissions. I accept that para 12.5 2) of the Practice Direction provides that:

Where an applicant unsuccessfully challenges an objector's right to object to an application the applicant is normally ordered to pay the objector's costs in dealing with that challenge.

In my view, however, Mr Smith has not established a right to object. The position is uncertain because I have deferred that decision to the final hearing when all the relevant documents are before the Tribunal. By reserving the costs of the preliminary hearing I am not depriving Mr Smith of his costs. If he establishes a right to object at the final hearing he will be able to argue in favour of the normal order. However, if it turns out that the right to the easement has in fact been lost when MAN 116630 was separated from the rest of retained land I can see no basis on which Mr Smith should be entitled to his costs. There would then be an argument for ordering Mr Smith to pay the costs of the preliminary hearing though I can see force in a counter argument that TCBL should have produced the relevant documents at the preliminary hearing.

36. In all the circumstances, the costs of the preliminary hearing will be reserved to the final hearing. I invite the parties to comply with para 33 of the decision.

Dated 29 August 2017

John Behrens

His Honour Judge Behrens