

UPPER TRIBUNAL (LANDS CHAMBER)



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LT Case Number: LP/46/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – entitlement to benefit – whether covenant annexed to land – whether land capable of being benefited – whether original covenantee entitled to be heard by virtue of contractual benefit only – admission as objectors refused

IN THE MATTER OF AN APPLICATION UNDER
SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY

IAN AND LORRAINE HUTCHINSON

Re: 1 Captains Gorse
Upper Basildon
Reading
Berkshire
RG8 8SZ

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
On 16 September 2009

Martin Hutchings instructed by IBB Solicitors of Uxbridge for the applicants
Daniel Gatty instructed by Richard Wilson & Co, solicitors of Goring-on-Thames, for the objector

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The following cases are referred to in this decision:

Crest Nicholson Residential (South) Ltd v McAllister [2004] 1 WLR 2409

Millbourn v Lyons [1914] 2 Ch 231

LCC v Allen [1914] 3 KB 642

Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd [1952] Ch 286).

The following further cases were also referred to

Re Frost's Application (1971) 23 P & CR 113

Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594

Marten v Flight Refuelling Ltd [1961] 1 WLR 1018

Mohammedzadeh v Joseph [2006] EWHC 1040 (Ch)

DECISION ON THE ADMISSION OF OBJECTORS

1. The substantive application in this case relates to an area of land forming part of the curtilage of the applicants' house, 1 Captain's Gorse, Upper Basildon, Reading. It seeks the discharge or modification of a restrictive covenant contained in a transfer of title of the subject land dated 17 May 1991. The transfer was from Joseph Nigel Goddard to Andrew Paul Greener and Wendy Greener, the applicants' predecessors in title. Mr Goddard objected to the application, claiming to be the owner of land to which the benefit of the restriction attaches. The applicants have challenged his entitlement to object. There is also an application by Mark Kenneth Dunkley, Michael Holland Goddard and Gregory John Whiting (referred to as the trustees), who are the owners of land which is occupied by Mr Goddard and which he claims to have owned at the date of the transfer. The trustees seek to be added as objectors, and the applicants oppose this. Whether Mr Goddard or the trustees or all of them should be admitted to object to the application is the subject of this decision following a hearing at which submissions were advanced by counsel for each of the parties.

2. The application was made in July 2007. It named Mr Goddard as the person entitled to the benefit of the covenant, and in due course notice of the application was served on him. On 29 April 2008 he filed an objection claiming that he was the original covenantee and also that he owned land at Rushdown Farm adjacent to the application land. Some months later the applicants instructed solicitors who, on 26 March 2009, raised with Mr Goddard's solicitors the question of his entitlement to object to the application. They sought from the solicitors a copy of the transfer of 17 May 1991.

3. Because of the Tribunal's concern about the slow progress of the proceedings a pre-trial review was fixed before a Member, Mr P R Francis FRICS, on 7 May 2009. In his order following the PTR Mr Francis ordered disclosure of the parties' respective title deeds by 13 May 2009, ordered a stay of the proceedings in the event that the applicants before 20 May 2009 made application to the High Court under section 84(2) of the Law of Property Act 1925 and gave other procedural directions. The substantive hearing was fixed for 16 September 2009. No application to the High Court was made. The objector's title documents, which consisted of Land Registry entries only, were produced on 20 May 2009, and the applicants' solicitors informed him that they were not satisfied that he was entitled to object. On 6 August 2009 his solicitors applied to have the trustees added as objectors, and the applicants objected to this. As a result the hearing on 16 September 2009 was changed to one for the purpose of determining the admission for objectors under section 84(3A).

4. The case for the applicants is that neither Mr Goddard nor the trustees are entitled to the benefit of the covenant, and that in any event the trustees should not be permitted to object in view of the delay in their request to do so.

5. The transfer itself of 17 May 1991 cannot be found. Reliance is therefore placed on the Land Registry entry. This identifies the property as "Land adjoining No.1 Captains Gorse Upper Basildon", the consideration as £12,500, Mr Goddard as the transferor and Mr and Mrs Greener as the transferees. The extent of the land transferred is described by reference to a plan and is said to be "part of the land comprised in a Deed of Gift dated the 1st day of

December 1975 and made between Joan Winifred Goddard (1) and the said Joseph Nigel Goddard (2)". The entry sets out the restrictive covenant as follows:

"The Transferees hereby jointly and severally covenant with the Transferor that neither they nor their Successors in Title shall do or permit or suffer to be done on the property or any part thereof any act or thing which shall be or may become a nuisance or annoyance to the owner or occupier for the time being of the retained land or any part thereof and in addition the Transferees covenant that at all times the land shall be used for agricultural purposes or as garden area and no building or structure for residential or commercial purposes shall be constructed thereon provided however that nothing herein shall prevent the Transferees and their successors in Title from erecting on the property a shed greenhouse or workshop".

6. The applicants' house, 1 Captain's Gorse, is one of nine houses in a close development. It is one of the two plots that are on the eastern side of the development. The application land abuts it to the east. Immediately to the east of the application land is the southerly tip of an area of land (the red land) owned by Anthony Pattinson, consisting of a house, Rushdown House, set in very extensive wooded grounds. On the north side of the red land are the house and other buildings of Rushdown Farm that are owned and occupied by Mr Goddard. The land on which these stand (the green land) is about 300 yards from the application land at its nearest point. Wrapping round the red and green land on the west, north and east is an area of land (the orange land) perhaps 50 acres or so in extent consisting of woodland and agricultural land. This land is owned by the trustees and is occupied by Mr Goddard. The application land is separated from the orange land by a plot of similar size to it that adjoins number 2 Captain's Gorse. To the west of this plot, and like it abutting the orange land, are the curtilages of four of the houses in Captain's Gorse and the curtilage of a further house. This part of the orange land, for a substantial distance northwards, consists of woodland.

7. A document entitled "Response by Joseph Nigel Goddard" was filed by his solicitors in July 2009. It is the form of a statement by him, although he has not signed it. It is said to be made in response to the applicants' claim that he should be debarred from objecting. In the statement Mr Goddard says that he owned the orange land and the green land at the time of the transfer in 1991 and that he has remained the owner of the green land. The orange land, he says, was transferred in 1998 pursuant to a power of sale by Coutts & Company, bankers, to Michael Holland Goddard and Joan William Goddard, who were acting as trustees of a settlement of which he is the life tenant. He produces the 1998 transfer and the settlement, which is dated 5 October 1951. In a statement dated 15 September 2009 signed by him (but containing no declaration) he says that his earlier statement that he had remained the owner of the green land since 1991 was wrong. In fact, due to his financial difficulties in the 1990s his family bought the land, which had been mortgaged, and he was finally able to buy it back in 2004. The applicants pointed out that Mr Goddard's two statements contained no declaration and that he had not signed the first one, but they did not seek to cross-examine him.

8. The application seeks discharge or (as now amended) modification of the covenant on grounds (a), (aa) and (c) in section 84(1). In support of ground (aa) it is stated amongst other things that on 17 August 1977, 12 October 1983 and 18 July 1984 Mr Goddard was refused

planning permission on applications each of which sought permission for the erection of a house on the strip of land comprised by the application land and the plot to the north.

9. For the would-be objectors Mr Daniel Gatty advances four reasons why Mr Goddard is entitled to the benefit of the covenant. Firstly, it is said, Mr Goddard, as original covenantee still has the benefit of the restriction even if he is unable to enforce it against the covenantors successors in title. This would entitle him to nominal damages against the covenantors in the event of a breach. Secondly, it is said, Mr Goddard is the freehold owner of part of the land, the green land, for the benefit of which the restriction was imposed, the “retained land” in the 1991 transfer being the orange land and the green land, and on this account he has the benefit of the covenant. The third basis that is advanced is that Mr Goddard is the occupier of the orange land, now owned by the trustees, and since, it is said, the covenant related to that land, he has the benefit of it under section 78(1) of the 1925 Act. The fourth basis advanced is that the trustees are Mr Goddard’s successors in title in relation to the orange land but, since he has a beneficial interest in it as tenant for life, he is a person deriving title under successors in title to the original covenantee and the covenant is deemed to be made with him under section 78(1). As far as the trustees are concerned, the contention is simply that they are the successors in title to Mr Goddard in relation to the orange land, and the benefit of the covenant was annexed to that land by the 1991 transfer.

10. Leaving aside for the moment Mr Goddard’s claim that he is entitled to object because he has a contractual right to obtain nominal damages against the original covenantors in the event of a breach of covenant, it is to be noted that his claim to be entitled to the benefit of the covenant is made on two alternative bases – that he is the original covenantee, and that he is not the original covenantee. The latter basis applies in any event to the trustees. On the latter basis he and the trustees must show that the benefit of the covenant was annexed to land of Mr Goddard by the 1991 transfer: see *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 WLR 2409. On the former basis it is sufficient for him to show that the covenant was taken to protect land retained by him at the time of the transfer (see *Millbourn v Lyons* [1914] 2 Ch 231; *LCC v Allen* [1914] 3 KB 642) and that as a matter of evidence, it does benefit that land (see eg *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286). I consider first, therefore, whether Mr Goddard is properly to be treated as the original covenantee for the purposes of these rules.

11. In my judgment Mr Goddard cannot claim to be the original covenantee for the purpose of enforcing the covenant against a successor in title to the covenantor. He disposed of both the orange land (in 1998) and the green land (some time in the 1990s), and although he bought the green land back in 2004 it is difficult to see why he should be in any different a position from a purchaser who had not previously owned the land. For the purpose of the rules relating to the transmission of the benefit and burden of a restrictive covenant, Mr Goddard ceased to be the original covenantee when he disposed of the land, and I can see no reason in principle why, by purchasing the green land in 2004, he should be in any better position as to the enforcement of the covenant than his immediate predecessors in title. If, during the period from 1998, when the applicants bought the land, and 2004 there was no one who could enforce the covenant against them, it seems to me inconceivable that the power to enforce, surrendered by Mr Goddard when he sold the green land, could subsequently be revived. *LCC v Allen*, on which Mr Gatty sought to rely, provides no support for his contention. It did not address the

situation of a covenantee who has divested himself of the land said to be benefited only to become owner of part of it at some later date.

12. The effect of this conclusion is that neither Mr Goddard (under section 78(1) or otherwise) nor the trustees can enforce the covenant unless there has been annexation. The benefit of a covenant is annexed only to such land as is identified in the conveyance by express words or necessary implication as intended to be benefited, being described in such terms as enable it to be easily ascertained from other evidence: see *Crest Nicholson*, per Chadwick LJ at paragraphs 31 to 34. The justification for the requirement that the land should be readily ascertainable was stated by the lord justice as follows (in paragraph 34 at p 2422 G-H):

“It is obviously desirable that a purchaser of land burdened with a restrictive covenant should be able not only to ascertain, by inspection of the entries on the relevant register, that the land is so burdened, but also to ascertain the land for which the benefit of the covenant was taken – so that he can identify who can enforce the covenant. That latter object is achieved if the land which is intended to be benefited is defined in the instrument so as to be easily ascertainable. To require a purchaser of land burdened with a restrictive covenant, but where the land for the benefit of which the covenant was taken is not described in the instrument, to make inquiries as to what (if any) land the original covenantee retained at the time of the conveyance and what (if any) of that retained land the covenant did, or might have, ‘touched and concerned’ would be oppressive. It must be kept in mind that (as in the present case) the time at which the enforceability of the covenant becomes an issue may be long after the date of the instrument by which it was imposed.”

13. Mr Gatty says that the words “the retained land” sufficiently identify the land to be benefited as the orange land and the green land. I do not accept this. The entry refers to the land conveyed as being part of the land comprised in the 1975 deed of gift. The deed of gift has been lost, so that it is impossible to establish what land was comprised in it, nor is it implicit that “the retained land” was the whole of this land or part of it and, if part of it, what part. Mr Gatty says that the 1998 conveyance to the trustees of the orange land shows that Mr Goddard owned the freehold of that land in 1998 and Mr Goddard’s statement that he owned the land in 1991 is sufficient to establish that he did. But in relation to neither the orange nor the green land is there anything in the entry that would enable a purchaser of the application land readily to ascertain what “the retained land” was. Accordingly the covenant was not annexed to any land and, since it was not, neither Mr Goddard nor the trustees are able to enforce it by virtue of their ownership of, respectively, the green land and the orange land, nor can Mr Goddard rely on section 78(1) to enforce it.

14. I have said that Mr Goddard cannot claim to be the original covenantee for the purpose of enforcing the covenant against a successor in title of the covenantor. Even if he were he would have no entitlement unless the covenant were imposed for the benefit of the green land and he could show that it is capable of being benefited by it. While I am inclined to think that the first part of the covenant (against nuisance or annoyance) can be said, through a combination of the 1998 conveyance and Mr Goddard’s statements, to have been imposed for the benefit of the orange land, there is insufficient in my view to show that the green land was part of the retained land. I also accept Mr Hutchings’ submission that the second part of the covenant

(restricting the use of the application land and the erection of building or structures upon it) was not, on a proper construction, intended to benefit the retained land. (This last point would not, however, defeat the objection since the application is made in respect of the totality of the covenant.) In any event, however, there is nothing before me to establish that the green land is capable of being benefited by the restrictions. The application land is a small parcel of land adjacent to a succession of plots in residential use and separated from the green land by about 300 yards of wooded land. No evidence has been called on Mr Goddard's behalf to suggest how the green land might benefit from the restrictions. The use and building restriction cannot, it seems to me, on any realistic basis, be said to benefit the green land; and, taking a similarly realistic view, the same would go for the restriction relating to nuisance and annoyance. For this additional reason, also, Mr Goddard has no entitlement as the original covenantee and the owner of the green land.

15. This leaves the claim that Mr Goddard should be admitted to object to the application as a covenantee who could maintain a claim for nominal damages against the original covenantors, who sold the subject land in 1998. I am happy to be able to conclude that he is not entitled to be admitted on this basis. The power of the Tribunal to discharge or modify a covenant applies in relation to "any freehold land affected by any restriction". That power does not extend to a covenant that is enforceable in contract only because there would be no freehold land affected in any way that was relevant to the right of the covenantee. It follows, in my judgment, that, where application under section 84 is made, only a person appearing to have the benefit of the covenant by virtue of an interest in the application land is entitled to be admitted as an objector.

16. Mr Gatty, however, points to section 84(5) which provides:

"Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not."

Mr Gatty says that under this provision Mr Goddard would lose his entitlement to nominal damages for breach of covenant and so should be admitted to object in order to defend that entitlement.

17. It is, of course, the case that an objection from a person in such a position would fail because ground (c) (probably) or ground (aa) (certainly) would apply: but this is not determinative of the issue. Under section 84(5) one possibility is that a person with a purely contractual right loses his entitlement if the restriction is discharged. The other possibility is that he retains it despite the discharge. It does not seem to me to be necessary to decide which of these two possibilities is correct. In either event it does not seem to me that the scheme of section 84 is such that a person with a purely contractual right should be treated as entitled to object.

18. Neither Mr Goddard nor the trustees are admitted to object to the application. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision.

Dated 21 September 2009

George Bartlett QC, President

19. I have now received representations on costs. The applicants ask for their costs of the proceedings on the admission of objectors against Mr Joseph Goddard, Mr Dunkley, Mr Michael Goddard and Mr Whiting, and there is no resistance to this. I can see no reason why such costs should not be awarded. Those persons must accordingly pay the applicants' costs of the proceedings, such costs if not agreed to be the subject of detailed assessment by the Registrar on the standard basis.

Dated 17 November 2009

George Bartlett QC, President