UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 667 (LC)
UTLC Case Number: LP/27/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – preliminary issue – whether objectors entitled to the benefit of a particular restriction – whether particular restriction spent – true construction of the word "vendor".

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

AND IN THE MATTER OF RULE 53 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) (LANDS CHAMBERS) RULES 2010

BETWEEN:

DERREB LIMITED

Applicant

and

CLAIRE WHITE AND PAUL HARPIN AND OTHERS

Objectors

Re: The Huntsman,
106 Manor Way,
London SE3 9AN

Before: Judge Edward Cousins

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
28th September 2015

Timothy Morshead QC for the Applicant
Timothy Mould QC for the Blackheath Cator Estate Residents Limited

The other Objectors were in person

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The following cases are referred to in this decision:

City Inn (Jersey) Ltd v Ten Trinity Square Ltd [2008] EWCA Civ 156
Re Woodhouse [2010] UKUT 235
Bell v Norman C Ashton Limited [1957] 7 P&CR 359
Arnold (Respondent) v Britton & Others (Appellants) [2015] UKSC 36
Prenn v Simmonds [1971] 1 WLR 1381
Rainy Sky SA v Kookmin Bank [2011] UKSC 50
Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38
Sigma Finance Group [2009] UKSC 2
Eagling v Gardner [1970] 2 All ER 838
Crest Nicholson v McAllister [2004] 1 WLR 2409
*Howard Pryor Ltd v Christopher Wren Limite*d (unreported 24 October 1995, per Knox J)
Kookmin Bank v Rainy Sky SA [2010] EWCA Civ 582
Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AG and Others [2014] EWHC 3068

CORRECTED DECISION

THE APPLICATIONS

1. The Applicant, Derreb Limited ("Derreb") is the freehold owner of land and premises known as "The Huntsman" situate at 106 Manor Way, London SE3 9AN, registered with title absolute at HM Land Registry under Title No. LM143032 ("the Application Land"). The Application Land is marked tinted red on the plan ("the Plan") contained in the bundle at tab 4 prepared for the hearing ("the Bundle"). By two applications dated 6th October 2014 ("the Applications") made pursuant to the provisions of section 84 of the Law of Property Act 1925, Derreb seeks to modify or discharge the burden of a restrictive covenant ("the Restriction") over the Application Land. The Restriction is defined in paragraph 3 of the First Schedule to a conveyance dated 5th November 1956 ("the 1956 Conveyance"), the benefit of which is said to attach to land held by the trustees of the Cator Estate ("the Cator Estate") pursuant to the terms of a trust ("the Trust") established under the 1956 Conveyance.

2. There are currently three objectors to the Application ("the Objectors"). The principal objector is the Blackheath Cator Estate Residents Limited ("BCER"), and is represented by Timothy Mould QC. BCER is the registered freehold proprietor of land and premises comprising a number of roadways on the Cator Estate, and registered at HM Land Registry under Title No. SGL25810 ("the Roadways"). The Roadways are tinted pink on the Land Registry title plan at Tab 17 of the Bundle. The other two objectors are the owners of the following properties, namely, 83 Brooklands Park and 85 Brooklands Park. They are the successors in title to John Cator and purportedly enjoy the benefit of the Restriction. They are also shareholders in BCER. These properties are marked as purple and brown respectively on the Plan.

3. The case for the Objectors is that they are the owners for the time being of the specified properties entitled to the benefit of the Restriction, and as a consequence are entitled to enforce the Restriction against Derreb.

4. It is not in issue between the parties that the Roadways were at the date of the 1956 Conveyance comprised in and formed part of the Cator Estate. Derreb accepts that the benefit of the Restrictions contained in the First Schedule to the 1956 Conveyance passed to BCER by virtue of the words of annexation contained in clause 2 thereof.

THE BACKGROUND

The 1956 Conveyance

The parties

5. The parties to the 1956 Conveyance were John Cator ("the Vendor"), of the first part, William Fellowes and Francis Cator of the second part, ("the Trustees"), and the Price Forbes Pensions Fund Trustee Limited, of the third part ("the Purchaser"). By clause 1 thereof in consideration of the purchase price paid by the Purchaser by the direction of the Vendor to the Trustees, the Vendor conveyed to the Purchaser the Application Land to hold the same unto the Purchaser in fee simple. John Cator died on 19th October 1999. Derreb is the successor in title to the Purchaser of the Application Land.

The extent of annexation

6. Clause 2 of the 1956 Conveyance contains a covenant on the part of the Purchaser: -

> "…. for itself and its successors in title with the Vendor and so that the covenant shall so far as practical be enforceable by the owner or owners for the time being of the property now comprised and known as the Cator Estate at Blackheath or any part of parts thereof that the Purchaser and its successors in title will at all times hereafter observe and perform the stipulations and regulations contained in the first schedule hereto…"

The Restriction

7. Paragraph 3 of the First Schedule provides as follows:

> "The property hereby conveyed shall not be used for any purpose other than as a Sports Ground or for the erection of detached houses for use as private residents only such buildings to be erected in such a position and in accordance with such plans and elevations including general layout and development plans as shall first be submitted to and approved at the Purchaser's expense by the Vendor's surveyor as aforesaid."

8. Paragraph 1 of the Charges Register of Derreb's title makes specific reference to the 1956 Conveyance and the Restriction contained therein.

The power of release

9. Clause 2 of the 1956 Conveyance also contains a proviso ("the Proviso") in the following terms: -

> "PROVIDED ALWAYS that it shall be lawful for the Vendor (which expressions shall be taken to include the estate owner or owners for the time being of property for the time being

remaining subject to the trusts of the present settlement or any future re-settlement of the Cator Estate at Blackheath) to make a Conveyance of any part of parts of the said Estate in a different form and in particular subject to different stipulations and regulations from those subject to which this present sale is made or without any such stipulations and regulations and further at any time or times not later than Twenty one years after the death of the survivor of the issue now living of His Late Majesty King Edward VII to release any property which has already been sold from all or any of the stipulations or regulations to which it is now subject."

THE PURPORTED RELEASE

10. Derreb relies upon a deed dated 27th September 2013 ("the September 2013 Deed") and made between the executors of the Cator Estate (namely the Vendor described in the 1956 Conveyance) and Derreb. Clause 2 of the September 2013 Deed purported to release Derreb from the burden of the Restriction, together with all other covenants contained in the 1956 Conveyance and to discharge those restrictions. In so far as Objectors are concerned, it is contended that the Restriction has not been released.

11. Thus the issue in the case relates to the effect of the September 2013 Deed having regard to the true construction of the terms of the Proviso contained in clause 2 of the 1956 Conveyance, to which reference has been made above. The argument put forward by Derreb is that the Executors of the Cator Estate were entitled to release Derreb's property and Derreb from the burden of the restrictions by virtue of a strict interpretation of the Proviso. This is denied by the Objectors. In this context it is to be noted that the Trust has come to an end, as acknowledged by Derreb.

THE SUBMISSIONS

Submissions made on behalf of Derreb

12. It is submitted by Leading Counsel for Derreb that there are a number of notable features in the power of release contained in the Proviso: -

(1) The Power of Release is reserved to the Vendor, namely John Cator, but is not to be regarded as having ceased with the death of John Cator; nor did it cease at the determination of the Trust which formerly owned the Cator Estate. It continued to be exercisable after the death of John Cator in October 1999, and after the determination of the Trust, by John Cator's personal representatives. It contemplates the possibility of its exercise over a protracted period of time.

(2) In other words, the central feature of the case presented for Derreb is that the power of release continued to be exercisable even after the death of John Cator and the determination of the Trust – hence the ability of the executors of John Cator to exercise the power of release contained in the 1956 Conveyance by entering into the September 2013 Deed.

13. The substantive argument in support of this interpretation is as follows: - in some cases a power reserved to an individual vendor might not be exercisable after his death by his personal representatives, and in effect is to be construed as personal to the vendor. The example cited by Leading Counsel is to be found in the case of *Bell v Norman C Ashton Ltd,*[1] *as* followed in *Re: Woodhouse.*[2] However, this is not to be construed as a rule of law. The question of who is capable of exercising the power is one of interpretation of the power. In the present case, the true construction to be made is that it was objectively in the contemplation of the parties, and it was the bargain obtained by the Purchaser, that within the stated perpetuity period the Purchaser should be entitled to negotiate with just one person in order to release the covenants in the September 1956 Conveyance. It cannot have been the intention of reasonable parties that this "valuable" power should cease to be exercisable within the stated perpetuity period, merely because all parts of the Cator Estate happened to have been sold, or because the Vendor himself had died.

14. Plainly, as submitted by Leading Counsel, it was contemplated that a release by the Vendor, or his personal representatives, would suffice in such circumstances. Otherwise, it would be necessary for the purchaser to negotiate with potentially "multitudinous" owners for the time being of land formerly contained in the Cator Estate all having the benefit of the covenants in the September 1956 Conveyance. It is submitted that this is contradictory to the whole point of the Proviso, and materially defeats the bargain actually made by the Purchaser. This interpretation would be "unworkable and so improbable". Leading Counsel also cites the case of *City Inn (Jersey) Ltd v Ten Trinity Square Ltd*[3] in support of this submission.

15. Counsel for the Applicant further stressed the reference to the words "already", and "now", within the Proviso, both references being to land sold as at the date of the September 2013 Deed, and not land sold as at the date of the 1956 Conveyance. This must by definition therefore include the Huntsman. As Leading Counsel put it, "the deed speaks when executed".

16. Accordingly, it is submitted that the benefit of the Restriction was annexed to the land then comprised in the Cator Estate; the Power of Release was reserved to the Vendor; and that Power of Release has been exercised by the Vendor's personal representatives by virtue of the September 2013 Deed so as to release the Application Land from the Restriction.

The Case for the Objectors

17. Mr Mould QC of behalf of BCER denies that the Executors of the Cator Estate were entitled to release the Restriction by virtue of the Proviso. He submits that on a true construction of the 1956 Conveyance it was not in the contemplation of the parties that the personal representatives were entitled to release the Restriction. The basis for this submission is as follows:

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[1] (1957) 7 P&CR 359.
[2] [2010] UKUT 235.
[3] [2008] EWCA Civ 156 at [33].

(1) The draftsman of the 1956 Conveyance has defined the persons entitled to exercise the Proviso in the following strict terms –

> "the Vendor (which expression shall be taken to include the estate owner or owners for the time being of the property for the time being remaining subject to the trusts of the present Settlement or any future re-settlement of the Cator Estate at Blackheath)".

(2) Notwithstanding what is said by the Objectors to be a careful and deliberate definition, Derreb argues that the expression "the Vendor" should also be read as including the Vendor's personal representatives. The Objectors submit that there is no good reason to extend the express definition of the Vendor in that way. The 1956 Conveyance did not contemplate on its true construction that the personal representatives of the Vendor were entitled to release the Restriction. Had it been intended to do so, then it could have been appropriately defined, but it was not. This analysis of the operation of the Proviso is neither "unworkable" nor "improbable".

(3) The express purpose of the Proviso was to reserve certain powers on the future disposal of estate property to the owner for the time being of property within the Cator Estate remaining subject to the said trusts. The express words of the Proviso make clear that it was the purpose and intent of the parties to the 1956 Conveyance that the Proviso should be exercisable only for as long as the trusts of the then current settlement of the Cator Estate (or any future re-settlement of the same) remained in existence. On its express terms, that purpose of the Proviso ceased to be effective upon the cessation of the Trust. As stated above, Derreb concedes that the trusts have come to an end.

(4) In any event Derreb's property does not itself fall within the scope of the Proviso. The words "to release any property which has already been sold from all or any of the stipulations or regulations to which it is now subject" refer, as a simple matter of construction, to property other than that which is made subject to the restrictions imposed under the 1956 Conveyance itself.

(5) That reading of the Proviso is consistent with its purpose and intent, which was to reserve powers to the Vendor in respect of other property within the Cator Estate.

(6) Further, BCER's submissions are consistent with the general proposition of law that, in order to secure release from the burden of a restrictive covenant, the covenantee must secure the agreement of all those entitled to the benefit of that covenant.

(7) It is submitted that the cases of *Bell v Norman C Ashton Ltd,*[4] as followed in *Re: Woodhouse,*[5] in fact support BCER's submissions. This was a case where a very distinguished Judge came to a clear view on the interpretation of the clause in question. Particular reference is made to pages 364 and 365 of the Judgment where the personal representatives in a building scheme were precisely defined as including their heirs and assigns, and by definition their personal representatives. There was "no dispensing

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[4] (1957) 7 P&CR 359.

[5] [2010] UKUT 235.

power". This case is an example, so it is said, of the position between where specific reference is made to heirs and assigns, and the present case where it is not.

18. Thus it is submitted by counsel for the Objectors that the word "the Vendor", untrammelled by other words, means precisely what it says. It does not extend to the Vendor's heirs and assigns, or his personal representatives. In other words, it does not extend to the successors in title to John Cator. It is said that the word is "unglossed" (a reference made by Leading Counsel for Derreb), and is precisely restricted to that category.

19. As Leading Counsel stated, there was a careful definition of the word "Vendor" contained in the deed, and had it been intended that the words should be extended to the personal representatives of Mr Cator, then that would have been specifically defined to include his personal representatives. There is no extended definition, and it is not possible to imply into the definition of the word other words in order to support the Derreb's case. Leading Counsel stated that one should be slow indeed to read the words into a deed which the draftsman did not intend.

20. In essence, therefore, the submission made by Counsel for the objectors is that the word "Vendor" contained in Clause 2 does not extend to include the personal representatives of Mr Cator. That being so, it is submitted that there was no power to release the covenant on the part of the personal representatives. Thus the Tribunal is invited to conclude that the September 2013 Deed does not have the effect to deprive BCER of the right to enforce restrictions contained in the 1956 Conveyance.

DISCUSSION

21. There would appear to be two issues to be resolved, namely:

(1) What is meant by the word "Vendor" and does it include the personal representatives of John Cator?

(2) If the word "Vendor" does include the personal representatives of John Cator, does the Power of Release contained in the September 2013 Deed apply as well as to the Huntsman sold away by 5th November 1956.

22. I have come to the conclusion that the interpretation raised by the Objectors on the word "Vendor", on its true construction cannot extend to the Vendor's personal representatives in the circumstances. The answer to the first issue is in the negative, and therefore obviates an answer to the second issue. In this regard I adopt the reasoning of Leading Counsel for the Objectors that the word "Vendor" means precisely what it says, and it was intended to be personal to the Vendor. It cannot implicitly include his personal representatives. In my judgment on the construction of the relevant phraseology contained in the 1956 Conveyance was carefully and deliberately phrased by the draftsman of the 1956 Conveyance.

23. In order to reach this conclusion, it is necessary to conduct a short tour of the relevant case law. At the outset of the exercise regard should first be made to the recent judgment in the case of *Arnold (Respondent) v Britton & Others (Appellants)*[6] in which the Supreme Court gave detailed consideration to the interpretation of contractual provisions by reference to existing case law. The cases to which consideration was given started with *Prenn v Simmonds*[7] and culminated in *Rainy Sky SA v Kookmin Bank.*[8] In [15] Lord Neuberger made reference to Lord Hoffmann's judgment in the case of *Chartbrook Limited v Persimmon Homes Ltd.*[9] Lord Neuberger then stated that when interpreting a written contract the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".[10]

24. In undertaking this exercise the Court does so by focussing on the meaning of the relevant words in their "documentary, factual and commercial context". According to Lord Neuberger in [15] that meaning has to be assessed in the light of:

(1) The natural and ordinary meaning of the clause;

(2) Any other relevant provisions of the contract, in this case a lease;

(3) The overall purpose of the clause and the contract/lease;

(4) The facts and circumstances known or assumed by the parties at the time that the document was executed, and

(5) Commercial common sense; but

(6) Disregarding the subjective evidence of any party's intentions.

25. Lord Neuberger then in [17] to [23] of *Arnold* emphasised several factors to be considered in the interpretation of contractual provisions. They are as follows: -

(1) The reliance placed in some cases on commercial commonsense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed.

(2) When it comes to considering the centrally relevant words to be interpreted, Lord Neuberger accepted that the less clear they are, or, to put it another way, the worse their drafting, the readier the court can properly be to depart from their natural meaning.

[6] [2015] UKSC 36.
[7] [1971] 1 WLR 1381.
[8] [2011] UKSC 50.
[9] [2009] UKHL 38.
[10] Quoting Lord Hoffmann at paragraph [14] of *Chartbrook.*

(3) Commercial commonsense is not to be invoked retrospectively just because a contractual arrangement has worked out badly or even disastrously for one of the parties. That is not a reason for departing from the natural language.

(4) While commercial commonsense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be very imprudent for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed.

(5) When interpreting a contractual provision one can only take into account factual circumstances which existed at the time that the contract was made, and which were known or reasonably available to both the parties.

(6) In some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended the court will give effect to that intention.

(7) In so far as service charge provisions are concerned (the subject matter of the case), Lord Neuberger was unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation, and be construed "restrictively".

26. Lord Hodge concurred with Lord Neuberger, and in [76] and [77] stated as follows: -

"This conclusion is not a matter of reaching a clear view on the natural meaning of the words and seeing if our circumstances which displaced that meaning. I accept Lord Clarke's formulation of the unitary process of construction, in *Rainy Sky SA v Kookmin Bank* at para. 21.

> "[T]he exercise of construction is essential one unitary exercise in which the Court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have met. In doing so the Court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other."

" This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated (re *Sigma Finance Corp*[11]) ….. but there must be a basis in words used in the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of real background knowledge, the meaning of the words which the parties used. The contract is not there to re-write to party's agreement because it was unwise to gamble on future economic circumstances and a long

[11] [2009] UKSC 2, [12] per Lord Mance.

term contract or because subsequently events have shown that the natural meaning of the words has produced a bad bargain for one side. The question for the Court is not whether a reasonable and properly informed tenant would enter into such an undertaking. That would involve the possibility of re-writing the party's bargain in the name of commercial good sense. ……"

27. The key words are those which define "the Vendor" in clause 2 of the 1956 Conveyance, and it is to be noted that this is an inclusive definition, and not an exhaustive one. In such circumstances, anything falling within the natural meaning of the term in the contextual framework can also fall within that definition and the "documentary, factual and commercial context".

28. Turning to the general sense of the Power of Release, and its context, and the presumed intention of the parties at the time, it is to be seen that the power points to the future when regard is had to the words "for the time being". In the case of *Crest Nicholson v McAllister*[12] "for the time being" means "for time to time".

> "And that, of course, makes good sense for the reason to which I have already referred. Where development land is sold off in plots without imposing a building scheme, it is likely that the developer will wish to retain an exclusive power to give or withhold consent to a modification or relaxation of a restriction on building which he imposes on each purchaser; unfettered by the need to obtain the consent of every subsequent purchaser to whom (after imposing the covenant) he has sold off other plots on the development land. If it were otherwise, he would create a situation in which the ability of a purchaser of one plot to enforce covenants against the owner of another plot depended on the order in which the plot had been sold off; a situation described by Mr Justice Ungoed-Thomas in *Eagling v Gardner*[13]… as "a building scheme in Alice's Wonderland".

29. Thus, in my judgment, the power only allows the Vendor to retain flexibility in terms of stipulations on future sales. The words of annexation contained in clause 2 suggest a right to enforce between all plot owners "for the time being" (i.e. "from time to time") within the Estate. This being so this must have some bearing on the limitation on the Power of Release which is clearly limited in terms of those who can exercise it. The many plot owners deriving title from the Vendor cannot do so.

30. In the case of *Howard Pryor Ltd v Christopher Wren Limited*[14]. It was also held that the words "for the time being" meant "from time to time". This was in the context of a development which was then in the course of being constructed. The conclusion made by Knox J was on the basis that there was a perceived need to limit to the original Vendors the scope of the covenants relating to consent so as to avoid a large number of persons as successors in title to the Vendors in respect of plots already sold, whose consent might have to be obtained. The learned Judge made reference to the necessity to do so so as to avoid "contradiction and disorder". Thus the intention was to limit the annexation of the benefit to the land retained, and not sold off.

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[12] [2004] 1 WLR 2409 [48].
[13] [1970] 2 All ER 838, 846D.
[14] Unreported 24 October 1995, per Knox J.

31. Reference has been made in the case by Leading Counsel for Derreb into the case of *City Inn (Jersey) Ltd v 10 Trinity Square Limited*[15]. This case concerned a transfer of property by the "Transferor" defined in the contract as the Port of London Authority. The question that arose for consideration was whether the expression "Transferor" included the successors in title of the Port of London Authority. That argument was rejected by Lord Justice Jacob where he stated that the conclusion that notwithstanding the chosen definition of the draftsman a different meaning should be imported, was rejected. "Such a conclusion will only be reached where, if the term is given its defined meaning the result would be observed, given the factual background, known to both parties in which the document was prepared. Nothing less than absurdity will do – it is not enough that one conclusion makes better commercial sense than another."[16]

32. A similar approach to construction was adopted by the majority of the Court of Appeal in *Kookmin Bank v Rainy Sky SA* [17] Where Pattern LJ expressed the principle applicable in the following way: -

> "In this case (as in most others) the court is not privy to the negotiations between the parties or to the commercial and other pressures which may have dictated the balance of interest which the contract strikes. Unless the most natural meaning of the words produced as a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect to its terms. To do otherwise would be to risk imposing obligations on one or other party which they were never willing to assume, and in circumstances which amount to no more than guess work on the part of the Court."

It will be noted that Lord Justice Patten used the word "extreme", which mirrors the word "absurdity" by Lord Jacob LJ.

33. In the case of *Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AG and Others,* Flaux J criticised that approach to construction which he describes in his judgment as being "more rigid" as an approach to construction, as in the *City Inn* case. He doubted whether the *City Inn* case can still be regarded as good law after the decision of the Supreme Court in *Rainy Sky* where Lord Clarke stated that it was not in his judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.[18] If there are two possible constructions, the Court is entitled to further construction which consists with business common sense and to reject the other.[19]

<u>THE CORRECTED DECISION</u>

34. Having regard to the principles of law set out above, and drawing together the various strands, in essence I find that on a true construction of the Restriction the term "Vendor" does not include the personal representatives of John Cator. The draftsman of the 1956 Conveyance defined the persons

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[15] See Footnote 3, above.
[16] [8].
[17] [2010] EWCA Civ 582.
[18] [20].
[19] [21].

entitled to exercise the proviso in strict terms and limited the class to the Vendor as defined. Further, the express words of the proviso make it clear that it was the purpose and intent of the parties to the 1956 Conveyance that the proviso should only be exercisable for as long as the trusts of the then current settlement of the Cator Estate (or any future re-settlement of the same) remained in existence. In my judgment the express purpose of the proviso was to reserve certain powers on future disposal of the property of the Cator Estate to the owner for the time being within the Cator Estate remaining subject to the trusts. On its express terms that purpose ceased to be effective upon cessation of the Trust. The reading of the proviso in this way is consistent with its purpose and content which was to reserve powers to the Vendor personally in respect of other property within the Cator Estate not subject to the Restriction. Accordingly, the Application Land does not fall within the scope of the Proviso.

35. In my judgment, it is unnecessary to attempt to extend the meaning of the term "the Vendor" in a somewhat strangulated fashion, as is sought to be argued by Leading Counsel for Derreb. In other words, as Leading Counsel for BCER submits, the term means precisely what it says, untrammelled by other words. On a true construction of the 1956 Deed it is precisely restricted to that category. Had the parties intended for the term to be extended to Mr Cator's personal representatives then this could have been specifically and clearly defined. There is no extended definition, and I find that it is not possible to imply into the definition of the word other words in order to support the Derreb's case.

36. Accordingly, I reject the submissions made on behalf of Derreb by Leading Counsel that the term "the Vendor" should also be read as including his personal representatives. I find that BCER and the Objectors are the owners for the time being of property entitled to the benefit of the Restriction, and are entitled to enforce it against Derreb - Derreb being bound by it.

37. I therefore propose to make the following Order in favour of BCER and the Objectors:

UPON THE APPLICATION of Derreb Limited dated 14th July 2015

AND UPON the withdrawal of the objections made by John Steel and Dominic Steel as registered proprietors of No 2 Manorbrook and by Damien Griffiths and Paula Ionnides as registered proprietors of No 95 Manor Way

AND UPON hearing leading counsel for the Applicant and Professor Martin Prince and Paul Harpin and leading counsel for Blackheath Cator Estate Residents Limited

IT IS ORDERED that the following persons only shall be permitted to object to the Application made by Derreb Limited pursuant to section 84 of the Law of Property Act 1925, namely:

(1) Professor Martin Prince and Mrs Mia Prince as registered proprietors of No 83 Brooklands;

(2) Paul Harpin and Claire White as registered proprietors of No 85 Brooklands; and

(3) Blackheath Cator Estate Residents Limited as registered proprietor of certain estate roads.

Dated 23rd December 2015

Judge Edward Cousins

ADDENDUM ON COSTS

38. Following the handing down of the original Decision on 23rd December 2015, representations were received from Paul Harpin and Claire White, and the Blackheath Cator Estate Residents Limited, seeking an order pursuant to Rule 10 of the 2010 Rules that Derreb, should pay the costs of and occasioned by the preliminary issue, to be subject of a detailed assessment, if not agreed.
Reference was also made to paragraph 12.5 of the Practice Direction dated 29th November 2010 where it is stated that where an unsuccessful challenge has been made by an applicant to an objector's entitlement to object to an application "… the applicant is normally ordered to pay the objector's costs incurred in dealing with that challenge." A payment on account of £10,000 was also sought.

39. Representations on this issue were sought from Derreb. In a letter dated 10th February 2016 Mr Macey, solicitor for Derreb, objected to this course of action, and stated that costs are a matter of discretion, and that in this instance that discretion had not been exercised. In any event and application for permission to appeal had been made.

40. Having considered theses representations, and having regard to the substance of this decision in paragraphs 34 to 37, above, I have come to the conclusion that there is no good reason for departing from the normal rule as set out in paragraph 12.5 of the Practice Direction. In short Derreb lost the preliminary issue for all the reasons stated. Accordingly, I exercise my discretion in favour of the Objectors, and order that Derreb should pay the costs of and occasioned by the preliminary issue, to be subject of a detailed assessment, if not agreed. I also consider that it is appropriate in my discretion that a payment on account should be made in the sum of £10,000 in favour of the Objectors. An order should be made to this effect.

Dated 19th April 2016

Judge Edward Cousins