



LP/14/2007

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – entitlement to benefit – restriction in order of Official Arbitrator modifying covenant under s 84 of Law of Property Act 1925 – objectors not entitled to benefit of modified covenant – whether objectors entitled to benefit of restriction in order – whether benefit conferred by contract – held objectors not entitled

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

by

BRIGHTON & HOVE CITY COUNCIL

**Re: Land between Marine Drive
and the rear of 2-18 The Cliff
Brighton**

Before: The President

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 26 January 2009**

Paul Ashwell instructed by the Head of Law, Brighton and Hove City Council, for the applicants Mr A G Liddle for himself and with leave of the Tribunal for 10 other objectors

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DECISION ON ADMISSION OF OBJECTORS

1. The applicants in this case seek the modification of restrictions affecting a rectangular plot of open land, 2.8 acres in area, that is set a short distance back from the cliff above Brighton Marina to the north of a road called Marine Drive. The applicant, Brighton & Hove City Council, own the land as successors in title to Brighton Metropolitan Borough Council. The application seeks the modification of the restrictions so as to enable the construction on the land of 16 houses. To the north and east of the application land are the rear gardens of houses in a road called The Cliff and to the west is a 10-storey block of 120 flats called Marine Gate constructed shortly before the second world war. The houses to the north of the application land have views across the land to the sea. Immediately to the north of Marine Court are houses in Cliff Road that formerly had views to the sea but lost them when the flats were built. The objectors are the owners of 8 houses in the Cliff and 3 houses in Cliff Road who are concerned to keep the application land open and undeveloped.

2. The restrictions to which the application relates are contained in three documents. The first is a conveyance of 11 June 1898 between Steyning Beard (vendor) and George Dickinson Byfield (purchaser). The conveyance itself cannot be found, but an abstract of title in the council's possession contains an examined extract from it dated 18 March 1931. The land conveyed was some 54 acres and is shown on the plan attached to the abstract of title as extending from what is now called Roedean Road in the north to the sea cliffs in the south. A "Proposed Road" is shown following more or less the alignment of the present Marine Drive. The plan referred to the land as the "Madeira Estate". The purchaser covenanted as to the land conveyed with the vendor, his heirs and assigns to observe the stipulations set out in the First Schedule. The stipulations embodying the restrictions to which the application relates are as follows:

(i) "No building shall be erected on the South or Sea side of the said proposed road except a Band Stand or building in connection with a garden it being intended that the land on the South or Sea side of the proposed road should be left as an open space. No earth clay graven stone or chalk shall be excavated or removed from any part of the said land except such as may be excavated or removed for the purpose of erecting building making of Roads and laying out of ground in conformity with the stipulations contained in the Schedule."

(ii) "No house or shop shall be erected on the said land which exclusive of outbuildings (other than domestic offices) and stabling in connection therewith shall be of less value than £400."

(iii) "No house or shop shall be erected on any part of the said land which lies at a greater distance than 350 feet from the western boundary thereof which exclusive of outbuildings (other than domestic offices) and stabling in connection therewith shall be of less value than £600."

A slightly different abstract of title, dated 27 May 1930, is relied on by one of the objectors, Mrs D T G Pendrigh, but there is no need for present purposes to identify the differences.

3. The second document is a conveyance of 26 May 1931 of the land on which Marine Gate now stands and the application land. The vendors were Bertram Dickinson Byfield and others and the purchasers were the Mayor, Aldermen and Burgesses of the County Borough of Brighton. The purchasers covenanted (a) with the vendors to observe the stipulations in the 1898 conveyance and (b) with the vendors for itself and assigns (so that the covenants may run with the land conveyed) for the benefit of the vendors' adjoining land coloured yellow to observe stipulations set out in the First Schedule. The land coloured yellow consisted of what now comprises numbers 2, 4 and 6 The Cliff, immediately to the north of the application land and some properties in Cliff Approach and Roedean Road a short distance away. The application relates to the following restriction in the conveyance:

“No dwellinghouse or other buildings to be erected on the land to be of a less cost in materials and labour and exclusive of the value of the site but inclusive of garages outbuildings and boundary walls and fences than One Thousand Pounds calculated at prices ruling in the year One thousand nine hundred and thirty. The external walls of all buildings erected on the land shall be constructed of red bricks red tiles or rough cast and the roofs of all buildings of red tiles or other suitable material of good appearance.”

4. The third document is an order dated 27 January 1936 made under section 84 of the Law of Property Act 1925 by one of the Official Arbitrators (the predecessors of the Lands Tribunal in the exercise of this jurisdiction) on an application by the Metropolitan Borough Council. The order modified the restrictions in the 1898 conveyance as they affected the MBC's land, on which it was proposed to construct the block of flats. The Official Arbitrator ordered –

“... subject to the payment, satisfaction or discharge of the sums hereinafter conditionally ordered to be paid as compensation and on the condition that the said Applicants duly carry out their undertaking agreed with and given to the Objectors to the said Application at the Hearing thereof before me, whereof the terms and conditions undertaken and agreed are hereinafter set out in paragraphs (g) and (h) of this my Order,

That the restrictions affecting the above-described property set out in the Deed of Conveyance on Sale dated the 11 day of June 1898 and made between Steyning Beard of the one part and George Dickinson Byfield of the other part be and the same are hereby modified to the extent of permitting the erection on the Plot of Land coloured pink on the said plan of a block of residential flats together with garage for private motor cars and a restaurant intend to be fully licensed for the use of the occupants of the said flats and of the general public subject to the following conditions, viz:-”

and then were set out as (a) to (f) conditions relating to the location of the building, the maximum number of flats (120), occupation of the flats, the garage, the restaurant and the laying out of gardens on the northern side of the block.

5. The order continued:

“And subject also as hereinbefore mentioned to due compliance with the following terms of the undertaking given to and agreed with the Objectors, viz:-”

And then were set out as (g) and (h) the terms of the undertaking. The first of these terms, (g), required the laying out of a road from Cliff Road and Rifle Butt Road for pedestrians, bath chairs and perambulators. It is in respect of the second of the terms that the present application is made. It required:

“(h) That the said Applicants, as an addition to the land hatched blue on the said plan which they have already undertaken to preserve as an open space, shall preserve for all time the adjoining block of land situate on the Eastern side of ‘The Avenue’ and coloured blue on the said plan. No building whatsoever to be erected upon it and no part of it shall be used for a vehicle stand, nor for parking, nor for the erection of stands, buildings, erections or constructions of any type whatsoever.”

The land hatched blue and the land coloured blue together make up the present application land.

6. The order went on to provide that “provided the Objectors to the said Application whose names are set out in the following Schedule are legally entitled to the benefit of the said restrictions” the applicants were to pay to them compensation in the sums of £130, £130, £200 and £130 respectively. (The properties were all in The Cliff, immediately to the north of the proposed flats.) The order was made conditional on the payment of these sums if the necessary entitlement was established. Costs were awarded to these and another 8 named objectors. The 12 properties of those who were awarded costs then had names and now have numbers. They can be identified as 2, 8, 14, 20, 22, 24, 26 and 32 The Cliff, 3, 5 and 7 Cliff Road and 8 Cliff Approach.

7. A manuscript memorandum of 14 June 1937 records the payment under agreements between the corporation and each of the objectors who were to receive compensation of amounts of £65, £65, £100 and £65 respectively, ie half the amounts specified in the order. On 10 February 1938 an Official Arbitrator endorsed on the order:

“I hereby certify that all compensation payable under this Order has been paid or satisfied or discharged.”

8. Objections have been lodged and are maintained by owners of 8 houses in The Cliff and 3 in Cliff Road. The applicants do not accept that any of them are entitled to the benefit of any of the restrictions that are the subject of the application. One of the objectors, Mrs Pendrigh of 10 The Cliff, claims to be entitled under the 1898 conveyance. She was not represented at the hearing. The other 10 objectors, who were all represented, with leave of the Tribunal, by Mr Liddle, who is a member of the committee of the Roedean Residents Association, say that they are entitled to the benefit of restriction (h) in the Official Arbitrator’s order of 27 January 1936. They say that the benefit was secured to them by the undertaking referred to in the order. With the exception of the owners of 20 The Cliff and 8 Cliff Approach, who do not maintain objections, they are the successors in title to those who were identified in the order.

9. I can see no basis on which Mrs Pendrigh can claim to be entitled to the benefit of the restrictions in the 1898 conveyance. The simple reason for this is that that conveyance, of 54 acres, included the land that Mrs Pendrigh owns. Her land is part of the burdened land, and she can have no claim to the benefit of the restrictions in the 1898 conveyance. The basis of Mrs Pendrigh's claim, as set out by her solicitors in their letter to the Tribunal of 25 May is that her property, 10 The Cliff, comprised plots numbers 70 and 71 on the Madeira Estate, the land which was the subject of the 1898 conveyance, and was therefore part of a building scheme. Reliance is placed on two conveyances, dated 8 March 1923 and 25 October 1924. These conveyed to John Seddon and Florence Helena Seddon plot 70 and parts of plots 69 and 71. No restrictions were imposed by the conveyances (and thus the application does not relate to them). There is thus no instrument that, for the benefit of Mrs Pendrigh's land, burdens the application land with the restrictions contained in the 1898 conveyance.

10. The other 10 objectors do not claim to be entitled to the benefit of the restrictions in the 1898 conveyance. The basis of their claim is the 1936 order of the Official Arbitrator modifying those restrictions. What is said is that the context, wording and layout of the order indicates that condition (h) (which I have set out above) was a new restriction offered by the council and agreed with them. This restriction was obviously to the benefit of the objectors' properties named in the order, where provision was made for the payment of their costs, as the objectors were there in their capacity as owners of neighbouring lands. The order meant that no deed was necessary. The council took the benefit of the order and must take the burden as well; and the contracts of the former Metropolitan Borough Council were by force of legislation binding on their successors, the present applicants.

11. The council accept that they are subject to the contractual duties of their predecessor council; but, apart from this, they reject the objectors' contentions. Mr Paul Ashwell submits on their behalf that for the undertaking to be enforceable by the present objectors it would be necessary for it to have been part of a contract between their predecessors in title and the council. But it was no more than a unilateral undertaking obscure in its origin and simply recorded in the order under section 84.

12. The objectors' reliance on the order, it seems to me, can be looked at in two ways. Firstly there is the contention that the order itself imposes a restriction on the council and confers the benefit of this on the objectors named in the order. Whether it does this is essentially a matter of construing the terms of the order, although this must be done bearing in mind the statutory power under which it was made. The order did five things:

- (a) It modified the restrictions in the 1898 conveyance so as to permit the erection of the block of flats.
- (b) It imposed six conditions, (a) to (f), relating to the development and use of the land on which the flats were to be built.
- (c) It made the order conditional on the payment (or satisfaction or discharge) by way of compensation by the council to each of four objectors of an amount specified, provided that the objector was able to make good title to the benefit of the restrictions. In the event only half the amount awarded in each case was paid, and

the endorsement on the order established that in respect of this requirement the order had become unconditional.

- (d) It imposed a requirement that the council must comply with the undertaking that they had agreed with the objectors and which was recorded at (g) and (h). The terms of the undertaking related to the construction of a road between Cliff Road and Rifle Butt Road and the preservation for all time as open space of the land coloured blue. In contrast to conditions (a) to (f), which related to the site of the flats, (g) and (h) related to land outside that site.
- (e) It made an order for costs in favour of each of the objectors, specifying each objector, his property, his solicitors and the amount of costs payable. This order was not conditional on the objectors proving title.

13. There is no doubt that the purported effect of the order was that the council must comply with the terms of their undertaking, one of which was to preserve for all time as open space the land coloured blue. The requirement was not that the council should enter into a deed containing those terms. The terms were imposed on them by the order. But the question is, who was to be entitled to enforce the terms? The objectors say it was the objectors who were identified in that part of the order awarding costs and the successors in title of those objectors. The order, however, does not in terms identify them as the beneficiaries, nor does it state that the benefit of the restriction is to attach to any particular land. It identifies the objectors and their properties, but only for the purpose of the award of costs. What in my view is of central importance is that the order was one that modified, pursuant to statutory powers, restrictions contained in the 1898 conveyance. Any substitute or modified restrictions would necessarily, it seems to me, be for the benefit of those who were entitled to the benefit of the restrictions that were the subject of the modification unless some narrower class was identified for this purpose.

14. It would not on the other hand have been within the power of the Official Arbitrator in an order under section 84 to confer the benefit of a restriction on a person who was not entitled to the benefit of any of the restrictions that were the subject of the application. The power of the Official Arbitrator to modify the restrictions in the 1898 conveyance was precisely that: to modify the restrictions. There is now a declaratory provision that is contained in subsection (1C), having been added by the Law of Property Act 1969. This provides:

“It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user or of the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify a restriction without some such addition.”

15. This provision was not in force at the time of the 1936 order, but since it is declaratory it is implicit that the powers of the Official Arbitrator included those set out. The subsection, however, carries no implication that a further restrictive (or indeed positive) provision may be imposed conferring a benefit on a person who is not entitled to the restriction that is the subject

of the order. In view of this it would be wrong to construe the order as conferring the benefit of the new restriction on persons who were not entitled under the 1898 conveyance. It does not in terms purport to do this, and there is no need to imply a provision to this effect. In my judgment, therefore, the effect of the order was not to confer the benefit of the new restriction on a narrower class than those who were entitled under the 1898 conveyance or on anyone who was not so entitled. Since the objectors for whom Mr Liddle speaks do not contend (correctly, in my view) that they are entitled to the benefit of the restrictions contained in the 1898 conveyance, I do not think that they can claim to be entitled to the benefit of the new restriction under the terms of the order.

16. The alternative way in which the objectors' reliance on the 1936 order could be put is as evidence of an agreement between the MBC and the objectors in the terms set out in conditions (g) to (h). The council's case is that the undertaking was unilateral. It is possible that an unconditional undertaking in the terms set out was given by the MBC as part of a settlement of the objectors' objections, under which the objectors received the undertaking in exchange for withdrawing their objections. On this basis it would have been contractual. But there is nothing in the wording of the order to show either that the undertaking was unconditional (so that, for instance, it was not dependent on the objectors being entitled under the 1898 conveyance) or that there was a contractual arrangement.

17. The objectors place reliance on a typed copy of a letter dated 20 October 1937 from Mr H Betteridge of 3 Old Steine, Brighton to Mr W Balshaw. (Messrs Graham, Hooper and Betteridge of 3 Old Steine, Brighton are identified in the order as the solicitors acting for Mrs E S Medhurst of "Blendon", The Cliff, and two other objectors.) The copy of the letter is stamped "Mellor & Mellor, 110 St James' Street, Brighton". It says:

"re Mrs Medhurst & The Brighton Corporation

Referring to your letter of the 9th inst. I have now looked into this matter from its commencement and I think that the best way of explaining the position to Mrs Medhurst is by sending a more comprehensive extract from the Order of the Official Arbitrator made after the hearing before him.

You may remember that before the hearing by the Official Arbitrator, we had, on behalf of Mrs Medhurst and other persons joining with her, arranged with the Town to withdraw covenants, provided the Town were prepared to retain the land south of The Cliff as an open space, and the Town agreed to execute a deed under seal effecting this settlement if the owners of all the property abutting on to the land on the South agreed.

This arrangement, as you know, was brought to the notice of the Official Arbitrator and he embodied it in the Order, he subsequently made. By doing this, he rendered any deed by the corporation unnecessary and the Corporation therefore refused to make a deed. I do not think they can be forced to do it.

With regard to what you say about the plot of land adjoining Lady Sackville's house – I do not know whether this land is part of the land covered by the Arbitrator's Order,

but I believe it is not. Consequently, the owner of it can, subject to the restrictions on the property build on it.

With regard to the penultimate paragraph of your letter I can only say that Mrs Medhurst is just as well off under the Arbitrator's Order as if she had a deed from the Corporation, and I certainly do not agree that the Corporation could institute another inquiry having for its object the erection of property on the land covered by the Arbitrator's Order."

18. I do not think that the letter supports the contention that there was a concluded contract that would support the rights that the present objectors now claim. It appears to show that the council had been prepared to enter into a deed embodying the terms of the undertaking, but only if all those with property abutting on the land to the south agreed. This is understandable on the basis that the consideration for the undertaking would be the renunciation in relation to the proposed development of any rights to prevent it that such property owners might have. It can only be a matter of speculation whether the deed was to have been contingent on proof of entitlement to such rights. In the event no deed was entered into, and, since the agreement to enter into a deed was conditional, it does not seem to me that the present objectors can rely as a concluded contract on the terms that such deed would have contained. On the other hand the letter is clearly consistent with what I have said above in relation to the effect of the order.

19. I conclude, therefore, that none of the objectors that Mr Liddle represents are entitled to the benefit of the restriction contained in paragraph (h) of the Official Arbitrator's order. Neither they nor Mrs Pendrigh are admitted to oppose the application.

20. Applications may now be made in relation to the costs of this preliminary hearing, and a letter on this accompanies this decision, which will become final when the question of costs has been determined.

Dated 4 February 2009

George Bartlett QC, President