



For: Redditch Borough Council

Matter: Arrow Valley Park, Redditch

Date: 7 May 2013

LEGAL OPINION

1. I have been asked to provide a legal opinion in respect of a *restrictive covenant* contained in a Conveyance dated 21 March 1974 made between (1) Redditch Development Corporation and (2) The Urban District Council of Redditch (the “1974 Conveyance”); and in particular how that *restrictive covenant* affects proposals for the use of Arrow Valley Park.
2. The *restrictive covenant* is set out in clause 2 of the 1974 Conveyance in the following terms:

“The Council hereby covenants with the Corporation that the Council and its successors in title will at all times hereafter use the land hereby conveyed (with the exception of the two bungalows shown coloured pink on the said plan annexed hereto) for public open space purposes only with buildings reasonably ancillary thereto”
3. The land conveyed by the 1974 Conveyance and referred to in the *restrictive covenant* consists of:

“ALL THOSE pieces or parcels of land situate at Redditch in the County of Worcester containing in the whole Sixty-six point two five acres or thereabouts and which are for the purpose of identification only more particularly delineated on the plan annexed hereto and thereon edged red TOGETHER WITH the two bungalows erected thereon or on some part thereof as coloured pink on the said plan annexed hereto and any other buildings or erection on the land...”

The plan annexed to the 1974 Conveyance is attached for your information.

The Proposal

4. I understand that the Council are considering relocating Redditch United Football Club from its current base at Valley Stadium, off Bromsgrove Road to Arrow Valley Park. This proposal would involve the construction of a new '3G' stadium comprising a '3G' football pitch surrounded by a structure supporting spectator stands or seating. It is understood that the new stadium would predominately be a private facility for Redditch United Football Club.

5. I am therefore asked to consider:

(a) *whether the Proposal would cause a breach of the restrictive covenant; and*

(b) *the enforceability by successors in title to Redditch Development Corporation of the restrictive covenant against the Council.*

Whether the Proposal would cause a breach of the restrictive covenant?

6. It is my opinion that the Proposal would be a clear breach of the *restrictive covenant*.

This is based firstly upon the ordinary meaning given to the words "public open space" and secondly if you look to statute for guidance on the meaning of "public open space" of particular relevance here are the Town and Country Planning Act 1990, section 336(1) and the Open Spaces Act 1906, section 20.

The Town and County Planning Act 1990, section 336(1) states that:

"“open space” means any land laid out as a public garden, or is used for the purposes of public recreation, or land which is a disused burial ground”

The Open Spaces Act 1906, section 20 provides that:

“The expression “open space” means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for the purposes of recreation, or lies waste and unoccupied.”

The *restrictive covenant* only permits “buildings reasonably ancillary” to “public open space purposes only” and therefore given that use as a private football ground falls outside what would be regarded as “public open space” the construction of a new stadium would be a contravention of this *restrictive covenant*.

The enforceability by successors in title to Redditch Development Corporation of the restrictive covenant against the Council.

7. I understand that as a designated new town, Redditch was removed from local authority control and placed under the supervision of a Development Corporation, namely Redditch Development Corporation, which was established by the New Towns Act 1959.

Redditch Development Corporation was later disbanded and its assets split between the Council and the Commission for New Towns. The Commission for New Towns and the Urban Regeneration Agency (set up by the Leasehold Reform, Housing and

Urban Development Act 1993) as two entirely independent bodies set up under separate statutes became known as English Partnerships.

By virtue of:

- (a) The Housing and Regeneration Act 2008;
- (b) The Housing and Regeneration Act 2008 (Commencement No. 1 and Transitional Provisions) Order 2008 (SI 2008 No. 2358 (c.103)) dated 2 September 2008;
- (c) The Housing and Regeneration Act 2008 (Commencement No. 2 and Transitional, Saving and Transitory Provisions) Order 2008 (SI 2008 No c 3068 (c.132)) dated 26 November 2008; and
- (d) Homes and Communities Agency, Tenants Services Authority and the Welsh Ministers Transfer Scheme

all assets, liabilities and interests were transferred from Commission for the New Towns and The Urban Regeneration Agency to Homes and Communities Agency with effect from 1 December 2008.

The Homes and Communities Agency (HCA) are therefore the successors of Redditch Development Corporation and appear to be the only entity able to enforce the *restrictive covenant*.

8. As a general rule, a covenant may be enforced between original parties simply as a matter of contract. However, where either the benefitted land or the burdened land, or both has changed hands, the successors in title must show that they are entitled to the benefit and are bound by the burden respectively.
9. The burdened land can clearly be identified from the 1974 Conveyance, and is the land described in paragraph 3 above, with the exception of the two bungalows shown coloured pink on the attached plan.
10. In order to enforce the *restrictive covenant*, HCA would need to show that they are entitled to the benefit of it. This question was examined in the case of *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410; [2005] 1 WLR 2409. This case emphasised the importance of clearly identifying which land has the benefit of the covenant. In this regard the 1974 Conveyance is deficient for reason that there are no words to indicate that any particular land is protected. The *restrictive covenant* is merely expressed to be with Redditch Development Corporation.
11. The question is whether the land intended to be benefitted can be identified (from a description, plan or other reference itself, but aided, if necessary by external evidence to identify the land so described, depicted or otherwise referred to) so as to enable statutory annexation under section 78(1) of the Law of Property Act 1925 to have effect. Consideration would need to be given to whether Redditch Development Corporation was the owner of adjoining land at the time that the covenant was imposed; in which case this may be sufficient to indicate land intended to have the benefit of the *restrictive covenant*. However, as there is no such reference on the 1974 Conveyance to enable the Council to identify the land benefitting from the *restrictive covenant* it is unlikely that HCA would be able to enforce the *restrictive covenant*, unless they are able to produce some other form of admissible evidence identifying the benefitting land.

12. Generally, if the land with the benefit cannot be identified then the *restrictive covenant* cannot be enforced. This principle is supported by a number of decisions in the Lands Tribunal relating to applications under section 84 of the Law of Property Act 1925 to modify or discharge a restrictive covenant. This includes the decisions in *Hutchinson, Re 1 Captains Gorse* [2009] UKUT and *Norwich City College of Further and Higher Education v McQuillan and anr* [2009] UKUT and in the Court of Appeal decision in *Perkins and Anr v Mclver and Ors* [2012] EWCA Civ 735. On this basis there would be grounds to challenge the enforceability of the *restrictive covenant*.
13. It does not appear that this *restrictive covenant* was registered as a D(ii) land charge; but as the Council are the original owner of the burdened land the failure to enter the *restrictive covenant* would only be material if there had been a disposition for value. I understand that an application for voluntary registration to the Land Registry has been submitted and/or completed, where an entry in respect of this *restrictive covenant* will have been made in the Charges Register of the title to the property. This entry nonetheless will not affect the enforceability of the *restrictive covenant* against the Council.
14. In addition to this it is noted that the *restrictive covenant* is expressed to bind the Council and its successors in title, but the benefit to be with the Corporation. Here you will note that there is no reference to successors in title and therefore it could be argued that the *restrictive covenant* was only intended to be for the benefit of Redditch Development Corporation. Accordingly, when Redditch Development Corporation was disbanded the benefit of the *restrictive covenant* was lost as there is no one who could now enforce it, as it is expressed only for the benefit of Redditch Development Corporation. Notwithstanding this, Redditch Development Corporation could have validly assigned the benefit of this *restrictive covenant* before it was disbanded – there is no way of knowing whether such an assignment had taken place and the burden of proof would rest with the party attempting to enforce the *restrictive covenant*.
15. *Conclusion*

On the basis of the points raised above, it is clear that the Proposal would be a breach of the terms of the *restrictive covenant*. However, the uncertainty lies in whether the HCA would be able to enforce the *restrictive covenant* against the Council. Given that the land with the benefit of the *restrictive covenant* cannot be identified and that the *restrictive covenant* is expressed to be with Redditch Development Corporation with no reference to successors in title, it is my opinion that the HCA would be unlikely to be able to enforce the *restrictive covenant* against the Council.

Prepared by: ████████████████████