

Your ref:

Our ref: NJT/DER8/1

27 January 2020

Mr Simon Scaddan & Mr David Moro,
(For Derby Road Fund Committee)
by email to

Gentlemen,

Derby Road Fund - Derby (and Grosvenor) Road, Caversham

I refer to our interesting meeting on Friday 24th. You asked me to summarise the (very provisional) advice I gave. It became apparent during the course of our meeting that the fund of which you are currently officers has a long history. The evidence I have so far seen is limited to a sight of a few Land Registry office copies and a copy of a deed in (I believe) the 1960's between the then Derby Road Caversham Association and a Housing Association whereby it, the Housing Association, undertook to make contributions to the then fund. "Your" fund is, or may be, the continuation of the original fund. It has certainly behaved for many years as if it were. My advice therefore was that a good deal of research into the long history of Derby (and Grosvenor) Road and its maintenance needs to be done before I, or anyone, could give any useful, definitive opinion – if then.

My advice however, so far as it goes, is this. Properties having Derby Road as their means of vehicular access all appear to have a common root of title in the Berkshire Estates Company Ltd which laid out the estate (and presumably constructed Derby Road) in the 1880's and sold off the various plots of land fronting it as building plots. Many, if not most, of those plots have subsequently been subdivided. The office copy entries (relating to such sub-plots) that I have been shown contain (some of them), in their charges registers, reference to such a conveyance as their root of title and to a covenant in it on the part of the original buyer to maintain the portion of Derby Road abutting his plot up to the centre line until such time as the road should become maintainable at the public expense (or words to similar effect, though they appear to differ from case to case). One of the sets of office copies, in its property register, contains reference to the conveyance in

question containing a grant of a right of way over Derby Road. Other sets (though containing the covenant) contain no reference to such a grant.

The short, first question on which you asked for my opinion was: Is the covenant enforceable? To which the short answer is: No – and certainly not by the Fund. Positive covenants of that kind are not directly enforceable against successors of the original covenantor. You mentioned the “no benefit without burden” rule – which might well have application in an action by the original covenantee (Berkshire Estates Company Limited) but cannot assist a stranger (no matter how interested a stranger) such as your fund.

Our discussion then broadened out onto the subject of what *might* be done. Precisely what is the status of Derby Road? Is it a highway or not? In my opinion (notwithstanding some contra-indications) it is. You told me that Reading Borough Council considered it a “private road” (i.e. a road that is not a highway – as distinct from a “private street” - a term of art used in the Highways Act to describe a road that a highway authority has power to make up at the expense of the frontagers).

Putting it at its very lowest, the existence of such a covenant (and one suspects that a covenant to like effect will be found on research to have been included in all the original conveyances by Berkshire Estates) is the clearest possible evidence that the grantor, the then owner of the subsoil of Derby Road, contemplated that, if not dedicated as a highway already, Derby Road would, at some point in the future *become* a highway – and consequently capable of becoming maintainable at the public expense. (It could not otherwise become so maintainable.)

Such a covenant is wholly inconsistent with an intention on the part of Berkshire Estates to exclude the public at large from the use of the road, and confine it to being a wholly privately owned means of access. What may well have been the intention was that, during the period while the estate was being sold off, Berkshire Estates would control access (by the grant of purely private rights of way to each plot as sold) but that, when all were sold, it would *then* formally dedicate the road as a highway. That company, however, seems to have gone into liquidation before completion of the sales of all of the plots (one conveyance at least, in 1890, is by the company in liquidation) and it may be that the contemplated *formal* dedication at the conclusion of the venture never took place.

The existence of the covenant is also consistent with the inference that the intention was to include the subsoil of the road up to the mid-point within the land conveyed in the case of each plot.

Even if there never was a formal dedication as highway, and even if it is not possible to infer informal dedication, it is difficult to imagine how, over the passage of time, the road has not become a highway by prescription (use by the public at large over a long period). To prevent the public at large from turning a road into a highway, it is necessary *for the owner of it* (and not strangers) to do enough to make it clear that *he* is not dedicating it. The fact of the liquidation of Berkshire Estates, (assuming them to have remained the

owners – rather than conveying slices of the road to plots abutting it) and the ineluctable geography of the road which, factually, is a through road, make it almost impossible (I would have said) to rebut the possibility of the road having become a highway.

However, without detailed research into the history for evidence to support this contention (i.e. that it *is* a highway), (which research *may* show otherwise – though I have to say, I rather doubt it) this opinion is only that: an opinion based on (so far) very limited evidence (suggestive though that evidence is).

What now ?

Derby Road, whatever its legal status, has all the physical characteristics and ambience of a private enclave and it seems that a substantial body of inhabitants would like to keep it that way. Moreover, whatever its legal status, it will not maintain itself and will only be maintained, if at all, by the energy and financial contributions of its residents. Hence the fund (as successor, in fact if not in law, to the Derby Road Caversham Association) whose charitable objects are to create and maintain a sinking fund to be applied from time to time for that purpose, by exacting yearly contributions from residents. Hitherto the fund has boldly demanded such contributions, as if of right – and, whether voluntarily or under the mistaken belief that they are legally liable, many have so paid, and their contributions have been so applied. Some however, have not – contending (probably rightly) that the fund has no legal right to exact such contributions.

Even if Derby Road is not now a highway, the local authority has the power, effectively, to turn it into one, under Part XI of the Highways Act 1980. If a private street is not maintained to the standard that the local highway authority considers adequate, it has the power to make it up at the expense of the frontagers – whether they like it or not. (There is a procedure for objections, and determination of disputes by the magistrates' court and so forth but, in reality, if a road falls into a sufficiently bad state of repair, the power is unstoppable.)

If Derby Road *is* a highway, there is a ponderous and protracted and expensive procedure under section 56 of the Highways Act 1980 whereby a complainant can, eventually, bring an offending landowner (i.e. one who owns the subsoil of a highway, and is therefore liable to maintain it) before the Crown Court – but only once he has allowed his patch of highway to fall into disrepair. It cannot be used to obtain payment in advance into a sinking fund.

If the Fund wishes to pursue its charitable purposes of raising and deploying a sinking fund, it can only be by way of voluntary contributions. The only conceivable coercive power it would have (if at all) would be under section 56 – and then only if (a) it could prove that a frontager was in fact the owner of the subsoil, and (b) the patch of road in question had been allowed to fall into serious disrepair.

It could deploy persuasive power by making it clear that, if the residents of Derby Road do not do so voluntarily, there will come a time when the Reading Corporation will force them to: by making it up to *its* satisfaction at *their* expense, which is likely to be a great deal more unpleasant than paying relatively small annual contributions to a sinking fund to maintain it in a style and way that suits *their* requirements.

Recommendations

1. I recommended that, before going into “battle” with any recalcitrant contributors, it would be wise to get copies of as many as possible of the “root” conveyances – and, in particular of the original plan of the estate (to identify the original plots).
2. I have bespoken from the Registry (but not yet received) a copy of the conveyance of 6 June 1890. It is clear that they differed in wording – though probably not in substance.
3. I would recommend, as well, researching the history of the Derby Road Caversham Association. It may well be that the former County Archive contains useful material. The Reading Borough Council will have a position and a search can be made against the roads to establish what (if anything) the Council holds on them.
4. I suspect that countless conveyancers have trodden this ground before me – and probably concluded that the answer was a lemon (i.e. that there is no-one in a position to deny a right of access; and no-one in a practical position to enforce the covenant to contribute.)
5. Having said that, there is a high degree of likelihood (and it is often the way) that huge labours in these directions will still reveal very little in the way of proof of anything very much.
6. I understand that a practice has been adopted for some time of closing a set of gates at the end of Derby Road; and (more recently, to try and prevent it from being used as a “rat-run”) of blocking a “pinchpoint” for a period. Neither of these expedients would be lawful. If it is a highway, to obstruct it in that way is an offence; if it isn’t, it would still be an obstruction of the private right of way granted by the original conveyances.

Conclusion

My instructions so far are limited to providing this initial advice – and do not extend to any of the suggested research. I shall be happy to act further, if so desired.