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Case No: BL-2020-000030

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY BUSINESS LIST

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 15th April 2021

Start Time: 10.30 Finish Time: 12.45

Before:

THE HONOURABLE MR JUSTICE MORGAN

**Re: CWMNI RHEOLI PENTREF MARINA
CONWY CYFYNEDIG**

Claimant

**MR. WILLIAMS for the Claimant
There was no Defendant**

APPROVED JUDGMENT
(via Microsoft Teams)

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MR JUSTICE MORGAN:

1. The matter which is before me is a Part 8 claim form where the claimant is Conwy Marina Village Management Company and there is no defendant. Although I have referred to the claimant by its English name, I understand that its official name is in Welsh rather than English, but I hope I will be forgiven if I use what is to me more familiar, the English name.
2. The fact that there is no defendant to this Part 8 claim form has given rise to a difficulty which has been addressed at the hearing today. Mr. Williams of counsel appeared on behalf of the claimant and there being no defendant no one has appeared on behalf of the defendant; I have had no representations from the other side. It is the case that there are a number of persons who are interested in the outcome of this hearing and I understand that have participated in the hearing by watching the video-link but I stress that the only party which is before me is the claimant.
3. The first question is whether these proceedings are properly constituted and whether they can proceed. It is necessary to give some background. The evidence that is filed in support of the Part 8 claim is relatively brief as to the background but I have been able to understand a number of matters. No doubt if this case were properly constituted and went to trial the background would be much fuller than my current understanding.
4. What I have been able to see from the material filed is that the Conwy Marina was developed in the 1990s and as well as being a marina with marina facilities for yachts and boats, there are a number of properties which I will refer to as residential properties built on the land near to or at the Marina. I am told there are altogether 151 houses and 18 flats.
5. I was also shown in the course of the hearing a marketing brochure which was used in general terms to assist with the marketing of the properties, the houses and flats to which I have referred. The marketing brochure refers to the possibility that owners of the houses and flats might be in a position to derive an income from holiday letting. I am not going to say any more about that brochure other than to recognise its existence.
6. After the development was completed, the freeholds of the houses were sold to purchasers and leases of the flats were granted to lessees. Each transfer of the freehold and each lease contains a covenant which is in standard terms. The covenant is a covenant by the purchaser or the lessee “not to use any part of the property other than for private residential purposes.”
7. The claimant management company had been set up at the time of the original development so as to have the benefit of the covenants in the transfers and in the leases and to be in a position to enforce those covenants against the covenantors. At any rate, that is the basis on which the claimant puts the case at the hearing today and I have not had any contrary argument which I need to address; whether that remains agreed or in dispute I cannot say.
8. What has been happening, as I understand it, at the Marina is that some of the owners of houses or flats have been letting them for holiday purposes. I do not know what

the extent of that use is, I do not know how long it has continued for, and I do not know whether it has caused practical problems and what the nature of those problems might have been. Suffice to say that the management company has taken advice on the meaning of the covenant to which I have referred. The management company wishes to contend that the covenant prevents the holiday lettings to which I have referred. The management company is not neutral on this question but wishes to bring about a situation where the covenant is observed and holiday lettings do not occur.

9. The owners of the houses and flats are all members of the management company. There are or there should be altogether some 169 members. As I understand it, the members are divided as to what should happen in relation to future holiday lettings. I understand that there are some who regard holiday lettings as harmful and inconsistent with the intended amenities and enjoyment of the Marina development, whereas there are other owners and lessees who regard holiday lettings as positively desirable and a useful source of income which they would wish to be able to receive.
10. Against that background, the management company issued the present proceedings using a Part 8 claim form. The first curiosity about the claim form is that the management company named itself as the claimant and named itself as the defendant. I can see that in some circumstances a legal person could have more than one capacity and could bring proceedings in one capacity against itself in another capacity, but there is no suggestion of that here. It is a case of the claimant suing itself. I have not heard argument as to whether that is something that can be done but I very much doubt it. The claim form sets out the relief which the claimant seeks. I will read from the claim form. It says:

“The claimant seeks the court’s guidance on the interpretation and construction of the user covenant for properties situated on the Conwy Marina. The covenant seeks to restrict the use of properties to private residential dwellings. The claimant seeks the court’s interpretation and construction of this use and specifically whether it would include or exclude the ability to use the properties for holiday rentals and Airbnb.”
11. That is a somewhat unusual claim. It is not generally the role of the court to give guidance to a legal person, whether an individual or a company. That person must go and obtain guidance from legal advisers. What the court does instead is it decides disputes between parties but this claim form does not identify an opposing party with whom the claimant is in dispute which the claimant asks the court to resolve.
12. The claim was issued on 7th January 2020 and there have been no fewer than six court hearings before a Master or a Deputy Master at which attempts have been made to get this case into a form where there is an active defendant in dispute with the claimant, raising a dispute which the court can then be asked to determine. I will refer to the various orders that have been made following appearances before a Master or a Deputy Master.
13. The first order was made by Master Teverson on 24th April 2020. The Master ordered that the claim form be amended to remove the existing defendant, that is, the management company. From that moment the claim form had a claimant but no defendant.

14. The Master then ordered that the claimant had permission to join a defendant and to make that defendant a representative defendant but no such defendant was identified and no representation order was made at that time.
15. The next order was dated 13th July 2020, again an order made by Master Teverson. The Master gave directions as to a future directions hearing at which the question of a defendant being identified and joined was to be considered.
16. The next order was made by Deputy Master Hansen on 26th August 2020. The order recited that there was an ongoing difficulty in identifying an appropriate representative defendant. The Master's order referred to a board meeting of the management company designed to address the question of what would happen with the costs of these proceedings if a representative defendant was joined to them.
17. The next order, again by Master Teverson, was on 1st October 2020. The Master ordered that there would be a further directions hearing on 25th November 2020 and that hearing was to be the final opportunity for any person to apply to be joined as a party to these proceedings.
18. The next order was made by Master Teverson on 25th November 2020. The order recited that the claimant had passed a resolution dealing with the question of the costs of the proceedings but no representative defendant had come forward since the earlier hearing. The order continued to give directions as to how it might be that a representative defendant could be joined. The order also referred to the case being listed for a final hearing before a judge.
19. There is no order made by the Master to the effect that the hearing before the judge could be an effective hearing if there were no relevant defendant; indeed, as I will indicate in a moment, I do not consider that the court has power to determine this claim if there is no defendant to the claim.
20. Ms. Johal, who is the solicitor acting for the claimant, has told me in the course of the hearing that her understanding of what the Master was doing on 25th November 2020 was directing that if no defendant was joined, the matter would nonetheless proceed to an effective hearing. I am not able to get that from the order itself and, as I have indicated, I do not see that that is a legal possibility. The obvious question would be: if there is no defendant, who, if anyone, would be bound by the decision of the court and any order made by the court?
21. Those are the orders and the case has been listed for hearing, as I have indicated, with a claimant but with no defendant. I should indicate that at one point it looked as if there might be a person prepared to become a representative defendant. I have seen an email of 23rd December 2020 from a Dr. Wolstenholme to the claimant's solicitors in which he confirms that he will act as a representative defendant.
22. There then seemed to be further communications between the claimant's solicitors and Dr. Wolstenholme, which seemed to have got bogged down over relatively minor matters and the last relevant communication from Dr. Wolstenholme was on 25th February 2021 when he indicated he was no longer prepared to be a representative defendant. His email of that date indicates that he had had access to legal advice. He made a number of points about the shortcomings in these proceedings. He asserted

that the lack of a defendant was a fundamental problem with the claim. He asserted that the proceedings had not been served on a defendant so that the proceedings were now a nullity. He also made a number of points as to why, in his opinion, a Part 8 claim form was inappropriate. He referred to the proceedings running the risk of being struck out and he also stated that the outcome of the proceedings would not be binding.

23. That is the nature of the claim which is currently before the court. Mr. Williams, who has said everything that could be said on behalf of the claimant, has urged me to proceed with this hearing and determine the meaning of the covenant. He appeared to accept that if I were to construe the covenant I should take account of background material, such as the sales brochure to which I have referred, but he would submit that the sales brochure provided no guide whatever to the meaning of the covenant.
24. If I were to proceed in that way, Mr. Williams would accept that I would not deal with any question of a possible estoppel based upon what was said in the sales brochure to purchasers of houses or flats, and if a person bound by the covenant wished to raise an issue of estoppel that would have to be raised in other proceedings or at another time.
25. Mr. Williams also told me that in correspondence, which is not in the bundle before the court, one or more persons bound by the covenant, or allegedly bound by the covenant, have contended that the management company has waived the benefit of the covenant. I do not know the detail of that allegation but it seems to involve an acceptance that the covenant has been broken. If the management company is right about its meaning, it has been broken for a substantial period of time without objection, without steps being taken to prevent the breaches, and possibly with acquiescence in the breaches continuing. Mr. Williams tells me that if that point were to be raised by a party bound by the covenant, it would have to be dealt with in other proceedings.
26. The question I am now going to address is whether these proceedings are properly constituted under the Civil Procedure Rules and then I will consider whether it is appropriate for me to exercise power which it is said I have under section 84(2) of the Law of Property Act 1925.
27. I consider that this claim is not a properly constituted claim. The general business of the court is to determine disputes between parties and so one needs to have a party on either side. As I indicated earlier, the court does not generally give advice or approve conduct. There is something of an exception to that in the case of the court's jurisdiction over trusts. For example, in Lewin on Trusts 20th Ed., Chapter 39, there is a discussion of when it is appropriate for a court to give guidance to trustees or approve the conduct of trustees. That jurisdiction informs some of the contents of the Chancery Guide but it is of no relevance to the present dispute.
28. Mr. Williams submits that the case comes within CPR 8.2A. That rule is headed: Issue of Claim Form without Naming Defendants. The rule provides for a Practice Direction to set out the circumstances in which a claim form may be issued under Part 8 without naming a defendant. The rule states that the Practice Direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued. It also deals with the question of when and how the

court should give permission for a claim form to be issued without naming a defendant.

29. That rule was referred to by the Supreme Court in *Cameron v Liverpool Victoria Insurance Co. Ltd.* [2019] 1 WLR 1471, in particular per Lord Sumption at paragraph 19. Lord Sumption indicated his understanding that there had been no Practice Direction made under rule 8.2A. It is quite right that there has been no general Practice Direction made under that rule. However, Practice Direction 64A and Practice Direction 64B do amount to Practice Directions made under rule 8.2A. I refer, in particular, to Practice Direction 64A, paragraph 1A.2 and paragraph 5, and to Practice Direction 64B, paragraph 4.2.
30. As I have indicated by reference to Chapter 39 of Lewin, there are cases within those two Practice Directions where the court does permit a claim form under Part 8 to be issued without naming defendants but those Practice Directions are not relevant to the present case. The position remains, therefore, that rule 8.2A has not been brought into effect in circumstances which would extend to the present case. It simply does not apply to the present case.
31. There are other rules to which it is relevant to refer. Rule 19.6 gives the court power to identify a party as a representative party. Paragraph 19.7 permits representation of interested persons who cannot be ascertained, etc. The “etc” is important because rule 19.7(2)(d)(ii) allows the appointment of a representative party where that would further the overriding objective, so there is quite a wide power and it is not restricted to cases where there are interested persons who cannot be ascertained.
32. Just standing back from those two rules in the present case, I do not see that there is any real difficulty in the way of the management company suing defendants who wish to take a stance contrary to the stance of the management company. Nor do I see a difficulty in one of those defendants or a defendant, if only one is joined, being given the status of a representative defendant. That is, in my judgment, the procedural way in which the management company should approach this question. The rules adequately provide for a defendant to be before the court for the full parameters of the dispute to be identified and for the dispute to be resolved.
33. If a defendant wishes to argue a number of defences, first as to the construction of the covenant, secondly, as to estoppel, thirdly, as to the waiver of the benefit of the covenant, those points ought to be identified in properly constituted proceedings. The court could then decide whether to take the construction of the covenant as a preliminary point or decide that that was not appropriate and the whole range of defences should be tried out. That is not something which is possible in the present proceedings constituted as they have been.
34. I also want to refer to rule 19.8A, which has the heading, “Power to make Judgments binding on Non-Parties”. This rule is not a general rule. It is a specific rule dealing with specific cases and the present case does not come within rule 19.8A. In a case that does come within the rule, the rule provides for the proceedings to be served on certain persons, giving that person an option to be joined as a party or stand back knowing that he will be bound by a judgment in a case to which he is not a party.

35. It seems to me that the Civil Procedure Rules indicate a number of things: First, they indicate an expectation in the ordinary way that there will be a defendant to a dispute which will come forward to the court for decision. Secondly, the rules deal with special cases where it is appropriate not to have a party as a defendant but in such a case if someone is going to be bound by a decision of the court in the case to which that person is not a party, that person has to be told that if he stands back from the proceedings and does not join in he runs the risk the proceedings will bind him and decide his rights.
36. Having reviewed the Civil Procedure Rules, it seems to me clear that these proceedings are not properly constituted. If I determine anything in these proceedings as to the meaning of the covenant, no one would be bound and the proceedings would be of no utility. Mr. Williams suggested that I could decide the meaning of the covenant and that would bind the claimant. I am afraid I do not understand how such a decision would be of any help to anyone. If it only bound the claimant, it would not bind a member of the claimant. A member of the claimant could say to the claimant, “You the management company must enforce this covenant,” and even if the judge said the covenant is not enforceable or does not mean what the member thinks, the member can say he/she is not bound by that decision.
37. I decline to make a determination which would allegedly bind the claimant. I do not recognise that as a possible outcome.
38. That brings me to section 84 of the Law of Property Act 1925. It is important to stress that section 84 of the 1925 Act was referred to in this litigation for the first time in Mr. Williams’ skeleton argument yesterday. It was not the basis on which the matter was presented to a Master on an earlier occasion. It is not the basis on which Master Teverson made orders, for example, his order of 25th November 2020.
39. Section 84 deals with the power of the Upper Tribunal to discharge or modify restrictive covenants affecting land, principally freehold covenants but some leasehold covenants: see section 84(12). Of course, the application before the court today is not an application to the Upper Tribunal to discharge or modify a restrictive covenant. Instead, what is relied upon is section 84(2), as follows:
- “The court shall have power on the application of any person interested – (a) to declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by any instrument; or (b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.”
40. Section 84(5) reads:
- “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 or parties to the proceedings have been served with notice or not.”

41. Mr. Williams says that the statutory provisions are unambiguous and straightforward to apply. He says that they cover this case. As to section 84(2), he says that the claimant is a person interested who can apply under section 84(2). He also says that the case comes within 84(2)(a) or 84(2)(b), or indeed both of them. As regards 84(2)(b) the court has power to declare what upon the true construction of an instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed. That, Mr. Williams says, is what he seeks in these proceedings.
42. As to section 84(5), he points out that if I make an order under section 84(2) it is binding on all persons, whether those persons are parties to the proceedings or have been served with notice of the proceedings, or not. I will assume in Mr. Williams’ favour that his interpretation of the scope of the power is right and this case could be brought within that power. However, section 84(2) gives the court a power. It does not oblige the court to exercise the power. The court will exercise the power where the court considers it is appropriate to do so and the court will not exercise the power where the court considers it is not appropriate to do so.
43. If there was any doubt about the provision giving a court a power which it is able to choose how to exercise, the matter is discussed in two cases to which I have referred, *Re Freeman Thomas Indenture* [1957] 1 WLR 560 and *Re Elm Avenue, New Milton* [1984] 1 WLR 1398.
44. The question before me, on the assumption that the power exists, is whether this is a proper case in which it ought to be exercised. I remind myself of the purpose of the section and the type of case in which it is generally thought to be appropriate to proceed under section 84(2). The power is considered in *Megarry & Wade: the Law of Real Property*, 9th Ed, at paragraph 31.083. The learned editors say:

“If the court declares that the land is not subject to restrictive covenants, the effect would operate in rem and the court would therefore only make such a declaration if it is clear from the evidence that the property is not burdened by restrictions. This provision is a convenience to intending purchasers or lessees in which to find out whether some longstanding restriction is really operative or not. It is often used to test the many 19th century covenants which may today be unenforceable in practice through non-compliance with the rules governing the transfer of the benefit although more recent conveyances may also be tested. In such cases although the land appears burdened by a restriction the lack of any person entitled to enforce the covenant renders it otiose and the restriction should be removed to reflect the reality of the situation and to ensure that the register of title remains accurate.”
45. The existence of the power and the use of the power is considered at greater length in *Preston & Newsom on Restrictive Covenants* 11th Ed., Chapter 10. I have had regard, in particular, to the discussion of the power in paragraphs 10.003 and 10.004, to the

procedure identified at 10.008, and to further procedural matters dealt with in 10.011 and 10.012.

46. All of the examples of the power being exercised have been cases where someone who wishes to act in a way which is contrary to, or might be contrary to, the wording of a restrictive covenant comes to the court for declaratory relief clearing the way for the intended future action. There is no case referred to in Preston & Newsom and no other case of which I am aware where the power has been invoked by someone who says that it has the benefit of the covenant and there is a named person who takes the contrary view, who is able to be sued in conventional proceedings for a declaration or an injunction, and yet the person with the benefit of the covenant proceeds under section 84(2) without joining that named person.
47. When used in the way for which the power was plainly intended, the power is a convenient one, often producing real benefit. That does not mean that it should be used in every case where the power appears to apply. Mr. Williams says that novelty is no barrier to the power being used in this case for the first time in the way in which he seeks. I agree that novelty is not a barrier. If I felt that this was an appropriate case for the court to act under section 84(2) then I would act upon that decision. If, on the other hand, I felt that it was not appropriate to act under section 84(2) then I would not do so irrespective of whether the suggestion is a novel one or not a novel one.
48. One point that weighs with me in deciding whether proceeding under section 84(2) is appropriate in this case is the question whether the members of the management company, the owners of the houses and flats, some 169 of them, have been properly warned that the court might act today and decide the meaning of the covenant in a way which binds them all even though none of them has been named as a defendant. I am certainly not satisfied that the persons who would be bound under section 84(5) have been given any adequate warning that if they refrained from joining in these proceedings as a defendant the proceedings would nonetheless go ahead and would bind their interests.
49. Ms. Johal told me that her understanding at the hearing on 25th November 2020 was that if no one joined in the proceedings then the proceedings would go ahead and would bind everyone. I confess I was somewhat surprised that she thought that. I will take some persuading that Master Teverson, who is a very experienced Master, gave any support to that belief, but I am in any event not persuaded that the members who would be bound under section 84(5) had been adequately warned that that would happen. Certainly, Dr. Wolstenholme's email of 25th February 2021 shows no awareness of that possibility, quite the reverse.
50. That means that I would be relying on section 84(2) in circumstances where it is not necessary to do so for me to do justice to the claimant, by which I mean the claimant ought to be able to conduct itself in an ordinary way in accordance with the rules by identifying the persons to be made defendants, any persons to be made a representative defendant, to have the issues pleaded out in an appropriate way, and for the real dispute to be identified and determined, binding the parties accordingly. In those circumstances, I will not exercise the power which I am assuming I have under section 84(2) of the Law of Property Act 1925.

51. The question then arises what to do with these proceedings. Mr. Williams has asked me to stay the proceedings, which will give the claimant time to reflect on what it wishes to do and to take appropriate action. The alternative to my staying the proceedings is for me to dismiss the proceedings. It might be that is the right thing to do. It might be that because they have not been served on any one that they have become a nullity and should be dismissed. However, I have not heard full argument on whether the proceedings have become a nullity by reason of non-service. If they were Part 7 proceedings they would have become a nullity but I would wish to hear argument as to what is the position in relation to Part 8 proceedings.
52. I think in the circumstances I will not decide the question about non-service. I will not today decide to dismiss the proceedings. That point can be argued in the future if it ever arises. Accordingly, the order I will make is I will stay the proceedings and I will give the claimant liberty to apply to lift the stay in appropriate circumstances.

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This judgment has been approved by Morgan J.