UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0190 (LC)
UTLC Case Number: ACQ/338/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PRELIMINARY ISSUE – deemed planning permission – restrictive covenant

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) SANDEEP KHIROYA
(2) RASIKLAL KHIROYA

Appellants

and

THE LONDON BOROUGH OF SOUTHWARK **Respondent**

Re: Former public conveniences,
St Olavs Square,
Albion Street,
London SE16 7JB

Judge Elizabeth Cooke
26 May 2020
Skype Hearing

Ms Heather Sargeant for the appellant, instructed by Penningtons Manches Cooper
Mrs Annabel Graham Paul for the respondents

The following cases are referred to in this decision:

Crest Nicholson Residential (South) Ltd v McAllister [2004] 1 WLR 2409

Marten v Flight Refuelling Ltd [1962] Ch 11

Newton Abbot Cooperative Soicety v Williamson & Treadgold Ltd [1952] Ch 286

Rogers v *Hosegood* [1900] 2 Ch 388 (CA)

Tulk v Moxhay [1848] 41 ER 1143

Zetland v Driver [1939] Ch 1

Introduction

1. This is the Tribunal's decision on two preliminary issues in this dispute about compensation for compulsory purchase

2. The property in question is a former public lavatory, partly underground, outside St Olav's Church in St Olav's Square, Albion Street. The claimants purchased it in 2002, from Andrew Johnson and David Rees, who bought it from the respondent local authority in 2001. In selling the property in 2001 the respondent imposed a restrictive covenant.

3. The respondent acquired the property under the London Borough of Southwark (St Olav's Public Convenience Site, Albion Street) Compulsory Purchase Order 2013 ("the CPO") on 26 November 2013. The valuation date is 8 July 2014. The dispute relates to the basis on which the property is to be valued.

4. The property was derelict at the valuation date, but it benefitted from planning consent, granted on appeal in 2011, for "redevelopment of a derelict former public convenience to a retail unit and the erection of a glazed canopy structure". The canopy structure was to have been a glazed roof, about 4m off the ground. The claimants say that they would have been able to use the glazed roof for the display of advertisements.

5. The two preliminary issues I have to decide are:

    i. Would the property, once developed in accordance with the planning permission, benefit from deemed planning consent for the display of advertisements visible through its glass roof, or would there have been no need for consent at all for such advertisements; and

    ii. would that use have been prevented by the restrictive covenant?

6. So there is a planning issue and a covenant issue.

7. The hearing took place on 26 May 2020; the claimants were represented by Ms Heather Sargeant and the respondent by Mrs Annabel Graham Paul; I am grateful to them both. At the hearing I gave directions for the respondent to provide evidence on a question raised at the hearing about its title to the land benefited by the covenant, by 4 June 2020, and for the Ms Sargeant to make a written response to that evidence on behalf of the claimant by 11 June 2020, which she did.

The planning issue

8. It is not in dispute that the property is to be valued for compensation purposes at its market value at the valuation date, with the benefit of any planning permission in force at that date (sections 5 and 14 of the Land Compensation Act 1961). So the property is to be valued

with the benefit of the 2011 consent. But should it also be valued on the basis that the glazed roof could have been used for the display of advertisements?

9. The advertisement potential of property is regulated by the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 ("the 2007 Regulations"). Regulation 1(3) provides that no planning consent is needed for advertisements within Schedule 1 to the regulations.

10. Schedule1 lists classes of advertisement by letter, A to I; Class I is:

> "Advertisements displayed inside a building"

subject to the following conditions:

> "1. The advertisement may not be illuminated.
>
> 2. No part of the advertisement may be within 1 metre of any external door, window or other opening, through which it is visible from outside the building."

11. Regulation 3 of the 2007 Regulations grants deemed consent for the display of an advertisement in any class listed in Part 1 of Schedule 3. Class 12 in Part 1 of Schedule 3 specifies:

> "An advertisement displayed inside a building, other than an advertisement falling within Class I in Schedule 1."

12. Accordingly the parties have agreed that if the advertisement proposed, being displayed on the inside of the roof but visible from the outside, falls within Class I to Schedule 1 then it has deemed consent; otherwise it falls within Class 12 to Schedule 3 and needs no consent at all.

13. The difference between needing no consent and having deemed consent is that the local planning authority is able to withdraw deemed consent; accordingly, the property is more valuable if no consent is required.

14. It will be apparent therefore that the planning issue turns on whether the glazed roof is a "door, window or other opening, through which it is visible outside the building". If it is, then the advertisement (since it is going to be within 1 metre of the glazed roof, being fixed to it) requires consent, because it falls outside Class I, but if so it has deemed consent by virtue of regulation 3.

15. For the claimants it is argued that the glazed roof can no more accurately be described as an "opening" than could a glazed wall. Ms Sargeant suggests that walls and roofs are the antithesis of "openings", which are made within them. If a glazed roof can be an "opening", then a window within it would be an opening within an opening which would not make sense. I asked Ms Sargeant what examples could be given of an "other opening" and she suggested a skylight. She accepted, however, that a window that does not open is nevertheless a window.

16. For the respondent Mrs Graham Paul argues that the glazed roof is an opening in the structure, just like a window or a door. It is not a solid part like a wall or a tiled roof. It is open to the light. Therefore it falls within the description.

17. In my judgment, the glazed roof is an "opening … through which [the advertisement] is visible outside the building". The crucial words are the words of explanation: "through which it is visible". So I take "opening" to mean a transparent part of the structure. I appreciate that a door will always physically open; that is what makes it a door, even if it is always closed as a matter of fact. But that is not the case for a window. A shop window may, and perhaps nearly always is, plate glass that does not physically open. The provision would be pointless if it did not apply to windows that do not open, as Ms Sargeant conceded, since it would be deprived of a lot of its practical effect. So "opening" cannot mean only something that physically opens. The glazed roof is an aperture for light, and in that sense is an opening; things are visible through it. It does not matter that the glazed roof might have within it a window that opens; there might well be an opening within the opening, and that does not seem to me to cause a problem in terms of the sense of the words.

18. Accordingly the advertisement contemplated would have deemed consent, rather than requiring no consent at all.

The covenant issue

19. The wording of the covenant is:

> "The Transferees hereby covenant on behalf of themselves and their successors and assigns not to develop or use the site other than for an A1 retail use and in accordance with plan numbers A131-110, A131-111, and A131-112 each dated January 2000 or such other use as may from time to time be permitted by Planning Permission and the Transferors Head of Property".

20. The numbered plans are no longer relevant because they relate to a planning permission that was not eventually used.

21. The respondent is of course the original covenantee so there is no question of having to prove that the benefit of it has passed to the respondent.

22. It is agreed that the covenant would not have prevented the use of the property for retail in accordance with the 2011 permission, but the respondent says that the use of the roof for advertisements could have been prevented because they could reasonably have objected to it under the covenant.

23. The claimants say, first, that the burden of the covenant has not passed to them; second that the use of the roof for advertisements is not within the scope of the covenant; third, that even if it was, the respondent could not reasonably have refused consent for the use of the roof for advertisement; and, fourth, that in any event the covenant would have been

discharged, or modified so as to permit the advertisement, under section 84 of the Law of Property Act 1925.

24. I take those four points in turn.

Did the burden of the covenant pass?

25. It is well-established that the burden of a covenant passes to the covenantor's successor in title when it meets the criteria in *Tulk v Moxhay* [1848] 41 ER 1143: it must be restrictive in nature, it must touch and concern the burdened land; the covenantee must retain land capable of benefiting from it; the burden must be shown to have been intended to pass by reference to "successors in title" or similar words; and the proprietor must have had notice of the covenant when he or she purchased the land. Registration constitutes notice for this purpose.

26. The covenant is restrictive, it is protected by a notice on the charges register of the property, and the transfer refers to the purchasers' successors in title. It was not suggested that the covenant does not touch and concern the burdened land, and clearly it does, being about the use of the land and affecting its value.

27. However, the claimants put the respondent to proof that they retain land nearby that can benefit from the covenant. As to the retention of the land, they accept that the respondent owns the surrounding pavement, the adjacent highway, and considerable other land in the vicinity but asked for proof that the nearby land was not acquired since the covenant was imposed in 2001; in response and following the hearing the respondent has produced historic office copy entries from HM Land Registry which show that it owned the square in front of the church in March 2001 and, by inference from entries on title, had owned it for some time before then.

28. In a written response to that evidence Ms Sargeant now seeks to question whether that land was owned by the respondent at the valuation date. But she conceded at the hearing that the land is owned now; it is highly unlikely that the respondent owned the land in 2001, disposed of it before the valuation date and re-acquired it afterwards; the request for proof of ownership precisely at the valuation date could have been made at the hearing date and was not, and it is too late to come up with it now. I accept that the respondent owned at the date the covenant was imposed, and has retained ever since, land that can benefit from the covenant.

29. The claimant says further that the covenant is not capable of benefiting the respondent's retained land but benefits it only by enabling it to secure a release fee. I agree that if that was all the benefit that could be shown then the covenant would not benefit the respondent's land. But the respondent argues that the covenant is of benefit to the surrounding pavement, St Olav's Square, which will benefit from the respondent's ability to control the use and – importantly in the context of the advertisements – the appearance of the claimants' property, The square is in front of the Norwegian seamen's church of St Olav's, a Grade II listed building, and lies between Albion Street and the Rotherhithe Tunnel approach road which is described as a distinctive listed structure of pillars and arch.

The respondent argues that the area could, potentially, be adversely affected in appearance and character by an advertising media display at the property. I accept that argument.

30. Accordingly the requirements of *Tulk v Moxhay* are met.

31. However, Ms Sargeant says that there are additional requirements. She relies upon *Zetland v Driver* [1939] Ch 1, which identifies three types of covenant: "covenants imposed by the vendor for his own benefit"; "covenants imposed by the vendor as owner of other land, of which that sold formed a part, and intended to protect or benefit the unsold land"; and those that are intended to benefit a number of purchasers of parts of the original land. The third category is not relevant here. Ms Sargeant says that the covenant in this case falls within the first category and not the second.

32. In *Zetland v Driver* Farwell J giving the judgment of the Court of Appeal set out p.8 four tests for covenants of the second type:

> "Such covenants can only be validly imposed if they comply with certain conditions. Firstly, they must be negative covenants. No affirmative covenant requiring the expenditure of money or the doing of some act can ever be made to run with the land. Secondly, the covenant must be one that touches or concerns the land, by which is meant that it must be imposed for the benefit or to enhance the value of the land retained by the vendor or some part of it, and no such covenant can ever be imposed if the sale comprises the whole of the vendor's land. Further, the land retained by the vendor must be such as to be capable of being benefited by the covenant at the time when it is imposed. Thirdly, the land which is intended to be benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance and the persons or the class of persons entitled to enforce it. The fact that the benefit of the covenant is not intended to pass to all persons into whose hands the unsold land may come is not objectionable so long as the class of persons intended to have the benefit of the covenant is clearly defined. Finally, it must be remembered that these covenants can only be enforced so long as the covenantee or his successor in title retains some part of the land for the benefit of which the covenant was imposed

33. Ms Sargeant says that this covenant fails the second and third of those tests; it does not touch and concern the covenantee's land, and the benefited land is not clearly identified in the 2001 transfer. She also relies on *Rogers* v *Hosegood* [1900] 2 Ch 388 (CA) for the requirement that the covenant touch and concern the land or the covenantee. She develops this in her additional submissions made after the production of the historic office copies, and requires the respondent to prove exactly which part of St Olav's Square was supposed to beneft from the covenant.

34. But that does not assist the claimant because the conditions set out in *Zetland* and in *Rogers v Hosegood* are conditions for the running of the benefit of the covenant, which the respondent does not need. Farwell J's three types of covenant are described by reference to their benefit; and for the benefit of the covenant to pass to the respondent's successors in

title the covenant must touch and concern those successors' land and the land benefited must be clearly identified in the deed that imposes the covenant. There is no authority for te transposition of those requirements to a case where the only issue is the running of the burden. See *Megarry and Wade* 31-061 ff and *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 WLR 2409. But that is not relevant here.

35. In her written submissions of 11 June 2020 Ms Sargeant refers to the cases of *Marten v Flight Refuelling Ltd* [1962] Ch 115 and *Newton Abbot Cooperative Soicety v Williamson & Treadgold Ltd* [1952] Ch 286. They too are about the requirements for the running of the benefit. I find it difficult to understand why these cases are cited without acknowledgement that they are not about the running of the burden of covenants, that they are referred to in *Preston & Newsome on Restrictive Covenants* in the context of the running of the benefit, and that the passages quoted by Ms Sargeant from that volume are all discussing the running of the benefit of the covenants.

36. Accordingly the claimants fail on their first point, namely whether the covenant binds them as successors in title to the original covenantor. It does.

Does the display of advertisements fall within the scope of the covenant?

37. Referring to the wording of the covenant (see paragraph 19 above) the claimants say that the display of advertisements is not a use of the property. Ms Sargeant explains that the display of advertisements is not a material change of use, and that therefore the display of advertisements does not require consent under the covenant.

38. That is to conflate the language of the covenant with the language of planning legislation. There is no reason why the word "use" in the covenant should not have its everyday meaning rather than a technical planning one. In any event, as Mrs Graham Paul points out, the covenant restricts both development and use; a material change of use is a development under the planning legislation; accordingly the word "use" in the covenant must mean something different.

39. I take the view that the use of the property for the display of advertisements would clearly fall within the scope of the covenant.

Could consent reasonably have been refused?

40. It is common ground that the respondent's Head of Property, as an official of a public authority, could not have refused consent to a proposed development or use unreasonable. The claimants say that there are no reasonable grounds on which permission could have been refused.

41. This is of course a hypothetical exercise and it is not known what sort of advertisements would have been displayed. Had this been a real-life scenario there would have been evidence of fact and perhaps also expert evidence about the effect of the intended advertisement, and it would have been possible to say whether or not the respondent's

objection was a reasonable one. As things stand I can decide only whether or not there might have been reasons for a reasonable refusal.

42. The claimants say there could not have been any basis for a reasonable refusal. Ms Sargeant points out that, on her clients' case, the advertisements did not need planning permission at all and are therefore regarded as wholly inoffensive; if instead (as I have found) the advertisements have deemed planning consent, it is important that that deemed consent has not been withdrawn by the respondent. It must therefore be unobjectionable.

43. What the respondents say is that their Head of Property would refuse permission because of the detrimental effect of the advertisement on the appearance of the surrounding area, which the respondent is endeavouring to smarten up and improve, and in particular on the vicinity of St Olav's church. The respondent also has concerns about road and pedestrian safety, because of the potential for distraction from advertisements.

44. Weighing up these points, I take the view that a use might have planning permission but nevertheless not be permitted by the respondent's Head of Property. So the existence of deemed consent does not assist the claimants. It would be open to the respondent to choose to prevent the use that way rather than by withdrawing the deemed consent. I accept that the respondent could reasonably reasonably have done so, out of concern for the amenity of the surrounding area.

Would the covenant have been discharged or modified on an application under section 84 of the Law of Property Act 1925?

45. Finally, the claimants say that even if the covenant binds successors, and the proposed use is within its scope, and the respondent might reasonably refuse consent, the covenant would be discharged if an application were made under section 84(aa) of the Law of Property Act 1925. The provisions of that section, so far as relevant, read as follows:

> "84(1) The Upper Tribunal shall …have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied-
>
> … (aa) that in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user;….
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say either –

(i) a sum to make up for the loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time, when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of the land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case falling within section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances

46. In order to succeed on this point, therefore, the claimant has to show:

- That the proposed use of the land for the display of advertisements through the roof would be a reasonable use in the public interest;

- That the covenant would impede that use, or would do so unless modified; and either

- That the covenant does not secure to the respondent any practical benefits of substantial value or advantage to them and (in that case only) money would be an adequate compensation for discharge or modification; or

- That the covenant is contrary to the public interest.

47. It is argued that the proposed use would be a reasonable use of the land in the public interest, and I accept that. It is also accepted that the continued existence of the covenant would impede that use. It is not suggested that the covenant is contrary to the public

interest, but it is said that it does not confer any practical benefits of substantial value or advantage.

48. Mrs Graham Paul says that it is a substantial advantage to be able to control the appearance of the surrounding land and also to be able to withhold consent in the interests of road safety. The respondent has demonstrated concern about the area; in 2010 it took enforcement action because the amenity of the area was being affected by the condition of the property, and in 2012 it refused planning consent for a proposed change of use because of the effect it would have had on visual amenity, the detrimental effect on road and pedestrian safety, and objections from the church. There is some dispute about what that change of use was (the respondent describes it as an advertising hoarding; the claimants as a memorial), but the respondent's point is that this is an area it is concerned about. The covenant gives an extra layer of control and enables the respondent to object to uses of the property that are not prevented by planning regulation and without being limited to planning considerations.

49. Again, the claimant's cases rests upon the fact that the proposed use has deemed planning consent or needs none; and the answer to that is very much along the same lines as outlined above on the question of reasonable refusal. This is a public space, with some architectural interest in the form of the church, and also a busy space surrounded by traffic. The additional control that the covenant confers upon the local authority is a practical benefit and a substantial advantage. Its loss could not be compensated in money (which would be an irrelevancy), but that point does not arise in view of the benefit that I have found the covenant confers.

50. Accordingly I do not accept that the covenant would be discharged, or modified to permit the proposed use, if an application were made under section 84.

Conclusion

51. The covenant binds the claimants, the use of the roof for advertisements is within the scope of the covenant, the respondent could reasonably refuse consent to the proposed use, and the covenant would not be modified on an application under section 84. The claimants fail on the second preliminary issue as well as the first.