**UPPER TRIBUNAL (LANDS CHAMBER)**


**UT Neutral Citation number: [2009] UKUT 114 (LC)**
**LT Case Number: LP/52/2007**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RESTRICTIVE COVENANTS - discharge or modification - building not to be used for any purpose other than maternal clinic - whether obsolete - whether injury caused to objector – application granted - Law of Property Act 1925 s84(1)(a) and(c)***

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

**BETWEEN**

**ABERTAWE BRO MORGANNWG NHS UNIVERSITY TRUST**
(formerly known as BRO MORGANNWG NHS TRUST) **Applicant**

**and**

**COEDFFRANC COMMUNITY COUNCIL** **Respondent**

**Re: Cefn Parc Clinic, Burrows Road, Skewen**

**Before: HH Judge Jarman QC**

**Sitting at: Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET**
**On 19 June 2009**

*William Moffett*, instructed by Morgan Cole Solicitors, Cardiff for the applicant.
Mr Keith Davies, with the permission of the Tribunal, for the objector.

The following cases are referred to in this decision:

*Truman Hanbury Buxton & Co. Ltd's Application* [1956] 1 QB 261.
*Re University of Westminster* [1998] 3 All ER 1014.
*Re Beecham's Application* (1980) 67 P & CR 379

## DECISION

### Introduction

1. By an agreement in writing dated 3 January 1938 (the 1938 agreement) The Parish Council of Coedffranc agreed to sell to The Rural District Council of Neath a small plot of land at the junction of Pen-Yr-Ally Road and Burrows Road adjacent to what was then the Skewen Recreation Ground. By clause 10(b) of that agreement it was provided that the purchasers shall covenant with the vendors:

> "Not to erect on the said piece or parcel of land any buildings other than a Maternity Clinic in accordance with plans approved by the Vendors and not to use such building for any purpose whatsoever other than a Maternal Clinic without the consent of the Vendors."

2. The building erected shortly after that date (the property) has been used as a clinic until 2005, since which time it remains vacant. The applicant as current owner says that because of changes in the way that health services are provided, the provision of a maternal clinic at the property is obsolete. It seeks a discharge of the restriction on that basis and on the basis that discharge will not cause injury to any one.

3. The objector is the successor to the parish council, and whilst it does not challenge in substance the applicant's case on the changes in the provision of health services, submits that the property should be used for the provision of other health care and in particular publicly funded dental health care, which it is said is much needed in the area.

4. The applicant called Shan Morgan, its services development manager, and Carolyn Williams, its assistant head of midwifery and women's health services, to give evidence. The objector called Keith Davies, one of its councillors, to give evidence.

### Facts

5. The relevant facts are not substantially in dispute. Several issues were raised by the objector as to the procedure adopted in the course of the applicant's decision to close the clinic at the property and for the sale of the property. Those issues are only relevant to this application insofar as they relate to the question of obsolescence and I deal with them only to that extent.

6. I find the facts as follows. The property was built before the introduction of a national health service at a time when most babies were delivered at home and there was concern in the locality and elsewhere about the level of infant mortality. The property provided a centre from which milk could be distributed to new mothers as well as a point of contact with community based midwives.

7. By the time the clinic at the property closed, this provision had changed. Midwives are now based either at the GP surgery in Tabernacle Road or at the Queen's Medical Centre in Skewen, and usually provide services in the family home. A decision is made as to the most appropriate location for the baby to be delivered, whether at home or at a birthing centre or at the local hospital. In the area for which the applicant is responsible, about 7% of births take place in the home but a target of 10% is being pursued at present.

8. Expectant mothers normally attend hospital in the course of pregnancy for routine scans or for parent crafting classes. The current provider of these services is the Neath and Port Talbot Hospital in Neath. Distribution of milk is not routinely provided for newborn babies but when needed is dealt with in baby clinics held in GP surgeries. Recently a voucher scheme has been introduced whereby vouchers can be exchanged for milk, fruit and vegetables at local supermarkets.

9. By the summer of 2005 the provision of maternal services at the property amounted to one weekly session of the distribution of baby food, with an average issue of 8 tins per session. The applicant and the local health board (LHB) considered that this was a significant under use of the property and that this service could be provided at the Dyfed Road Health Centre in Neath and that the clinic at the property should close. This decision was approved by the Neath Port Talbot Community Health Council on 8 September 2005.

10. By letter dated 12 November 2005 solicitors for the objector sent a copy of the 1938 agreement to solicitors for the applicant. The latter replied in January 2006 asking for evidence that a covenant referred to clause 10(b) thereof had been entered into and for the legal basis upon which it was claimed that the park at the rear of the property had the benefit of any such covenant.

11. There then followed negotiations for the purchase of the property by the objector. A final offer was received on behalf of the applicant on 30 March 2007, the last day set for the receipt of sealed bids. On 3 April the objector was informed by letter that its bid had not been successful. The successful bid was for a substantially higher figure on behalf of a religious organisation which wishes to use the property for a church. On 10 April the applicant's solicitors repeated an earlier request for the objector's consent to discharge of the covenant. On 23 May the objector replied that the property should continue to benefit the community and proposed that medical services for the area should be provided there. By this time, the objector had an expression of interest from the proprietors of a dental surgery in Neath, who were and remain interested in establishing a NHS dental practice in the Skewen area.

12. At one time there had been about 5 such practices in the area. Now, there are none. Funding for such a practice is the responsibility of the LHB. There are at present no plans to provide such funding. The applicant is currently working with the LHB in partnership with a development company to build a new resource centre for dental services serving the people of Neath and Port Talbot including the Skewen area. The centre is currently under construction on a site off Moor Road, Baglan, Port Talbot near to an existing supermarket. It is intended

that there will be a training centre and the provision of community and general dental services. Such a centre could not be accommodated at the property.

13. At present the property is costing money to maintain at a minimal level. Unless sold to the intended purchaser, the applicant has no other plans to use it. Although there are in the region of 4 or 5 vacant religious establishments in the Skewen area at the moment, that purchaser is still interested.

**Submissions**

14. The first submission on behalf of the applicant is that there is no evidence that a covenant was entered into as intended by the 1938 agreement. The property was first registered in 1996 under title number WA787103 and the applicant is registered as proprietor with title absolute. In the charges register, there is a note that the deeds and documents of title having been lost the land is subject to such restrictive covenants as may have been imposed thereon before 23 April 1996 and are still subsisting and capable of being enforced. It is submitted that despite being called upon to do so, no evidence has been adduced by the objector of such loss or the circumstances surrounding the same or of any search for the lost deeds.

15. On behalf of the objector it is submitted that the property was clearly built and has stood and been used for a maternal clinic since 1938. I am asked as a matter of inference to find that it was likely that a covenant in the terms of clause 10(b) of the 1938 agreement was entered into as intended.

16. Secondly, the applicant submits that it is for the objector to prove that it has the benefit of any such covenant. Even if such a covenant was entered into, it was not expressed to be for the benefit of any land. Although the objector may own the park behind the property, the covenant does not touch and concern that land. Moreover there is no evidence that an agreement was entered into under section 34 of the Town and Country Planning Act 1932 (the 1932 Act), then in force, which would have provided for the enforcement of the covenant.

17. The objector submits that by a conveyance dated 4 October 1923 Charles Tennant and others conveyed to its predecessor in title The Parish Council of Coedffranc land which included the property and what became the recreation ground behind. As present owners of that land, it is said, the objector has the benefit of the covenant.

18. Thirdly, the applicant submits that the purpose of the covenant was to provide a maternal clinic for the population of the area. That purpose was not achieved due to the lack of compulsion for the property to be put to any use at all. It is no breach of the covenant to leave the property vacant or to demolish it. Alternatively, if the purpose was achieved, by reason of the changes in modern healthcare provision as found above, such a purpose can be achieved no longer. Accordingly this is a classic case of obsolescence by reason of changes in material circumstances within the meaning of section 84(1)(a).

19. The objector points to the fact that there have been no changes in the character of the property or the neighbourhood. Although there is no funding by the LHB for a dental practice at present, that does not mean that the covenant is obsolete.

20. Finally, the applicant says that in the alternative the objector will not be injured by the proposed discharge. Again, the lack of a positive obligation to use the property as a maternal clinic is heavily relied upon.

**Conclusions**

21. In my judgment it is likely that the 1938 agreement was completed by a deed now lost which contained a covenant in the terms of clause 10(b). That agreement is a professionally drawn document, and records on the copy which is in evidence that the common seal of Neath Rural District Council was affixed at a meeting of that council and in pursuance of a resolution duly passed at such meeting in the presence of the chairman and the clerk, whose signatures then appear. Clause 6 provides for completion on 20 January 1938 at the officers of the vendors solicitors in Neath. It was provided that the purchase monies would then be paid. Clause 6 provided that upon such payment the vendors would execute a proper assurance to the purchasers which was to be prepared and executed at the expense of the purchasers and left at the offices of the vendors solicitors not less than 14 days before completion.

22. It is unlikely in my judgment that after such detailed provision had been made in the agreement for completion, that such an assurance should not be drawn and executed as provided for. The property was built and used as a maternal clinic for many years, and it is doubtful that that Neath RDC would have gone to the expense of so building without a title deed. Accordingly I find the first issue in favour of the objector, that such a covenant was entered into.

23. Clause 1 of the 1938 agreement sets out in detail the plot to be conveyed "more particularly delineated in the plan attached hereto and therein coloured pink together with the right to enter the said land on the north side thereof from the adjoining land of the Vendors now used as a public Park and Recreation Ground." It follows from my finding above that the conveyance is likely to have contained an identically worded parcels clause. The plan attached to the 1938 agreement shows the recreation ground.

24. Although express words of annexation are not used, in my judgment the land intended to be benefited is clearly established. It is true that the reference to that land in clause 1 is in the context of a right to enter the plot which was to be sold. Moreover, in my judgment it is likely that the main intention behind the covenant was that the property would be put to its intended use, but that is not to say that there was not a secondary intention to benefit the retained land. In my judgment the covenant is capable of benefiting that land. Without the covenant, in terms of title the purchaser would be entitled to put the property to any use, including that of a noxious trade which may adversely affect the use of the land as a public park and recreation ground. In my judgment on the proper construction of the deed of title now lost, there was an intention to benefit that land.

25. For the reasons already given, I am also of the view that the covenant in question touches and concerns that land. There is no need for the objector to rely upon an agreement under the 1932 Act. It is entitled to the benefit of the covenant at common law.

26. On the issue of obsolescence, which in my judgment is the central issue in this application, I accept the objector's submission that there is no material change in the property or in the neighbourhood. Moreover I reject the applicant's submission that the purpose of the covenant was not achieved because of the lack of a positive obligation to use the property as a maternal clinic. The reality is that that was the purpose for which the property was sold to Neath RDC and there is no evidence to suggest that that council had any other use for it. Indeed the basis of the application is that that use has now come to an end and the applicant has no other use for it. In practical terms, the covenant has had the desired effect which is that the property has been used as a maternal clinic for many years until the need for that use has ceased.

27. However desirable the objector's plan for an NHS dental practice in the area may be, the evidence establishes that there is no funding for it, present or planned. But that is not the issue which is determinative of the application under section 84(1)(a). The real question in my judgment is whether a covenant restricting the use of the property to a maternal clinic is capable of being achieved now that the provision of health care to expectant mothers and new born babies has changed in the way set out above. If the original purpose of a covenant can no longer be served, it is obsolete within the meaning of that subsection: see Romer LJ in *Truman Hanbury Buxton & Co. Ltd's Application* [1956] 1 QB 261.

28. In my judgment the original purpose of the covenant can no longer be served in a meaningful way. By 2005, of the facets of maternal care which had formerly been carried out at the property, the only one which remained was baby food distribution. It was clearly not viable to continue the very low level of distribution which had by then been reached, the modern approach to such distribution having changed radically.

29. Because the only user specified in the covenant is that of a maternal clinic, it follows in my judgment from a finding that that purpose can no longer be achieved that the covenant must be discharged: see *Re University of Westminster* [1998] 3 All ER 1014.

30. That finding makes it unnecessary to consider the alternative case for the applicant that discharge would cause no injury to the objector, but for the sake of completeness I do so. On behalf of the applicant reference was made to *Re Beecham's Application* (1980) 67 P & CR 379, which concerned a planning covenant restricting user to that of playing fields. The Tribunal found there was no injury to the council, taking into account the lack of any aesthetic or other complaints about the new proposed user.

31. There was a finding in that case that the council did not own any land in the area. In this case, I have found that the objector does own land adjacent to the property. Although it may be said that it is better that the property is used as a church than remain vacant, in my judgment it cannot be said that discharge would cause no injury. Discharge will take away control from the

objector, which might at some future time be used to prevent user detrimental to the land which the objector retains.

32. However, for the reasons set out above, the covenant must be discharged. A letter on cost accompanies this decision, which will take effect when the question of costs has been determined.

Dated 23 June 2009

HH Judge Jarman QC