In the Worthing County Court

Claim No.	G5QZ40E9
Claimant	Brooklands Residents Association Ltd.
Defendant	[redacted]
Date	3rd September 2020

ORDER

Before **JUDGE EDGINGTON** sitting as a **District Judge** by video hearing at Havant Justice Centre, Elmleigh Road, Havant PO9 2AL

UPON HEARING Jane Silsby as a lay representative of the claimant and the defendant in person

IT IS ORDERED THAT

1. Permission for the defendant to pursue his counterclaim is refused
2. The claim be and is hereby struck out
3. No order as to costs

Dated 3rd September 2020

In the County Court at Worthing
Sitting by video hearing from Havant Justice Centre, Elmleigh Road, Havant PO9 2AL **claim no. G5QZ40E9**

Before:

Judge Edgington sitting as a District Judge of the county court

between:

Brooklands Residents Association Ltd.
Claimant
and

[redacted]
Defendant

Judgment

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Introduction

1. In proceedings commenced in the County Court Money Claims Centre on the 15th April 2020, the claimant claims £634.90 being alleged service charge arrears. The further sum of £60 court fee is also claimed.

2. In his defence, the defendant admits that he owns [redacted] Old Farm Court, New Salts Farm Road, Shoreham by Sea, BN43 5FE and [redacted], on the same estate. In a subsequent document, he states that [redacted] Old Farm Road was purchased in the joint names of himself and his partner [redacted] although he does not say whether she is a tenant in common or a joint tenant i.e. an indication of whether there is joint and several liability.

3. The service charges claimed are for maintenance of the site known as Old Farm Court. The defence denies, as a matter of law, that any monies are payable. It goes on to say, as alternatives, that the proportion of monies claimed are wrong and that the charges are unreasonable.

4. The order of District Judge Ellis, sitting at Worthing county court on the 25th June 2020 says "*the claim be transferred to the First Tier Tribunal (Property Chamber)*". Whilst such Tribunal has jurisdiction to determine disputes between landlords and tenants over service charges, the service charges in this case relate to freehold land. However, Judge Ellis has also ordered that the Tribunal Judge, sitting as a county court judge can resolve all other issues raised in the proceedings because sub-sections 5(2)(t) and (u) of the **County Courts Act 1984** were amended by the **Crime and Courts Act 2013** so that First-tier Tribunal judges became county court judges.

5. It should be made clear at this stage that there was no counterclaim filed with the defence and by a further order dated 21st July 2020, the claim was allocated to the Small Claims Track. By rule 20.4 of the **Civil Procedure Rules 1998**, a defendant can make a counterclaim against a claimant "*without the court's permission if he files it with his defence; or at any other time with the court's permission*".

6. There has been a series of submissions by both parties which are included within the hearing bundle. At page 13 is the defendant's response to the claimant's comments on the defence. It is dated 22nd August 2020 and includes, for the first time, a purported counterclaim in the sum of £10,227 for previous legal costs incurred by the defendant in various prior disputes between the parties. It also asks the court to make 3 orders relating to how future charges are to be calculated and that no member of the claimant is to park on land not owned by it. Finally, it asks for the defendant's costs incurred in these proceedings to be paid by the claimant. This last item is not, of course, a counterclaim.

7. As all documents were ordered to be filed by 24th August, no defence to the counterclaim has been filed. In the circumstances, namely that the court's permission has not been sought to pursue a counterclaim, the amount claimed is disproportionate to the £634.90 claimed, most of the counterclaim relates to costs unconnected with the county court claim and the claimant has had insufficient time to respond, I declare that the counterclaim has not been properly made and will not be considered by me. This will leave the defendant to pursue those matters if he wishes at some future date.

The Maintenance Covenants

8. The claimant relies on covenants in a transfer of part of title numbers WSX95065 and WSX50667 dated 8th March 1993 commencing at page 8 of the claimant's statement of case. This is not a Land Registry office copy of such document. The transfer is said to be between Rayford Properties Ltd. (1) and Christopher Fenton (2) and relates to the property described as 'Old Farm Court, New Salts farm Road, Shoreham by Sea, West Sussex'. At the hearing it was said that this document relates to 4 Old Farm Road. Of particular relevance is that there is no signature block for the transferee i.e. the person purportedly entering into the covenant to pay.

9. The transfer grants a right of way over certain land on foot only and then grants the right to drive and park vehicles on other land subject to a covenant purportedly binding the transferee "*and also as a separate covenant with every other person who is now or will be the owner of any part of the estate*" to comply with the restrictions and stipulations set out in the 3rd Schedule.

10. One of those is "*to share with the owners of Plots 1 to 14 and Latham Lodge on the Transferors estate in equal portions the expense of keeping and maintaining the roads pathways amenity areas and parking spaces shown hatched green and hatched black on the plan annexed hereto in good repair*". There is then a further obligation to share similar expenses

in equal proportions over land cross hatched green and black "*…with the owners of Units 1 to 14 and Latham Lodge and the owners for the time being of the flats in Brooklands House…*".

The Law

11. Unlike for tenants of residential property, there are no provisions such as those set out in sections 18-27A of the Landlord and Tenant Act 1985 to protect owners of freehold properties. Their rights and obligations are set out in the relevant covenant plus any common law rules of interpretation if they should be needed. At the hearing Ms. Silsby on behalf of the Claimant, did ask what should be provided in this case to people from whom service charges were being claimed. I referred to the above Act and suggested that the procedures there for allowing people to see invoices may be good practice to follow.

12. I hasten to add that whilst there are some tenants in Brooklands House who are involved in this dispute, the dispute itself is between freehold owners relating to service charges over freehold land.

13. The defendant, in his defence, relies upon the leading case of **Rhone v Stephens** [1994] 2 AER 65 which confirms the common law general rule that the only covenants which usually pass with a freehold title are negative covenants i.e. prevent a subsequent owner doing something. Positive covenants e.g. requiring a subsequent owner to pay money, do not usually pass with land.

14. In his further submissions, the defendant relies further on **Davies v Jones** [2009] EWCA Civ 1164 as it applies to the doctrine of benefit and burden and **Goodman v Elwood** [2013] EWCA Civ 1103 which, so it is argued, only allows contributions to be made to land required for access to the paying party's land.

15. I will deal with these arguments in due course.

The Hearing

16. In view of the corona virus pandemic, this hearing has been by video and has been attended by Ms. Silsby for the first section and [redacted]. During the hearing Ms. Silsby's connection broke down and the hearing was resumed with her on the telephone by way of a conference call.

17. I pointed out to the parties at the outset that the main problem I had with all the papers submitted by the parties was that I had no office copies of Land Registry entries showing what covenants applied to all the various sections of land. Ms. Silsby then tried to show me copies of 2 old documents but it was clearly impossible for me to see them properly and, as I say, they were old copy documents and not up to date office copies.

18. I asked if she had taken legal advice about what should be provided for the hearing and she said that she had not. She asked whether she could provide the documents I was asking for in due course and I said that I would consider this request but she should know that proportionality was

relevant because the cost of an adjournment to the tax payer, let alone the defendant, would probably be more than the claim.

19. I then read out the chronology set out below and it was agreed by the parties.

20. The hearing then proceeded with the parties repeating various allegations as set out in the papers. Most of these were irrelevant to the issues but I felt that some time, at least, should be given for them to say what they wanted to say. Eventually I had to bring the hearing to a close which I did after asking both sides whether they wanted to make any final comments, which they did not.

Discussion

21. Trying to reach a fair and equitable decision when such relatively small amounts are involved but where the relationship between the defendant and the claimant's current single director are so bad, has been difficult. The bills cover 2 properties and are charges over a 6 year period i.e. just over £50.00 per property each year. It seems clear from the documents filed that over the years the defendant has clearly considered that if the maintenance work claimed for had been undertaken properly at reasonable cost, then he would have contributed. He has made offers on a number of occasions which appear to have been rejected.

22. Such a bad relationship has meant that I have had to go through hundreds of pages of documents most of which deal with past disputes between the parties and which are therefore irrelevant to the determination of this claim. There are allegations of dishonesty, falsification of documents and illegal acts. None of these allegations has had any effect on the decisions made.

23. I have seen a number of plans of this estate as well as an overhead photograph. There appears to be a northern 'half' which includes 8 leasehold flats known as Brooklands, a car park, some common land and the freehold properties known as 9, 10, 11, 12, 13 and 14 Old Farm Court.

24. The southern 'half' includes a car park, some common land, 1, 2, 3, 4, 5, 6, 7 and 8 Old Farm Court, Latham Cottage and a car park.

25. Doing the best I can, a relevant chronology is as follows:

Date		Event	Page no.
	1982	Brooklands flats built	7 of bundle
	1989	freeholds Old Farm Court built	7 & 130 of bundle
8th March	1993	4 Old Farm Court sold by Rayford	8 of claimant's case
	1996	claimant co. formed by Brooklands tenants and buys some common land	7 of bundle
April	1999	defendant buys Latham Lodge	60 of bundle
August	1999	claimant demands service charge	61 of bundle
Dec.	1999	defendant offers payment	118 in bundle
	2001	defendant offers payment	61 of bundle
	2002	defendant buys 4 Old Farm Court	

	with his partner	13 of bundle
2012	OFC Residents Ltd. buys entrance to southern car park	
17th Aug. 2013	defendant purports to reject right of way	4 of bundle

26. As explained to the parties at the hearing, there are a number of serious problems with the documents provided to me by the claimant in attempting to prove its claim. In no particular order they are:

(a) I have no office copy title documents relating to 4 Old Farm Court, Latham Lodge or the relevant common parts owned by the claimant. I therefore cannot tell what actual covenants are registered against those titles and therefore whether there are actually any covenants obliging the defendant to pay any maintenance charges.
(b) If the wording of the covenants is as illustrated by the claimant, then there is clear confusion between the parties about what proportion of the service charges are to be paid by individuals who may have entered into the covenants. This could well make such covenants void for uncertainty although I have not explored that matter in detail.
(c) The copy title documents which have been provided all refer to plans with coloured and/or hatched areas which are not attached to those documents. I therefore have no idea what such coloured and/or hatched areas are. There are several plans in the bundles but not next to the relevant documents and with no description of the documents they are attached to.
(d) The claimant knows that the defendant does not agree the proportions of total charges claimed and what area on the estate that the total charges cover. I fully appreciate that the amounts are very small indeed but an accountant's certificate does not give me the disputed information.
(e) The defendant has provided what appear to be copies of the property register, the proprietorship register, charges register and filed plan of title number WSX348294. The owner is said to be OFC Residents Ltd which has 4 Old Farm Court as its address i.e. one of the defendant's properties. The property appears to be the common parts of the southern part of the estate including the car park entrance but not the remainder of the southern car park. There are various general covenants which are not the same as the document relied upon by the claimant.

27. The defendant says that he owns the entrance to the southern car park and he also refers to his company. He refers to OFC Land Ltd. on page 54 and the title to the common parts and the entrance to the southern car park are in the name of OFC Residents Ltd. said at the hearing that the name of the company had changed. In any event, it is not, of course, the defendant who owns the entrance to the car park, but a separate legal entity.

28. The defendant says that he has rejected any right of way to his 2 properties in an e-mail which the claimant says that it did not receive with those words. I do not see how a declaration in an e-mail overrides a covenant in

title deeds because the covenant is to pay an equal share of the cost of maintenance. Someone must therefore pay the defendant's share. Otherwise the other people paying would have to pay more than their share.

29. As far as [redacted] is concerned, [redacted] does not appear to have rejected any right of way even on the defendant's case. Further, there is a photograph in the bundle of Latham Lodge said to have been taken in August 2020 with a car outside the property. As access to this property with a motor vehicle is partially over land owned by the claimant, it seems clear that someone from Latham Lodge is exercising a right of way.

30. As to the various cases referred to by the defendant, I cannot really see their relevance without the title deeds. **Rhone v Stephens** is a well know leading case dealing with the issue of how positive and negative covenants can be passed on to subsequent owners of freehold land. The general rule, as suggested, is that negative covenants can be passed on and positive ones cannot. However, Lord Templeman, in giving the lead speech in the House of Lords, referred to the case of **Halsall v Brizell** [1957] Ch. 169 and went on to say:

> "*In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. Halsall v Brizell was just such a case and I have no difficulty in whole-heartedly agreeing with that decision. It does not follow that any condition can be rendered enforceable by attaching to it a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In Halsall v Brizell there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers.*".

31. If the covenants which apply to the defendants properties are as set out in the 1993 deed, then it seems to me that they are very similar to those in the **Halsall** case i.e. rights of way on foot and by motor vehicles subject to maintenance obligations.

32. As to **Davies v Jones** and **Goodman v Elwood**, I cannot see that any analysis of them will take me any further with this case, particularly as they are not House of Lords/Supreme Court cases and will therefore not override the approval of **Halsall** by the House of Lords in **Rhone**.

Conclusions

33. As I see it, my main problem is whether I simply adjourn this case to enable the relevant documents to be produced or whether I say that proportionality dictates that I should simply dismiss the claim because the claimant has not proved its case?

34. My decision is that this has always been set down as the final hearing of a Small Claims track case involving a claim of just over £600. It appears to me that neither side has taken proper legal advice about the law or the way to conduct this sort of complex litigation concerning difficult legal obligations over land. If they had then they would know that it is up to the party making a claim to prove its case on the balance of probabilities.

35. Where the claim is to enforce the terms of a legal covenant, such proof is bound to include certified copies, i.e. Land Registry office copies in this case, of the title deeds of the land in question, including the covenant, together with any plans so that I can make a decision about whether the covenant actually applies and whether it binds the defendant. If the counterclaim had gone ahead, then I would have needed clear submissions and evidence as to whether there had been a breach of contract or a tortious act giving rise to a liability. A person who seeks legal advice (to include work undertaken by the lawyer) cannot normally recover the cost thereof without such a liability.

36. In this case, most of the cost of an adjournment would have to be met by the taxpayer and the claim is less that such cost. In my view, proportionality dictates that I proceed and make my determination which is that the claim does not succeed as liability has not been proved. I also refuse to make any order for the payment of costs as neither party has persuaded me that the entirely exceptional circumstances which would give rise to such an order in a small claims track case apply.

The Future

37. I am sure that neither party will be happy with this decision and the following is designed to try to assist them. Obviously it does not form part of the decision I have made in any way.

38. Where a large plot of land is split into different sections and/or where smaller plots are joined together to make one plot for development purposes, the legal work relating to rights of way and maintenance provisions is complex and needs to be thought through.

39. Whilst I have not seen all the deeds covering the land in question, my impression is that such thought has not been applied in this case. The result is that there is confusion and a likelihood of owners of the various sections of land having difficulty in selling. No buyer usually wants to buy something which is subject to an ongoing dispute. I have also seen photographs of parts of the site which seem to show a lack of maintenance.

40. If this were a housing estate planned and developed by a professional developer, the likelihood is that the whole project would be managed in such a way that there would be clear and registered covenants binding each new freehold owner of a plot which could include, for example, a covenant saying that any subsequent sale of a plot could not be registered without the buyer entering into a deed ensuring that each and every covenant was enforceable against such buyer.

41. The parties will have to consider their positions and take legal advice but if the covenants I have seen do not cover the whole estate, then the only way out is for every owner of freehold land on the site to meet and agree to enter into an enforceable deed of covenant along the lines of the **Halsall** case mentioned above. This would have to be registered against each title and provisions made to ensure enforcement rights against future buyers.

42. It would set out what rights of way were agreed, what maintenance was to undertaken, by whom and what proportion must be paid by each freeholder. A solicitor experienced in handling developments for professional house builders would be helpful and, perhaps, should attend the meeting, subject to the freeholders agreeing beforehand to split the fees incurred.

3rd September 2020

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Judge Edgington