UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Law of Property Act 1925 Section 84 -- application for discharge or modification of restrictive covenants -- covenants imposed by a deed of 1910 which is no longer available -- whether objectors entitled to the benefit of the covenants

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

BY

SUTTON AND EAST SURREY WATER PLC

Applicant

MS EDITH JOYCE KILBY
MR AND MRS EVERETT
MRS SU BARRY AND MR STEPHEN LEHEC
MRS DOROTHY ANN MURRAY
MR KEITH ROBERTS

Objectors

Re: **Woodcote Reservoir,**
Smithambottom Lane,
Purley
CR8 3DE

Decision by Written Representations

The following cases are referred to in this decision:

Sainsbury Plc v Enfield LBC [1989] 1WLR 590
Federated Homes Limited v Mill Lodge Properties Limited (1980) 1WLR 594

DECISION

Introduction

1. This decision is concerned with the question of whether any of the objectors, who have made objections to the application by the applicant under section 84 of the Law of Property Act 1925 for the discharge or modification of restrictive covenants, are entitled to the benefit of the relevant covenants. If an objector is not entitled to the benefit of the covenants then that objector cannot be admitted to oppose the application for the relevant modification or discharge of the covenants.

2. This decision is made upon the written representations of the applicant and the various objectors.

3. The applicant is the owner of land known as Woodcote Reservoir, Smithambottom Lane, Purley. The applicant is the successor in title to the Sutton District Water Company ("SDWC") to whom it appears the application land was conveyed in or about July 1910. The applicant is registered with title absolute to the application land at HM Land Registry.

4. In the charges register paragraph of the Land Registry document it is recorded that the land is subject to restrictive covenants in the following terms in paragraph 2 of the charges register entry (paragraph 1 is not presently relevant):

> "The land is not to be used for any trade or business except that of a Company for the supply of water and for the purpose of forming a reservoir or reservoirs with the necessary pipes connections and underground apparatus for the storage of water. The excavation for any reservoir or reservoirs shall not extend below 348.69 ordnance datum provided that a suitable foundation can be found in the opinion of the Sutton District Water Company's Engineer at such a depth otherwise to such depths as the said Company's Engineer shall consider necessary to carry the superstructure nor shall the height of any part of such reservoir or reservoirs or the embankments thereof extend above 368.94 ordnance datum. The top of such reservoir or reservoirs shall be covered with turf or sewn with grass seed and the sides with turf slopes. No building or structure other than the said reservoir or reservoirs shall be erected on the land except a recorder house not nearer the road frontage than the houses on the adjoining land and not exceeding 8 feet by 12 feet and not more than 10 feet in height above the natural ground to the ridge. Such recorder house shall be for the purpose of recording and shall be built of brick and rough cast with tiled roof in accordance with elevations previously approved by William Webb of Upper Woodcote House, Purley, Surrey Gentleman and a wooden tool shed 6 feet by 12 feet and not more than 8 feet to the ridge and not nearer the road than the recorder house.
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> No boundary or party fences or party walls shall be erected on the land other than wire fences and live hedges and the Proprietors shall do all that be necessary to maintain such parts of the live hedges as are on their land the back and side fences being party fences. No part of the land shall be used as a public path or road or as a means of access to other property. No chalk gravel or sand is to be taken out of the land within 15 feet of the side or back boundaries of the land. Nothing shall be done on the land which shall become a nuisance or annoyance to the said William Webb or the adjoining owners nor shall any

machinery except such as is as far as practicable noiseless inoffensive and underground be erected or used on the land."

5. The application to modify or discharge these restrictive covenants is dated 12 July 2016. The application states that the original of the deed imposing the covenants is not available. Thus the only information regarding the wording contained in the 1910 deed whereby the restrictive covenants were imposed is the wording to be found in the charges register part of the Land Registry document.

6. The application is made for the purpose of enabling a development pursuant to a planning permission which has been granted by a decision of a planning inspector dated 21 July 2014. The proposed development would involve the construction of two buildings containing apartments with associated amenity space and parking.

7. The application was duly advertised. Objections were received from:

(1) Edith Joyce Kilby as owner of 7A Smithambottom Lane;

(2) Sharon Everett as owner of 10 Smithambottom Lane;

(3) Mrs S Barry and Mr S Lehec as owners of 4 Woodcote Lane;

(4) Mrs Dorothy Murray as owner of 7 Smithambottom Lane;

(5) Keith Roberts as owner of 12 Smithambottom Lane.

8. The representations made by each of these objectors principally constitute observations as to why on the merits of the case their respective properties would be adversely affected by the proposed discharge or modification of the restrictive covenants and why in consequence such covenants should be preserved. Apart from certain limited additional representations (which I will refer to separately below) on the part of some of the objectors, the objectors do not put forward any specific evidence as to why they claim they are entitled to the benefit of the restrictive covenants beyond the fact that they are the owners of their respective properties in the immediate neighbourhood of the application land.

9. In respect of the objections of each of the objectors the applicant raises the same arguments as to why that objector is not entitled to the benefit of the restrictive covenants. In summary the applicant makes the following points:

(1) The objector has not provided any evidence to show that their land is entitled to the benefit of the covenants.

(2) There is no reference to the covenants on the objectors' respective registered titles such as evidence of an express assignment of the benefit of the covenants.

(3) The covenants in question predate of Law of Property Act 1925 and in order for the benefit of a pre-1925 covenant to pass to successors in title of the original covenantee it must be shown that the following requirements are satisfied:

(a) The covenant must touch and concern the land of the original covenantee; and

(b) The benefit must have passed to the original covenantee's successors in title by annexation, if there is no evidence of express assignment.

(4) Statutory annexation under section 78 of the Law of Property Act 1925 does not apply in the present case because that section is not applied retrospectively and its statutory predecessor, the Conveyancing Act 1881 section 58 which would apply, does not annex the benefit of a covenant without proof of intention that the covenant should run with the land – see *Sainsbury Plc v Enfield LBC* [1989] 1WLR 590.

(5) The wording of the covenants suggests that the benefit of the covenants was not intended to run with the land. Had there been an intention that the benefit should run with the land then, rather than there being a reference to William Webb in the last sentence of the first part of the covenant, there would instead have been reference to "William Webb and his heirs and successors the owners of ….." [namely the benefited land].

Discussion

10. The law of equity permits the devolution and sharing of the benefit of a covenant for the protection of land that remains capable of benefiting that land, but successors (i.e. to the original covenantee) may enforce against successors (i.e. to the original covenantor) only when the benefit of the covenant has run into the hands of those seeking to enforce the covenant in one of three possible ways, namely:

(1) By annexation of the benefit of the covenant to the land now held by the objector; or

(2) By assignment of the benefit of the covenant from the original covenantee through to the present objector; or

(3) On the basis of there existing a local law in the form of a building or development scheme.

11. There is nothing in the material before the Tribunal to indicate that there has been any express assignment of the benefit of the restrictive covenants such that the benefit has come into the hands of any of the objectors through a chain of assignments.

12. There is nothing in the material before the Tribunal to indicate the existence of any building or development scheme such as to give rise to a local law of mutually enforceable restrictive covenants binding the application land. I stress that this observation is made in relation to the application land which was sold for the purpose of being made into a reservoir. I make no observation as to what if any mutually enforceable local law (through a building scheme) may exist in relation to the various houses in the vicinity.

13. Accordingly the objectors will only be entitled to the benefit of the restrictive covenants if the benefit of the covenants became annexed to land which has in due course become vested in them.

14. Upon the question of whether there is evidence of annexation in a conveyance dated before 1926, Preston & Newsom Restrictive Covenants Affecting Freehold Land 10th Edition at paragraph 2-14 states as follows:

> "To effect annexation apt words should have been used. In *Drake v Gray* Green LJ explained that:
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> > "There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant … a covenant with so-and-so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken 'for the benefit of' whatever the lands may be."
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> Accordingly the Court of Appeal held that the benefit of a covenant with the respective parties to a partition "and other the owners or owner for the time being" of the partitioned properties was annexed to those respective properties.
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> In practice there are many variations of these phrases; but it is essential to find a clear indication within the pre-1926 instrument of an intention to benefit the property (and the owners thereof merely by virtue of their ownership), as distinct from creating a covenant which
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> > "would be of use to the covenantee for the protection of [his property] in his own hands and for enabling him to dispose of [the property] advantageously to anybody with whom he might deal in future."
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> A covenant of the latter sort is not annexed, but its benefit can in some circumstances pass by express assignment."

15. It is easier to infer an intention to annex the benefit of a restrictive covenant to land of the covenantee in a conveyance after 1925 having regard to the operation of section 78 of the Law of Property Act 1925 as interpreted by the Court of Appeal in *Federated Homes Limited v Mill Lodge Properties Limited* (1980) 1WLR 594. However section 78 was not in force as at the date of the 1910 conveyance. The statutory provision which was in force, namely section 58 of the Conveyancing Act 1881 which deems the covenant to be made with the covenantee "his heirs and assigns" is not of itself sufficient to annex the benefit of the covenant to the land (and each and every part of the land) held by the covenantee at the date of the conveyance, see *J Sainsbury Plc v Enfield LBC* [1989] 1WLR 590.

16. The charges register does not disclose who were the parties to the 1910 conveyance nor does it disclose the words which introduced the restrictive covenants. All that is given is the text of the restrictive covenants themselves. Accordingly there is no evidence that the original conveyance which imposed the restrictive covenants was a conveyance whereby SDWC covenanted in the terms of the restrictive covenants with William Webb and his heirs and assigns owner or owners for the time being of the residue of some identified area of land. It is right to say

that it is not even made expressly clear that William Webb was the person who conveyed the land to SDWC or that William Webb owned other lands in the vicinity. However in my view, bearing in mind the terms in the charges register, it is possible to infer that it was Mr Webb who conveyed the application land to SDWC and that Mr Webb did own other land in the vicinity. Even making those inferences however, this is not sufficient as is explained below to enable the objectors to succeed.

17. The wording of the restrictive covenant itself contains some indication that the benefit of the covenant was for William Webb personally rather than for the benefit of the owners for the time being of some particular area of ascertainable benefited land. In my view this intention emerges from the fact that the restriction upon the construction of the recorder house, namely that it should be in accordance with previously approved elevations, required that this previous approval should be given by "William Webb of Upper Woodcote House, Purley, Surrey Gentleman". It is Mr Webb personally whose approval is needed.

18. Separately from the foregoing point, there is no evidence of the extent of the land in the neighbourhood which William Webb owned in July 1910. I have already indicated I consider it is permissible to infer that he did own some land in the neighbourhood (and there is an express reference to him having owned other land in the neighbourhood anyhow in 1907 in the charges register entry in respect of Ms Kilby's land). However there is no evidence before the Tribunal as to the extent of the land owned in 1910 by William Webb. Accordingly even if, contrary to my view, there can be found in the present case an intention in the (missing) 1910 conveyance to benefit retained land of William Webb (rather than the covenant being one that was enforceable by William Webb personally) there is the following problem. For the benefit of a restrictive covenant to be annexed to land it is a requirement that the land to be benefited should be so defined as to be easily ascertainable. This requirement is not satisfied in the present case. See paragraph 2-06 of Preston and Newsom:

> "In *Crest Nicholson Residential (South) Ltd v McAllister* Chadwick LJ in the leading judgment of the Court of Appeal confirmed that a requirement for annexation to land is that the land should be so defined as to be "easily ascertainable". After referring to the statutory provisions for registration he said:
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> > "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 enquiries 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."
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> It therefore behoves any covenantee who wishes to establish a scheme of mutual restrictions or to ensure annexation to make this clear within the covenant itself so that it is replicated in official copies of the registered title. Otherwise evidence of intended mutuality or of the identity of benefited land could cease to be easily ascertainable if

> relevant deeds are lost or destroyed. The use of express words is undoubtedly the best way of achieving permanent proof of mutuality or annexation."

19. This combination of the absence of any evidence as to the wording of the 1910 deed regarding what (if any) land was to be benefited; the indication from the wording of the restrictive covenant that the intention may have been that the benefit of the covenant was for Mr Webb personally; and the absence of any ability easily to ascertain the extent of the benefited land (if land was intended to be benefited rather than Mr Webb personally) leads to the conclusion that none of the objectors can succeed in proving that they are entitled to the benefit of the restrictive covenant.

20. In reaching this conclusion I have not overlooked the following wording in the restrictive covenant:

> "Nothing shall be done on the land which shall become a nuisance or annoyance to the said William Webb or the adjoining owners…"

However this reference "adjoining owners" in my view weighs against rather than towards an intention to annex the benefit of the covenant to any identifiable area of land owned by Mr Webb in 1910. A person would only be an adjoining owner if that person owned land whose boundary at some point touched the boundary of the burdened land. Also, I do not read this provision as being sufficient by itself, and in the context of the remainder of the wording of the restrictive covenants and in the light of the other evidence (or lack of it), to show an intention that the benefit of the restrictive covenants should be annexed to (and enforceable by the owners for the time being of) the adjoining land. Mr Webb, in order to protect himself from complaints (or possible legal claims) from the adjoining owners for nuisance or annoyance based upon what Mr Webb was allowing SDWC to do on the application land, may understandably have taken this covenant to be enforceable by himself (but not by the adjoining owners directly). Mr Webb would thereby have the comfort of knowing that if one of the adjoining owners complained to him that that adjoining owner was being caused a nuisance or annoyance because of the activities of SDWC which Mr Webb had authorised, Mr Webb could then for the purpose of protecting himself (if he thought it necessary to do so) have sought to enforce this covenant against SDWC. The presence of this covenant requiring that nothing shall be done on the land which will become a nuisance or annoyance to Mr Webb "or the adjoining owners" cannot in my view be taken as any indication or an intention that such adjoining owners should in their own right (as such adjoining owners) have the benefit of the restrictive covenants.

21. I now turn to deal separately with certain specific matters arising in relation to the objections of the various objectors.

22. As regards Ms Edith Kilby owner of 7A Smithambottom Lane, no specific points are raised by way of argument that the benefit of the covenants has become annexed to her property. A copy of her title at the Land Registry is included in the bundle before me. It is interesting to notice that Ms Kilby's property at 7A Smithambottom Lane is subject to certain restrictive covenants imposed in a transfer dated 6 August 1907 made between William Webb and Albert Joseph Stannah. This shows that Mr Webb, anyhow in 1907, owned other land in the neighbourhood. It is also interesting to observe that in the charges register the nature of the restrictive covenants

binding 7A Smithambottom Lane are set out which include a restriction upon building save buildings erected:

> "… in accordance with elevations previously approved by the said William Webb or his heirs or assigns owner or owners for the time being of the residue of the land registered under the title above referred to."

This may be contrasted to the wording in the restrictive covenant affecting the application land where the approval to the recorder house has to be given by William Webb (without the additional words following his name).

23. As regards Mr and Mrs Everett owners of 10 Smithambottom Lane, no particular evidence or arguments are raised as to why their property enjoys the benefit of the covenants. A copy of their Land Registry title document is before the Tribunal. It is interesting to note the wording of a covenant contained in a conveyance dated 13 June 1902 as recorded in the charges register being a covenant expressed to be with the vendor:

> "His heirs executors and administrators and assigns and with the owners and occupiers for the time being of the land coloured blue on the said Plan…"

It is wording of this type which is typically used for the purpose of making clear an intention to annex the benefit of a covenant to the land of the covenantee. There is an absence of any evidence of any such wording in the 1910 conveyance of the application land to SDWC.

24. As regards Mrs Barry and Mr Lehec as owners of 4 Woodcote Lane, they submitted two attached sheets with their objection. They make reference to the passage within the restrictive covenants regarding "nothing shall be done on the land which shall become a nuisance or annoyance to … adjoining owners." They may be adjoining owners. However for the reasons already mentioned I do not consider that the benefit of the covenants was annexed to their land. They refer in their document to the Webb Estate being a conservation area and the application land being part of a local area of special character intended to provide a protection border to the Webb Estate. However these observations are more directed towards the planning merits and towards the question of whether the restrictive covenants should be modified or discharged, supposing that there is some person entitled to the benefit of the covenants. This point does not touch upon whether or not their land enjoys the benefit of the covenants. They make various other observations directed towards planning and amenity arguments and as to whether on the merits the restrictive covenants should be modified or discharged, but once again these arguments do not deal with the question of whether their land has annexed to it the benefit of the covenant. Mrs Barry and Mr Lehec do raise a further point in the following passage:

> "Both our house and the Reservoir form part of the 260 acres purchased by William Webb, who's vision was, that garden and landscaping took priority over any building and explained in his book 'Garden First' '*the occupiers of houses (should) not only have enjoyment of their own premises in desirable seclusion, but that both from their own upper windows and when passing along the roads it may appear as though they are one large garden of which their own holding is a part.'* It was such an idea that appealed to our family and that is why we purchased a property on the Webb Estate with the covenants which William Webb included to protect his "Garden First" idea."

Mrs Barry and Mr Lehec do not submit any documents to evidence this 260 acre development by William Webb and the vision he is said to have had for this development. There is no evidence regarding the laying out or marketing of the Webb Estate or as to where this 260 acres lay and as to what part of it has been incorporated into the Estate. It is possible that if Mr Webb developed a residential estate and sold off plots on the basis that there was to be a local law of mutually enforceable covenants then as between the various house owners a building scheme of such mutually enforceable covenants may have arisen. However there is nothing in the material provided by Mrs Barry and Mr Lehec to indicate that as regards the 1910 conveyance of the application land (being a conveyance which is now lost but which contained the restrictive covenants set out in the charges register) this conveyance of land for a reservoir was intended to form any part of such a building scheme. Indeed the restrictive covenants relating to the application land are, by reason of the subject matter of what was being conveyed namely land for a reservoir, in very different terms to what could be expected in relation to sales of houses within any building scheme. Nothing in the arguments or documentation provided by Mrs Barry and Mr Lehec lead me to reach any conclusion different from that which I have expressed above.

25. As regards Mrs Murray as owner of 7 Smithambottom Lane Mrs Murray makes observations regarding the merits as to whether the restrictive covenants should be modified or discharged. However she has not submitted any evidence or argument to support a claim that her land enjoys the benefit of the restrictive covenants. It may be noted that in her title documents in the charges register there is registered a covenant in similar terms to that found upon the title of Ms Kilby, namely a covenant arising from a transfer dated 6 August 1907.

26. As regards Mr Keith Roberts as owner of 12 Smithambottom Lane, he in his objection raises various points directed towards the merits as to whether the restrictive covenants should be modified or discharged. He points out that he has lived there for many years and is aware there are multiple covenants in the area. He says he has always understood and still does that these were for the benefit of the local population. Mr Roberts has submitted certain further documentation in response to the challenge as to whether he is able to show that he enjoys the benefit of the covenants, see his letters of 19 February 2017, 9 March 2017 and 11 April 2017. Mr Roberts points out that multiple covenants were explained to him when he purchased his property in the late 1990s. His property is subject to certain restrictive covenants as contained in a conveyance dated 13 June 1902, being covenants which are recorded as having been made by the then purchaser "with vendor his heirs objectors administrators and assigns and with other the owners and occupiers for the time being of the land coloured blue on the said plan….". There is no evidence that the restrictive covenants affecting the application land were imposed in a clause in the 1910 conveyance containing any wording such as that which is present in the 1902 conveyance affecting Mr Roberts' land. It is possible that there are multiple mutually enforceable covenants, though some building scheme, affecting some area of residential development at Smithambottom Lane. However for the reasons already explained above I am unable to find that any such building scheme (if it exists) includes the application land. Mr Roberts also refers to the clause against there being any nuisance or annoyance. I have already explained why I do not consider this to amount to words annexing the benefit of the restrictive covenant in the 1910 conveyance to any ascertainable land of Mr Webb. Mr Roberts also makes reference to the fact that builders of additional dwellings on his side of Smithambottom Lane have been charged substantial sums for what he suspects is the release of restrictive covenants. First there is no evidence as to what was paid by whom and to whom for what. However even supposing that such payments were made for a release from covenants affecting a plot which has been developed with a dwelling house and which was held pursuant to a title different from the application land, this does not assist on whether the restrictive covenants imposed upon the application land are

covenants whose benefit has been annexed to ascertainable benefited land held by Mr Webb in 1910.

Conclusion

27. For the reasons set out above I conclude in respect of each of the objectors separately that such objectors do not enjoy the benefit of the restrictive covenants in respect of which the applicant seeks a discharge or modification in the present proceedings. I conclude therefore that none of the objectors should be admitted as being entitled to object to the present application under s.84.

His Honour Judge Huskinson

13 June 2017