

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE – proposed use of field as a farm strip for private aircraft in close proximity to Sandown Airport – planning permission for construction of agricultural barn – whether to be used to hangar applicant’s aircraft – possibility of future unspecified use of application land – relevance of GPDO – Law of Property Act 1925 section 84(1)(a), (aa), (b) and (c) – application refused

IN THE MATTER OF AN APPLICATION UNDER SECTION 84(1), LAW OF
PROPERTY ACT 1925

BETWEEN

JOHN CHRISTOPHER MILLER

Applicant

and

DANIAL SUBHANI

Objector

Re: Land adjoining Sandown Airport,
Sandown,
PO36 6PS

Before: A J Trott FRICS

on

15 January 2020

Havant Justice Centre, The Court House, Havant, Portsmouth, PO9 2AL

Both the applicant and the objector appeared in person

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No cases are referred to in this decision.

Introduction

1. The applicant, Mr John Miller, purchased the freehold interest in 32 acres of land adjoining Sandown Airport, Isle of Wight in October 2017. It is burdened by restrictive covenants which prevent Mr Miller from implementing a planning permission granted on 2 January 2018 for the construction of an agricultural barn at the southern end of the site.
2. The restrictive covenants were imposed in the First Schedule to a conveyance of 77.56 acres of land dated 31 March 1977 between John and Phyllis Somers (vendors), Embassy Aviation Limited (purchaser) and Thomas and John Bevis (sub-purchasers). The restrictions state:

“1. Nothing shall be done or omitted to be done on the land hereby conveyed that shall be a nuisance annoyance or cause an interference with the use of the said adjoining land of the Purchaser as an airport whether private or licenced by the Civil Aviation Authority.

2. ...¹

3. Not to permit or suffer any growth or placing of any structure (other than a fence not exceeding four feet six inches in height) of a height as to ... the land shown cross-hatched black on the plan annexed hereto exceeding four feet six inches².

4. No buildings or other erections whether permanent or temporary shall be erected or placed on the land hereby conveyed without the prior written approval of the Purchaser or its successors in title first obtained.

5. To use the land hereby conveyed for agricultural purposes only and not to use or permit to be used any part thereof for the display of advertisements.”

On the same day as these restrictions were imposed Embassy Aviation Limited purchased a further 85 acres from Mr and Mrs Somers, being the site of Sandown Airport. It can be inferred that the imposition of the restrictive covenants by the purchaser on the sub-sale to Messrs Bevis was therefore to protect the safe operation of the airport.

3. The land purchased by Messrs Bevis was sold to CJW Holdings Limited in May 2007. In 2014 CJW Holdings sold two parcels of this land:
 - (i) The southern part of the site was sold to Cheverton Copse Holiday Park; and
 - (ii) A strip of land at the north east of the site was sold to Mr Ian MacKinnon.

Both parcels were subject to the burden of the restrictive covenants imposed in 1977. The remainder of the CJW Holdings land was sold to the applicant on 5 October 2017.

¹ The second covenant is not a restrictive covenant but is a positive covenant to erect and maintain fencing.

² The land shown cross-hatched black forms part of the applicant’s land but does not include that part of it upon which it is proposed to develop an agricultural barn.

4. In 1979 Embassy Aviation Limited changed its name to Sandown Aviation Limited. On 17 April 1980 Sandown Aviation Limited sold part of its site to Embassy Air Services Limited who therefore also has the benefit of the restrictive covenants.
5. On 25 March 2016 a lease of Sandown Airport was granted to Mr Danial Subhani for a term of 20 years. It is agreed that Mr Subhani has the benefit of the restrictive covenants.

The application and objections

6. Mr Miller made an application under section 84(1) of the Law of Property Act 1925 on 29 October 2018. The application was for the discharge of restrictions 4 and 5 under grounds (a), (aa), (b) and (c). There was no application to discharge or modify restrictions 1 or 3.
7. There were three objectors to the application:
 - (i) Mr John Woodhouse, the freehold owner of the roadway known as Embassy Way and the leasehold owner of part of the roadway known as Scotchells Brook Lane and the site of the Aviator Restaurant at the southern end of the airport;
 - (ii) Embassy Air Services Limited, the freehold owner of part of the land conveyed on 17 April 1980; and
 - (iii) Mr Danial Subhani, the leasehold owner of Sandown Airport.
8. Objectors (i) and (ii) withdrew their objections on 6 November 2019.
9. In his objection Mr Subhani said he thought Mr Miller intended to use part of his land as an airstrip for a light aircraft. Mr Miller had already cut out a grass runway, seeded it and compacted it. Mr Subhani said that Mr Miller had told him that he intended to hangar his aircraft in the agricultural barn which he had planning permission to construct. Mr Subhani considered the discharge of restrictive covenants 4 and 5 would enable Mr Miller to use the proposed barn as a hangar which in turn would pose a serious risk to the operation of Sandown Airport given that Mr Miller proposed to use his own land as an airstrip.
10. Both Mr Miller and Mr Subhani gave evidence under oath at the hearing.

Facts

11. The parties did not agree a statement of facts and so I reach my factual conclusions based on the evidence.
12. The application land is shown as the whole of the 32 acres purchased by Mr Miller and which is all subject to the restrictive covenants. This land comprises an arable field and

woodlands but Mr Miller has created a strip of grass along the extent of the south-eastern boundary (some 540m long) which I estimate to be at least 30m wide.

13. It appears that the purpose of the strip of grass is to serve as a private airstrip (“farm strip”) for Mr Miller to use. He owns a light aircraft and said in evidence that he had landed there four times in July 2019. The evidence contains aerial photographs showing Mr Miller’s aircraft parked at the southern end of the farm strip. Mr Miller is not a farmer and lets the field (or at least the arable part of it) to a neighbouring farmer.
14. The grass farm strip on the applicant’s land is parallel to the grass runway at Sandown Airport (884m long) which is aligned on a 05-23 axis. This means, depending upon wind direction, aircraft will take off and land on a heading of either 050° (approximately north east) or 230° (approximately south west). The grass farm strip on the applicant’s land and the runway at Sandown Airport are approximately 250m apart. A group of ten buildings lies between Sandown Airport runway and the application land. These are hangars, aviation-related uses and B1 buildings but there is also a residential property called Timber Lodge. Vehicular access to these properties is from Embassy Way which joins Scotchells Brook Lane close to the entrance of Cheverton Copse Holiday Park and eventually to Newport Road to the south of the airfield.
15. Sandown Airport has a designated circuit pattern. Aircraft taking off and remaining in the circuit climb out on a heading of either 230° or 050°. They will then turn 90° either left (runway 05) or right (runway 23) onto the crosswind leg. Aircraft climb to the circuit height of 1,000ft and turn another 90° onto the downwind leg. The circuit is completed by another 90° turn onto the base leg and then a 90° turn onto the final runway approach. This circuit pattern means that aircraft avoid low flying over the built-up areas of Sandown and Shanklin to the east of the airfield. It also means that an aircraft taking off from Mr Miller’s farm strip will do so *inside* Sandown Airport’s circuit pattern.
16. Departing aircraft which are not remaining in the circuit do so by flying straight ahead (whether from runway 05 or 23) for one nautical mile before turning onto their desired heading. Incoming aircraft joining the circuit overhead do so by flying over the airfield in a south easterly direction at a height of 2,000ft and then descending on the dead side (i.e. outside the circuit) over Sandown Bay before joining the crosswind leg of the circuit at 1,000ft.
17. Aircraft movements are observed from a two-storey control tower at the south of the runway close to the threshold of runway 05. Sandown Airport has an air to ground communication service (“A/G”). It gives information to pilots about the runways in use, atmospheric pressure (to allow the correct setting of the altimeter) and traffic in the vicinity. An A/G service does not give mandatory directions or instructions; take-off and landing remain at the discretion of the pilot and without any formal clearances from the A/G service.
18. The applicant’s private farm strip is not visible from Sandown Airport’s tower since it is masked by the buildings in Embassy Way and the topography of the site.

19. Sandown Airport operates two flying schools for the training of private pilots. It also hosts occasional parachuting activities during the summer (about eight days per year).

The case for the applicant

20. Mr Miller said that all the protection Sandown Airport needed to maintain operational safety was secured by restriction 1 and he was not proposing to modify or discharge that covenant.
21. The proposed development is of a building of 270m² with a ridge height of 5.5m and an eaves height of 4m. It would therefore be similar in size, height and design to the other buildings already located along Embassy Way to the north west of Sandown Runway. It would be further away from the airfield than those other buildings and, in Mr Miller's opinion, would present no physical obstruction or risk to the safe operation of aircraft.
22. Ground (a) allows the discharge of a restriction where, by reason of changes in the character of the property or the neighbourhood or other material circumstances, the restriction is deemed by the Tribunal to be obsolete. Mr Miller said that the construction of the buildings in Embassy Way since 1977 had changed the character of the area such that restriction 4 was now obsolete under ground (a).
23. If a series of conditions are satisfied, ground (aa) allows the discharge of a restriction the continued existence of which would impede some reasonable use of the land. One of the relevant conditions is that the restriction does not secure to the beneficiary any practical benefits of substantial value or advantage. Mr Miller suggested that by impeding the proposed use of the application land for the construction of an agricultural barn which Mr Miller said in his statement of case "would allow plant and machinery to be housed on site", restrictions 4 and 5 did not secure to Mr Subhani practical benefits of substantial value or advantage under ground (aa). Furthermore, Mr Miller said that he may want to use the application land for other purposes in the future similar to those already undertaken at Sandown Airport without any apparent adverse effect on flying operations, e.g. a weekly car boot sale, live music, family fun days, classic car weekends, auctions and even, in 2017, a circus and music festival (denied by Mr Subhani). Although Mr Miller recognised that the application land would not lend itself to such large-scale events, he felt that some small-scale change of use, subject to planning permission, might well be possible. He did not yet know what he might do with the land in future but he queried why it should be necessary to make a further application under section 84 when the matter could be decided now.
24. Ground (b) applies where those with the benefit of the restriction have agreed to its being discharged, either expressly or by implication. Although Mr Miller's case under ground (b) was directed primarily at objectors (i) and (ii) (see paragraph 7 above) rather than Mr Subhani, he said that Mr Subhani had not objected to the development of Cheverton Copse Holiday Park or to a wooden building that was constructed on the field owned by Mr MacKinnon, both of which were on land burdened by the covenants. Mr Miller submitted that this meant Mr Subhani had implicitly agreed, by not objecting to these developments, to covenants 4 and 5 being discharged or modified.

25. Ground (c) applies where the proposed discharge will not injure those entitled to the benefit of the restriction. Mr Miller said that the size and location of the proposed barn and “a limited diversification of activities (subject to planning permission)” would not conflict with the use of Sandown Airport and would not injure Mr Subhani. Ground (c) was therefore satisfied as well.
26. Mr Denness, the farmer who rented the application land from Mr Miller, did not need the proposed barn as he farmed neighbouring land as well and had other facilities. Mr Miller said he did not intend to farm the application land himself. He had always intended to create a farm strip on the land but acknowledged he would not be able to obtain planning permission for such a use. His proposed use of the land as a farm strip therefore depended upon the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), Schedule 2, Part 4, Class B (temporary use of land) which includes as permitted development:

“The use of any land for any purpose for not more than 28 days in total in any calendar year ... and the provision on the land of any moveable structure for the purpose of the permitted use.”

Mr Miller said that he did not intend to use the barn as an aircraft hangar but proposed to “store an aircraft for one or two days a year”.

27. Mr Miller said there would be no conflict between his use of the farm strip and Sandown Airport. He said he had received rigorous training, had been qualified as a pilot for five years and followed relevant procedures, using the A/G service on each of the four times he had flown into the farm strip last year. He pointed out that Sandown was an unlicensed airfield without a control zone and that it was not mandatory to use the A/G radio. The A/G service was not always manned in any event and on three occasions when he used it there was no response. Mr Miller suspected that certain A/G operators were deliberately ignoring his calls. He knew the appropriate procedure to take in the event of parachute jumping taking place and would hold off outside the circuit until the call “all chutes down” was received. He always flew the designated circuit for Sandown Airport.

The case for the objector

28. Mr Subhani said that Sandown Airport was one of the busiest private (non-commercial) airfields in the UK with over 10,000 annual aircraft movements. There were active flying schools at the airfield as well as occasional parachute activity.
29. It was not possible to see Mr Miller’s farm strip from either the control tower or runway 05 and Mr Subhani thought there was a serious risk of a mid-air collision if Mr Miller was to use his farm strip in future. All proposed development on the land near the airport that was burdened by the restrictions was considered on its merits. Some hangars had been built around the airfield but these housed aircraft that used the runway at the airport and did not cause any visual obstruction. Mr Subhani said he did not object to development that would not adversely affect airfield operations. But the removal of restrictions 4 and 5 would

effectively remove any protection of the airfield from the conflicting use of Mr Miller's farm strip.

30. Mr Subhani submitted several letters and emails expressing concern at Mr Miller's use of his farm strip. These came from pilots, flying instructors, the sky diving school and occupiers of property in Embassy Way. The main points they raised were:
- (i) Mr Miller's allegedly cavalier attitude towards safety issues arising from his use of the farm strip, particularly given its location within Sandown Airport's circuit pattern;
 - (ii) The dangerous proximity of Mr Miller's farm strip to Sandown Airport and its absence from published flight charts;
 - (iii) Mr Miller's alleged failure to use A/G radio and his alleged use of the opposite runway to that being used by Sandown Airport, thereby going "against the flow of traffic" or "the wrong way up a one way street";
 - (iv) The confusion caused to pilots intending to land at Sandown Airport when they see Mr Miller's nearby farm strip in use;
 - (v) The invisibility of the farm strip to other pilots using the Sandown runway and the lack of clear A/G communication with Mr Miller; and
 - (vi) The risk to parachutists of a "random aircraft" entering their landing zone without warning and creating "a very real risk of collision".

Mr Subhani endorsed all of these comments.

31. Mr Subhani explained that the presence of a farm strip close to Sandown Airport would have a material adverse impact on its operational risk assessment. It would threaten the ability of the airfield to host parachuting events which were a major source of income. Student pilots would also be exposed to an unacceptable additional risk and Mr Subhani said that to allow flying training to continue under these circumstances would make him as culpable as Mr Miller if anything went wrong.
32. Mr Subhani was asked by the Tribunal whether there was any operational solution that would allow Mr Miller to operate safely from his farm strip. He replied that he might accept a legal undertaking under which Mr Miller would only fly on a prior permission required basis ("PPR"). If he had not spoken to the Sandown A/G or if the A/G radio was not manned then he would not fly. Further Mr Miller would have to agree not to hangar his aircraft in the proposed agricultural barn. Mr Subhani explained that given Mr Miller's past behaviour he was not confident that any such undertaking would work in practice.
33. Both Mr Miller and Mr Subhani spent time at the hearing giving their versions of incidents in which (i) Mr Miller is said to have deliberately started a bonfire on his land so that the

smoke went across the Sandown Airport runway thereby halting flying activity; and (ii) Mr Subhani is said to have deliberately blocked access to the Timber Lodge hangar (where Mr Miller then parked his aircraft) thereby preventing the owner of Timber Lodge and Mr Miller from moving their aircraft. It is fair to record that relations between Mr Miller and Mr Subhani appeared strained and that there was a mutual lack of trust between them.

Discussion

34. The covenants in the First Schedule to the 1977 conveyance were made “for the benefit and protection of the said adjoining property of the Purchaser” (clause 2(3)), i.e. Sandown Airport. I take this to mean that the covenants were imposed to protect the safe operation of the airfield by controlling what the burdened land could be used for and developed by. The relevant question under ground (a) is whether covenants 4 and 5 are still capable of fulfilling this original purpose.
35. The fact that parts of the benefited and burdened land have been developed by hangars and other buildings does not mean that restrictions 4 and 5 are now obsolete. They continue to fulfil an important function (and the reason for their being imposed) by ensuring that any development or use of the burdened land does not compromise the operational safety of the neighbouring airfield. The application under ground (a) therefore fails.
36. The application made under ground (aa) seeks to satisfy the Tribunal that by impeding a reasonable user, i.e. the proposed development of an agricultural barn which has planning permission, restrictions 4 and 5 do not secure to Mr Subhani practical benefits of substantial value or advantage and that money will be adequate compensation for any loss or disadvantage suffered by their discharge.
37. Restriction 5 does not impede the use which Mr Miller purports to want to make of the application land, i.e. the construction of an agricultural barn. On the other hand, it does impede the use of that barn to hangar his aircraft, even occasionally. The 28 day rule for the permitted use of land for other purposes under the GPDO does not apply to buildings, see Schedule 2, Part 4, Class B, B1(b):

“Development is not permitted by Class B if the land in question is a building or is within the curtilage of a building”.

Furthermore, the GPDO is not relevant to the interpretation of a restrictive covenant. The fact that the GPDO permits the temporary use of the application land as a farm strip under town planning legislation does not mean that such temporary use is included in the meaning of “agricultural purposes” in restriction 5. It is not. The ordinary meaning of use “for agricultural purposes only” does not include the use of land as an occasional farm strip.

38. The only reason that it would be necessary to include restriction 5 in the application is if Mr Miller intends to use his land as a farm strip or his barn as a hangar. It would also be necessary if Mr Miller wanted to use the application land for one of the unspecified uses that he discussed in general terms at the hearing. I am not satisfied that any such vaguely

described use which may or may not be pursued in the future, and for which no plans or planning permission presently exist, constitutes some reasonable user of the land. Ground (aa) permits the discharge of a restriction to facilitate a specific use, and the relevant conditions must be assessed by the Tribunal in relation to that specific use.

39. The agricultural barn for which planning permission has been obtained is subject to condition 3:

“The barn hereby approved shall only be used for purposes associated with the agricultural activities on site and for no other purposes.”

Use of the barn as a hangar, even occasionally, would be a breach of that condition unless, as was mentioned in evidence, Mr Miller’s aircraft was used for an agricultural purpose such as crop spraying. There is no suggestion that this is the case.

40. The rudimentary plan and elevations of the proposed barn that were submitted as part of the planning application showed that the building would be suitable as an aircraft hangar; e.g. the front elevation shows fully folding doors of a similar design to those used in other hangars on the airfield.
41. I am satisfied from the evidence that Mr Miller intends to use the proposed agricultural barn to hangar his aircraft, even if only occasionally. He certainly intends to use part of the application land as a farm strip. It is that specific use which must satisfy the conditions in ground (aa).
42. In my judgment the use of a private farm strip only 250m away from the runway at Sandown Airport would be potentially dangerous. The farm strip is not visible from the airport’s control tower or from the threshold of runway 05 and there is uncertainty about the availability and/or use of A/G services when Mr Miller wishes to fly in or out. Given the history between the parties and the mutual distrust that appears to exist between them I am not satisfied that a form of PPR arrangement would be observed or reliable. Furthermore, and most importantly, the farm strip lies in the designated circuit pattern of Sandown Airport. There is therefore a real risk of conflict between aircraft in the Sandown circuit and aircraft using Mr Miller’s farm strip. This is not a trivial or remote possibility given that:
- (i) Sandown Airport is heavily used;
 - (ii) The presence of flying schools means there are likely to be inexperienced pilots or pilots under training flying in the circuit who are less able to respond quickly or safely to an emergency;
 - (iii) The use of the airport by parachutists would be jeopardised; and
 - (iv) The proximity of the farm strip would be confusing and potentially hazardous to pilots unfamiliar with Sandown Airport.

43. By impeding Mr Miller's proposed use of the application land I therefore consider that restriction 5 secures to Mr Subhani practical benefits of substantial value or advantage. The restriction helps protect a safe flying environment in the vicinity of the airport. Mr Miller submitted that Mr Subhani's concerns about operational safety were fully protected by restriction 1 which he did not propose to modify or discharge. I disagree. While restriction 1 provides general protection against nuisance, annoyance or interference with the use of the airport, restriction 5 is a specific limitation on the use of the application land to agricultural purposes only. That offers certainty and avoids any possibility of dispute about whether restriction 1 has been breached. In my judgment the four restrictive covenants act together to ensure the safety of the adjoining airport is not compromised.
44. Restriction 4 requires the prior written approval of Mr Subhani to the erection of the proposed barn. It is worded in absolute terms but even if such approval is taken to be subject to an implied proviso that approval is not to be unreasonably withheld, I consider it secures to Mr Subhani practical benefits of substantial value or advantage. It enables him to prevent the construction of the proposed barn in circumstances where, although the physical size and location of the building itself may not prejudice airport operations, there is a reasonable expectation that Mr Miller would use the barn to hangar his aircraft, at least occasionally, with the adverse consequences Mr Subhani reasonably anticipates.
45. Although Mr Miller pleaded ground (b) I do not accept that at any time Mr Subhani has agreed, either expressly or by implication, by act or omission, to restrictions 4 and 5 being discharged or modified in relation to the application land.
46. Given that ground (aa) has not been established, ground (c), which requires it to be shown that the proposed discharge will not injure Mr Subhani, must fail.

Determination

47. I am not satisfied that any of the four grounds of the application have been established and I therefore refuse the application to discharge restrictions 4 and 5.
48. This decision is final on all matters other than the costs of the application. The parties may now make submissions on costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunals Practice Directions dated 29 November 2010.

Dated: 30 March 2020

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)