[2020] EWHC 3466 (Ch)

Claim No. PT-2020-00052

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building,
Fetter lane,
London EC4A 1NL

Before:
DEPUTY MASTER LLOYD

BETWEEN:

THE INCORPORATED TRUSTEES OF THE CONGREGATION OF THE HOLY SPIRIT AND THE IMMACULATE HEART OF MARY (BRITISH PROVINCE)

Claimants

-and-

(1) PETER ANTILL
(2) HILARY ELIZABETH ANTILL

Defendants

Andrew Francis (instructed by Howard Kennedy LLP) for the Claimant
The defendants did not appear and were not represented

Hearing date 26th November 2020

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no recording shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Handed down on 16th December 2020

(Signed) Deputy Master Lloyd

DEPUTY MASTER LLOYD:

1 The claimants are a religious order and own the property 6 Woodlands Road Bickley Bromley BR1 2AF (title no 12676) which is used as a residential community and retreat.

2 These proceedings were commenced by a Part 8 claim form by which the claimants seek inter alia *"A declaration pursuant to s. 84(2) Law of Property Act 1925 that the restrictive covenants imposed by the Deeds set out in the Schedule below…are not enforceable by the Defendants by reason of:- (i) There being no annexation of the benefit of the Covenants to the Defendant's land, or any part or parts thereof (ii) the covenants being obsolete (iii) for such other reason as this Court shall declare upon the evidence*".

3 The covenants were imposed when No 6 was sold by Ernest James Wythes to John May. John May acquired the property by two transfers, the first dated 26th July 1911 transferred the house and the major part of the garden; the second dated 24th September 1913 transferred a strip of land to straighten the western boundary. Contemporaneous with the 1911 transfer was a deed of covenant setting out the same covenants. The covenants were varied by deeds dated 10th June 1947 and 17th December 1956 made between Mr Wythes (and his Settled Land Act trustees) and the members of the order in whom the property was then vested. These are the five documents referred to in the schedule to the particulars of claim.

4 The covenants in the 1911 transfer and 1911 deed (so far as here material- covenants (e) and (h) being fencing covenants) were:

(a) *The said John May his heirs or assigns (hereinafter called the Transferee) shall not erect on any part of the said land edged red any building or buildings for the purpose of a school chapel hotel boarding house or place of public entertainment but will keep the said land edged red as private residential property only.*

(b) *That the Transferee shall not burn bricks or lime on any part of the said land edged red or do or permit or suffer to be done thereon any act matter or thing which may be or grow to be a nuisance or disturbance to the Transferor or any of his tenants in the neighbourhood.*

(c) *That the Transferee shall not erect more than two private dwellinghouses with or without stables or motor houses and entrance lodges for private residence on the said land edged red and shall roof in all such buildings with plain red tiles.*

(d) *That each such dwellinghouse shall not be of less cost than One thousand five hundred pounds (exclusive of the cost of erecting such stables motor houses and entrance lodges as aforesaid and laying out the grounds and fencing) and shall not be erected until the plans thereof shall have been previously submitted to and approved of in writing by the Transferor or his Agent.*

(e) *…*

(f) *That the Transferee shall not build or erect any structure on any portion of the said land edged red which lies between the building line and Woodlands Road aforesaid marked on the said plan.*

(g) *And lastly that the Transferee shall not erect or permit or suffer to be erected on the said land edged red any hoarding or other erection for advertising purposes and shall not attach to any house to be erected as aforesaid on the said land edged red or any other erection put up on the said land edged red any board poster or placard other than and except a board poster or placard notifying that the said house or houses as the case may be are to be let or that the said house or houses as the case may be or the contents thereof are for sale.*

(h) ...

5 The covenants in the 1913 transfer (again ignoring two fencing covenants) were:

(a) T*hat the said John May his heirs or assigns (hereinafter called "the Transferee") shall not erect on any part of the said land any building or buildings whatsoever but will keep the said land as garden or pleasure grounds only for private enjoyment in conjunction with the adjoining private residence known as Hadlow.*

(b) *That the Transferee will not burn bricks or lime on any part of the said land or do or permit or suffer to be done thereon any act matter or thing which may be or grow to be a nuisance or disturbance to the Vendor or his successors in title or any of his tenants in the neighbourhood.*

(c) *That the Transferee will not erect or permit or suffer to be erected on the said land any sort of hoarding or other erection for advertising purposes or any poster or placard attached to any house or other erection other than and except a board poster or placard notifying that the premises are to be let or that the premises or the contents thereof are for sale.*

(d) *...*

(e) ...

6 The transfers indicate that the properties formed part of title no 10476 which is one of the titles now vested in the defendants. Title number 10476, shown as first registered on 16th June 1868, relates to the land described as *"West Kent Golf Club and land at Thornet Wood Road, Blackbrook Lane and Magpie Hall Lane, Bickley";* it makes no reference to the Bickley Park Estate or title 159. The defendants also own the property still remaining in title number 159, shown as first registered on 8th June 1898; in that title the property is described as *"the Freehold land shown edged with red on the plan of the above Title filed at the Registry and being the Bickley Park Estate which land was formerly registered under the Transfer of Land Act 1862 no 159 except the parts edged and numbered …*[there then follow 23 numbers]*… which were respectively disposed of under such last mentioned Act".* I was told that the plan annexed to title 159 was about one metre square and of poor quality. There is a much-reduced copy in evidence which is virtually illegible. I was told that the totality of the land shown in that plan is about 600 acres but that the only land now remaining in that title comprises estate roads. In 2013 the defendants dedicated those roads as public highways.

7 Woodland Roads runs east-west. Roughly half is included in the title 159 and that lies to the west of the junction with St George's Road. The closest part of the land still comprised in title 159 starts some 100 metres to the east; the defendants do not own the eastern section of Woodlands Road which runs past the claimants' property. The land owned by the Defendants under title 10476 (the West Kent Golf Club) is approximately 1km south of the claimant's property. A modern plan shows that the land in between is heavily built up.

8 Covenants (a) and (g) in the 1911 transfer and the deed of covenant were amended by the 1947 deed. The structure of the deed was to release the original covenants and impose fresh covenants in the following terms:

1 *"IN pursuance of the said Agreement and in consideration of the sum of FIFTY POUNDS paid by the Covenanters to the Trustees (the receipt of which sum the Trustees hereby' acknowledge) and of the covenant on the part of the Covenanters hereinafter contained the said Ernest James Wythes as Beneficial Owner with the consent of the Trustees testified by their executing these presents HEREBY RELEASES the said land and premises from the restrictive conditions set out in the First and Second Parts of the Schedule hereto.*

2 IN consideration of such release as aforesaid the Covenanters hereby covenant with the said Ernest James Wythes and the Trustees for the benefit of the land comprising the Bickley Park Estate (of which the said land and premises formed part) AND IT IS HEREBY AGREED that from and after the date of this Deed the said instrument of Transfer and the Deed of Covenant hereinbefore recited shall respectively be read and construed as if the covenants and restrictive conditions set out in the Third Part of the Schedule hereto had been originally embodied in each of such documents respectively in lieu of the covenants and restrictive conditions set out in the First and Second Parts of the said Schedule hereto to the intent and so that the said covenants and restrictive conditions set out in the Third Part of the said Schedule hereto shall be binding restrictions on the land transferred by the said Instrument of Transfer into whosoever hands the same may come in lieu of the said covenants and restrictive conditions contained in the First and Second Parts of the said Schedule but save as aforesaid the said covenants and restrictive conditions contained in the hereinbefore recited Instrument of Transfer and Deed of Covenant shall remain in full force and effect

NOTHING in this Deed shall prevent the said Ernest James Wythes from selling leasing or holding free from stipulations any hereditaments forming part of the Bickley Park Estate or from waiving any stipulations or restrictions for the time being affecting any such hereditaments as last aforesaid

The covenants imposed by the 1947 deed were as follows:

Restrictive conditions imposed in lieu of the restrictive conditions released

(a) That the said Henry Parkinson William Grice Thomas Finan and James Hagan their heirs or assigns (hereinafter called "the Covenantors") shall not erect on any part of the said land coloured

> *pink on the plan annexed hereto any building or buildings for the purpose of a school chapel hotel boarding house or place of public entertainment but will keep the said land and premises as private residential property only PROVIDED that the user of the said land and the premises erected thereon known as Hadlow as a centre for the Holy Ghost Fathers Mission including the residence there of the Holy Ghost Fathers and at times of students undergoing tuition and the user of part of the said premises as a private place of worship shall not be deemed a breach of this covenant*
>
> *(g) That the Covenantors shall not erect or permit or suffer to be erected on the said land coloured pink on the said plan any hoarding or other erection for advertising purposes and shall not attach to the premises erected thereon and known as Hadlow or any other erection put up on the said land any board poster or placard other than and except a board poster or placard notifying that the said house or houses as the case may be are to be let or that the said house or houses as the case may be or the contents thereof are for sale PROVIDED that a small notice board of dimensions Two feet by One and a half feet attached to the entrance gate or otherwise exhibited in a position approved of by the Agent for the time being of the said Ernest James Wythes giving the name of the Society occupying the premises shall not be deemed a breach of this covenant*

9 The 1956 deed permitted a chapel to be built on the land; it did not contain any restriction and I do not need to be concerned with that deed further.

10 In about 2014 the claimants applied and obtained planning permission for the development of their property for residential purposes with a view to selling the property. By letter dated 12th May 2015 the defendants by their then solicitors (who subsequently stood down because of a conflict of interest) asserted a right to enforce the restrictive covenants and threatened an injunction. They also contended that the property had no easements entitling the claimants to access or service any additional buildings, but this latter contention was robustly contested and not further pursued. As to the restrictive covenants, the claimant's solicitors set out a detailed response disputing the defendants' assertion and making it clear that, unless it was withdrawn, the claimants would (inter alia) apply for a declaration. A reply was chased in December, but the defendants did not back down; the claimants held their ground; time passed and on 19th December 2019 the claimant's solicitors sent a formal letter before action.

11 The defendants then instructed new solicitors (Wannops LLP) who responded by letter of the 14th February 2020 and, the parties having reached an impasse, the claimants issued and served these proceedings. The defendants served an Acknowledgement of Service stating that they did not intend to defend the claim. Although the defendants are no longer asserting a right to enforce the restrictive covenants, the claimants must satisfy me that the declaration sought is well founded and it is appropriate to make it and, on an application for the

matter to be decided on paper or for directions, I ordered a hearing which is how it comes back before me.

12 The only other matter of background I should record (although it does not bear on the matters I have to resolve) is that the claimants have changed their plans for their property and now propose to retain the property and develop it for their own purposes.

The 1911 and 1913 Transfers

13 There is nothing in the 1911 or 1913 deeds of transfer to suggest that the covenants were imposed as part of a building scheme. Neither the 1911 nor the 1913 transfers contain words indicating that the covenants were taken for the benefit of any retained land and nor do they identify any retained land. In my judgment there was therefore no express or implied annexation of the benefit of the covenants.

14 There was also no express reference to successors in title of Mr Wythes. By virtue of section 58(1) of the Conveyancing Act 1881, covenants with the vendor were *"…deemed to be made with the covenantee his heirs and assigns…"* but those deemed words were not capable of affecting a statutory annexation: *J Sainsbury Plc v Enfield London Council* [1989] 1 W.L.R. 590.

15 In my judgment, there being no express, implied or statutory annexation of the restrictive covenants set out in the 1911 and 1913 covenants, those covenants are not enforceable by a successor in title to the original vendor.

16 But for the later 1947 deed that would be sufficient to dispose of the matter.

The 1947 Deed

17 Wannops, for the defendants, argued that section 78 Law of Property Act 1925 annexed the benefits of the restated covenants contained in the 1947 deed to the Bickley Park Estate.

18 It is important to note three points about the 1947 deed. First, the structure of the 1947 deed was to release the two relevant restrictive covenants imposed in the 1911 transfer and deed of covenant and impose fresh covenants. Second, if the requirements for annexation were otherwise met, the wording of the 1947 deed was such as to effect an express annexation and there would have been no need for the defendants to rely on section 78 Law of Property Act 1925. Third, despite the way it is worded, the deed cannot have had retrospective effect and cannot have effected a retrospective annexation of any of the covenants contained in the 1911 transfer and deed. It would have been open to the parties to release and impose all the covenants taken in 1911 (and 1913) but they did not do so. On any footing, in my judgement, all the restrictions imposed in the 1911 and 1913 transfers are not, and never have been, enforceable against a successor in title of John May.

19 The only relevant question is whether the benefit of the covenants taken under 1947 deed (which keep their original lettering (a) and (g)) were annexed to any part of the land now vested in the defendants.

20 In contrast to the original deeds of transfer, the covenant in the 1947 deed was expressly taken "*…for the benefit of the land comprising the Bickley Park Estate (of which the said land and premises formed part)…"*. Despite the lack of qualification, the covenants can only have been annexed to those parts of the Bickley Park Estate as at the date of the 1947 deed as were then still held by Mr Wythes as tenant for life, and then only if the retained land was sufficiently identified and that retained land, at the date of that deed, was capable of benefitting from the two covenants.

21 Mr Francis' primary argument is that the reference to *"the Bickley Park Estate"* in the 1947 deed was not sufficient to identify the land intended to benefit. It is clear from the wording of the property register of title 159, that the land now owned by the defendants under that title was part of *'the Bickley Park Estate'* but he argued that unless the extent of the Bickley Park Estate, or more precisely the extent of the Bickley Park Estate still held by Mr Wythes at the date of the deed, could be easily ascertained there can have been no effective annexation to any part of that land.

22 In *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410 Chadwick LJ (with whom Auld and Arden LJJ agreed), in the context of the effect of section 78, affirmed at paragraph 33, the principle that the land to be benefitted should be so defined that it is *"easily ascertainable"*. At paragraph 34 he explains that a purchaser should be able to ascertain the land for the benefit of which the covenant was taken so he can identify who can enforce the covenant and continues *'That latter objective is achieved if the land which is intended to be benefited is defined in the instruments 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 of what (if any) land the original covenantee retained at the time of the conveyance and what (if any) land the original of that retained land the covenant did, or might have, "touched or concerned" would be oppressive'*. Two of the conveyances with which the case was concerned referred to the "Fee Farm Estate" which was otherwise not defined. Chadwick LJ concluded (paragraph 52) that there was insufficient indication in the conveyances that the covenants were taken for the benefit of the Fee Farm Estate; however, if there had been, evidence as to the extent of the Fee Farm Estate then unsold would have been admissible.

23 In *Bath Rugby Ltd v Greenwood* PT-2019-BRS-000103 HHJ Paul Matthews sitting as a Judge of the High Court at paragraphs 83 to 91 drew a distinction between substance and evidence: i.e. the difference between a description of the land intended to be benefitted (substance) and the identification of exactly what that land comprised at the date of the transaction (evidence); the ease with which evidence can be assembled may differ from case to case (see paragraph 91). Providing the land intended to benefit has been identified, proof by a person claiming the benefit of the covenant that his or her property has the

benefit of annexation is a matter of evidence. Judge Matthews accepted that there might be uncertainty "at the fringe" but that did not mean that a owner who could show that his or her property was part of the land intended to benefit should not be able to enforce the covenant. He was dealing with a pre-1926 covenant but his observations seem to me equally pertinent to post 1925 covenants.

24 Mr Francis' argument is that simply referring to "The Bickley Park Estate" in the 1947 deed was insufficient to identify the land intended to be benefitted. I do not accept that. The description "the Bickley Park Estate" was a sufficient description to be used in the registration under title number 159 and it seems to me sufficiently clear for the purpose of annexation. It may be that determining exactly what parts of the surrounding land were (a) part of the Bickley Park Estate and (b) still owned by Mr Wythes at the time of the deed would involve research and that there might well be some uncertainties over specific properties or areas of land but that would go to whether the owner of a particular parcel could produce evidence that his or her property had the benefit of the covenant.

25 Mr Francis' secondary argument is that the land now held by the defendants was not capable of benefitting from either of the two covenants. Although the covenants do not expressly so state, they must be construed as enuring for the benefit of the Bickley Park Estate and each and every part thereof. In respect of this argument it is important to note that I am only being asked to make a declaration in respect of the defendants' properties.

26 It is clear from the transfers to John May that the claimants' property was formerly part of title number 10476 (and not, as one might have expected, title number 159). The plan annexed to the 1911 transfer is headed "Bickley Park Estate Plots 69, 70 and 71" but there is no other evidence before me that the part of title number 10476 now vested in the defendants (i.e. "the West Kent Golf Club") was ever part of the Bickley Park Estate or, if it was, whether it was still owned by Mr Wythes at the time of the 1947 deed. However, even if it was, in my judgment it is located too far away from claimant's property to benefit from the covenants i.e. the covenants did not 'touch and concern' that property even if part of a larger parcel of land then registered under that title. Therefore, in my judgment, as regards the defendants' property held under title no 10476 the covenants are not, and never have been, enforceable by a successor in title of Mr Wythes.

27 As to the defendant's land held under title 159, which comprises only estate roads including the western part of Woodland's Road, and St Georges Road (both of which are shown as such on the plan to the 1911 transfer) is no closer than some 100 metres to the claimants' property. It is not obvious that this land, or any part thereof, was at the relevant time capable of benefitting from the 1947 covenants and the defendants have not sought to make a case that it was. I therefore find that the benefit of those covenants was not annexed to that land either.

28 For those reasons I propose to make the declaration sought. For completeness I should add that, as I indicated in during the hearing, I take the view that the

relief sought in (1)(ii) and (2) would have been a matter for the Upper Tribunal rather than the court. However, in the circumstances, those heads of relief do not arise.

29 Mr Francis indicated that, as the defendants did not seek to defend, the claimants would be content with no order as to costs and the order will so provide.