

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

29/01/2010

B e f o r e :

MR JUSTICE PETER SMITH

Between:

Seymour Road (Southampton) Ltd

Claimant

- and -

Robin Williams & Ors

Defendants

Timothy Morshead (instructed by Dutton Gregory LLP) for the Claimant
Hearing dates: 21st January 2010

Peter Smith J :

Introduction

1. In this action the Claimant Seymour Road (Southampton) Ltd (“the Claimant”) seeks relief in the respect of land situated at the rear of 7 Seymour Road Upper Shirley Southampton SO16 6RH as shown red on the plan annexed to the Claim Form issued on 16th June 2009 (“the Application Land”). It seeks a declaration that various covenants as set out below are no longer enforceable. No one appears to oppose the application.
2. The Application Land comprises four registered titles. The Applicant is the registered freehold proprietor with absolute title of all titles. The relevant title numbers are:– HP168166, HP569336, HP569282 and HP584206.
3. The Application Land or some part or parts of it might have been previously affected by covenants imposed by a series of deeds dated 16th November 1896, the common vendor being the County of Hants Land and Building Society Ltd (“the Society”). The Claimant on 9th March 2005 (on appeal) obtained planning permission to build five houses on the Application Land. It is part of a large plot of land surrounded by rear gardens of properties fronting Winchester Road, Seymour Road, Hollybrook Road and Malvern Road. A Development Plan (“the Development Plan”) which the Claimant has obtained dated 1896 shows that the plot of land bounded by the rear of those relevant properties (which comprises part of the Application Land) was originally intended to be tennis plots. There is no evidence to show before me that the land in question was ever developed as tennis plots. It is however landlocked because it is surrounded by the gardens of the properties that front the four roads.

4. Thus the Applicant seeks to provide a road through part of one of the grounds of the houses (7 Seymour Road) to access the Application Land which will therefore be a Cul de Sac behind all of the properties on the four roads.

Objection

5. As the inspector's decision dated 15th February 2005 shows there were a number of objections to the development. One of those concerned the proposed access. However the inspector did not accept any of those objections.
6. The Claimant's solicitors have identified (so far as they are able) all people who could potentially claim the benefit of the covenant. Annexed to the witness statement of Stephen Roy Bowden dated 10th June 2009 is a plan identifying all the adjoining properties so far as it has been able to identify them and giving them the relevant registered or unregistered title.
7. He also attached ordinance survey plans for 1933, 1941-42, 1947 and 1956-59. They all show that the proposed tennis courts have been divided up and sold off to individual owners fronting Malvern Road, Winchester Road and Seymour Road as extended gardens. As I have said above the Application Land forms part of the titles so divided up.
8. That is significant because the Building Society ceased to exist on 31st November 1929 [sic]. Further no records of the Society exist and according to agreed practice for these types of societies its files and papers were destroyed after 10 years from the date of cancellation of registration i.e. 31st November 1939 [sic].
9. Correspondence was sent to identify Defendants inviting them to agree that the covenants were no longer effective. A number of replies were received opposing that suggestion. As a result the present proceedings were served on a large number of Defendants. Some of those filed acknowledgments repeating that they did not accept that the covenants were obsolete. However despite service of the proceedings upon them as I have said nobody attended at the hearing to oppose the present application.
10. I am satisfied on the information before me that sufficient Defendants have been identified and served who could possibly have any locus to challenge the Claimant's contention in respect of the relevant covenants.

Covenants

11. The various titles identify conveyances off by the Society in 1896. For example in title number HP168166 there is a conveyance dated 16th November 1896 between (1) The Society and (2) William Hampton. In addition there is a further conveyance of part of the land comprising title dated 21st December 1896 between (1) The Society and (2) George Harrison. There are identical covenants imposed by different conveyances in the other titles HP569336 and HP569282.
12. I was also provided with a copy of an Indenture dated 16th November 1896 between (1) the Society and (2) George Franklin. By that Indenture plot 5 (which I assume is plot 5 identified on the 1896 plan referred to above) (fronting Winchester Road) was conveyed to Mr Franklin subject to identical covenants.
13. All of this appears to derive from an earlier conveyance dated 29th July 1896 between (1) William Burrough Hill and (2) the Society. There is evidence to show that the Society conveyed some plots back to Mr Hill but as I have said the Development Plan above was apparently drawn by Mr Hill and it appears reasonably clear that it identifies the plots comprised within the development and the plots were subsequently sold off by the Society for houses to be constructed. The position about the proposed tennis courts is not clear but as I have said they appear to have been sold off to owners at a later stage. The title HP168166 for example refers to a

conveyance dated 14th February 1958 which imposes covenants affecting the Application Land for the benefit of the Laurels number 13 Malvern Road.

14. It is accepted by the Claimant that the only issues before me are the 1896 covenants and these covenants will have to be separately disposed of in so far as the proposed development will be in breach of those covenants.

The Indenture

15. I refer to the Indenture of 16th November 1896 produced at the hearing (“the Indenture”). After reciting the earlier conveyance from Mr Hill to the Society it recited that the land comprised in that earlier Indenture had been divided and staked out for building purposes.

16. After the Parcels Clause and the conveyance of the fee simple estate the covenants were set out as follows (in so far as relevant):–

“and the purchaser with intent to bind all persons in whom the piece of land expressed be hereby conveyed shall, for the time being, be vested, but so as not to be liable under the covenant after he has parted with the same piece of land, HEREBY covenants with the Vendors, their successors and assigns in the manner following that is to say:–

1) That if, and when the purchaser desires to use, sell, or let to others, all or any part of his Plot for building purposes (but he shall not be bound so to use it) he shall be at liberty to build, but the said Plot or the messuages and buildings for the time being erected thereon as aforesaid shall not at anytime be used for the purposes of any shop, trade, or business (except the business of a School or Boarding House but (except as aforesaid) shall be used as a private dwelling house or private dwelling houses only....

5) That the Purchaser shall not use his Plot as a Road or Way without the consent in writing of the Vendors.....”

17. The Indenture also contains a declaration which is relevant:–

“AND IT IS FURTHER DECLARED that the vendors reserve absolute power at any time or times, to vary or modify any or either of the foregoing covenants or conditions relating to the said Plot or to any other Plot or Plots upon their said Estate, in such manner as they may determine”.

18. The Claimant’s case is that those covenants (which are part of a section of covenants) can no longer be enforced because they were covenants in favour of the vendor only and that vendor has ceased to exist.
19. It is trite law that even if the vendor was still in existence unless it retained land benefited by the covenant or there were others who had the benefit of the covenant they could not enforce the covenant against successors in title from the Purchaser. The reason for that is that they could only enforce such covenants if it created a restrictive covenant and one of the requirements of the restrictive covenants must satisfy the principle of *Tulk v Moxhay* (1848) 18 LJCh 83 in that the covenantee must have land that is benefited by the covenant.
20. There is no identification in the Indenture of any land to which it can be said that a covenant is annexed.
21. As the Indenture is dated before the Law of Property Act 1925 came into force the relevant covenant is s.58 Conveyancing Act 1881. Unlike s.78 Law of Property Act 1925 (see *Federated Homes v Mill Lodge Properties* [1980] 1WLR 594) the words are not effective to create an implied annexation: see s.58 CA 1881 does not have the same effect see *Sainsbury PLC v Enfield LBC* [1989] 1WLR 590.

22. There is in my view scant evidence in the Indenture to show that there is any implied annexation of the covenants. The phrase “the vendors, their heirs, executors, administrators and assigns” is of course insufficient see *Renals v Cowlshaw* [1878] 9 Ch D 125. However an intention to annex will not be implied merely from the surrounding circumstances. It must be manifested in an instrument containing the covenant when construed in the light of those attendant circumstances (*Sainsbury* above).
23. As appears to be established in the Court Appeal in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1WLR 2409 in the case of statutory annexation s.78 of the Law of Property 1925 it is suggested that for annexation to occur impliedly by that section the covenant or conveyance must identify the lands to be benefited either explicitly or by necessary implication. That of course does not apply to these covenants.
24. The only words that can possibly assist an argument in this respect are the word “the successors”. I should say that it is true that the second recital refers to land being staked out for building purposes but once again in my view that is not enough to lead to an inference that it can be implied that the covenants intended to benefit all the land comprised in the early indenture from Mr Hill to the Society. There is of course no identification of the land in respect of successors. It is not like those cases where the covenant is given with a vendor and successor so long as any land for the time being remains unsold see *Zetland v Driver* [1939] Ch D Ch1 and *Sugarman v Porter* [2006] EWCH 331 (Ch). It is demonstrated by the fact that it is impossible to answer the question on successors without considering who are the vendor’s successors? Does it extend (for example) (absent a Scheme) to people who acquired earlier from the vendor? It is difficult to describe them as successors at the time of the Indenture.
25. There is of course reference to lotting as I have said in respect of recital 2. There is also the power to vary the covenants. This has sometimes been said to be good evidence of a scheme see *Elliston v Reacher* [1908] 2 Ch at 375 at 389. At best in my view the provision is equivocal (*Re Elm Avenue New Milton* [1984] 1WLR 1398, 1406).
26. Looking at that material there is in my view no clear indication that the covenants have been annexed to any of the vendor’s land save perhaps to a limited extent. One has to bear in mind that conveyancing was not in the 19th century quite as precise a form as regards particular words like this as it is now. There is in my view no clear material to suggest that any of the covenants were annexed to land beyond the possibility that it can be argued by implication based on the words of the Indenture above but as a matter of practicality the vendor would have the benefit of the covenants only as long as it retained land in the area. By implication it would mean that the intention was to have the covenants benefit land retained by the vendor from time to time i.e. did not annex and pass to people who acquired land from the vendor. The position is much like the *Zetland* case and the *Sugarman* case that I have referred to above although I accept they were cases where there was a much clearer indication.
27. Nevertheless my conclusion is that the covenants were intended to be exercisable by the Society only as long as it retained land.
28. The evidence shows unequivocally that the Society has no land in the area. It follows therefore that any interest enforcing these covenants would cease when the Society no longer has any land and that occurred many years ago.
29. The use of the word “successors” is intended to cover a situation where the Society conveys some un-disposed of part of the land referred to in the recitals to a third party. It would then have the benefit of the covenants annexed to that land until all of the land had been sold. It is merely a slight extension therefore of the basic principle that the Society as vendor was intended to have the benefit of the covenants *prima facie* only so long as it and a successor to unsold parts had retained any land.

30. Once it had disposed of any land of course the Society would never be able to enforce the covenants against third party successors in title from the original covenantor because it would have no land which would be capable of being benefited by the covenants. The position to my mind is that if all of the land is fully developed in reality the vendor's interest in covenants then ceases.
31. It will be seen in the conveyance that in the Indenture there is no suggestion set out that the covenants intended to be annexed to any land expressly identified nor is there any intention stating the Indenture that is intended that the benefit of the covenant should be annexed to any clearly identified land let alone any other of the purchasers so as to create a scheme of mutually enforceable covenants.
32. I know that Mr Morshead who appears for the Claimant conceded that there was a Scheme in this case. However I am not persuaded on the material before me that there is such clearly set out evidence to give rise to the implication of the Scheme. It is simply an arrangement whereby the Society as owner of the land comprised in the recited Indenture obtains covenants from sub purchasers which it might desire to enforce during its period of sale off.
33. Further I think it is difficult to carve out some of the covenants and say that they annex and others that do not. Covenants 3, 4 and 9 are plainly positive covenants. In my view the structure of the covenants with negative and positive ones intermingled is a further indication that the draftsman of the Indenture intended that the covenants be given to the Society personally. I can see no sense in stripping out part of the covenants and giving them different status from other covenants.
34. The logic of this is that if the covenants are annexed to the Society's land so that the benefit of the covenants passes (for example) to future purchasers of other parts of the property comprised in the recited subsequent Indenture I do not believe the draftsman could have intended to have a multiplicity of people from whom it was intended that clause 5 meant that the purchaser needs the consent of every purchaser to whom a plot has been sold before it can be released. I do not think that is intended and the actual wording is significant because it says "without the consent in writing of the vendors". There is no suggestion that it also extends to the successors and assigns which is the wording set out in the formal part of the covenant.
35. All of this demonstrates the personal nature of all of the covenants in my view. I therefore conclude that contrary to the submission of Mr Morshead there was no Scheme in this case. The only person who can enforce the covenants is the vendor so long as it retains land. Once it retains no land there is no person who can enforce the covenants.
36. At best an annexation can only occur and subsist for the period of ownership of land by the vendor until all the plots are sold off.
37. This is further reinforced by the reservation clause which extends to the vendors only and not vendors, successors and assigns.

Effect of dissolution of the Society

38. There is a succession of cases which consider on the construction of each covenant as to the relevance of the disappearance of the covenantee. These are all summarised in the decision of *Margerison v Bates* [2008] EGLR 165 at paragraphs 47-52.
39. Unsurprisingly Mr Bartley-Jones QC the Judge decided that each earlier decision did not create a precedent but merely a decision of the Judge in each occasion as to the effect of the dissolution of the vendor on the construction of the relevant covenant in question. I too favour the observations of Neuberger J in *Crest Nicholson* [2003] 1 EGLR 165. The point was not argued in the Court of Appeal but it saw no reason to depart from the conclusions reached by Neuberger J. Chadwick LJ

expressed the view that he thought Neuberger J was right and for the reasons that he had given (paragraph [53]).

40. As I have set out above the covenant in my view was given to the Society personally as vendor or at best was annexed to land that it held from time to time and was not subsequently annexed when a sale of a plot occurred. The sense of that is that the covenant is intended to be qualified by the vendor's ability to vary it.
41. Once the vendor disappears some of the cases suggest that the dispensing power falls off and the covenant becomes an absolute covenant. I cannot see that is the correct position here as a matter of construction. The reality is that once the Society was dissolved any interest in enforcement of these covenants disappeared likewise. On the construction of the Indenture as I set out above when the Society had sold all of its land it ceased to have any interest in enforcing the covenants. Once it is clear that the interest in enforcing the covenants disappears there is no sense when that event occurs in ripening the covenant to an absolute covenant where no one is in a position to give the consents or the variations contemplated by the various covenants. That cannot be in my view what the draftsman intended in this case.
42. I therefore accept Mr Morshead's submissions that with the dissolution of the Society (or alternatively when it disposed of all of its land acquired pursuant to the recited Indenture) that covenants ceased to be enforceable.

Construction of covenant

43. It is unnecessary therefore to deal with the second submission that the creating of the roadway was not a breach of covenant. In my view I do not accept that. It is plain that covenant 1 contemplated a plot would be used for a number of dwelling houses. I do not see that the plot is used as such as regards part of it that is used for a way to access other parts of land. Further that seems to me to be a plain breach of covenant 5. I reject Mr Morshead's submissions that it is self evident that there intended to be access rights to the backland plots. If that was intended there would have been a reservation of such a right and there is none. His construction gives a purchaser of a plot which is sought a power to construct a right of way which was never intended. There is a further point that shows Mr Morshead's submissions are incorrect. The backland plots on the Development Plan are identified as tennis courts. In my view the original intent was to build a set of tennis courts which would be accessed through back gates from surrounding properties. That clearly never happened. For all of those reasons however I do not accept that the proposed construction of the roadway would not be a breach of either covenant 1 or 5 if those covenants were still extant.
44. However for the reasons I have set out above I am of the opinion and so determine that the covenants are no longer enforceable and that I would grant the declaration sought under paragraphs 1 (i) and (iii).