A legal history of Leicester Square

Steven Gasztowicz QC marks the 170th birthday of *Tulk v Moxhay*

IN BRIEF

- *Tulk v Moxhay* (1848) and the birth of restrictive covenants.
- An examination, 170 years later, of some of the human and historical aspects of the case – and the way they have affected the law – and Leicester Square in London.

Can a case have a birthday? Well, no, not really, of course. However, 22 December 2018 marked the 170th anniversary of the decision of the Lord Chancellor in *Tulk v Moxhay* (1848) SC 2 PH 774, [1843-60] All ER Rep 9.

This is the celebrated case which is seen as representing the birth of restrictive covenants in English land law, so the reference to birthdays is not entirely inappropriate.

Restrictive covenants are, of course, contractual promises not to use land in a particular way, which are enforceable not just against present, but also against future, owners and occupiers of the land. You do not have to be a land lawyer to appreciate the human and historical side of the case, however.

On the anniversary of the decision, I thought it might be interesting, 170 years later, to examine some of these human and historical aspects, and the way they have affected the law—and Leicester Square in London, to which the case related.

The judge & his approach

The case was decided by Lord Cottenham. He was a whig politician and was appointed Lord Chancellor by Lord John Russell when he became Prime Minister in 1846. He remained Lord Chancellor until 1850.

His judgment in *Tulk v Moxhay* ran to just over two pages. Some modern judges might learn from that. Why is it always necessary for judgments, even on seminal points, to be so long? Has the law, and the ways of moving it on, really become so much more difficult? It has to be said that Lord Cottenham was not known for sophisticated judgments, however, so much as for firm action.

The nature of the case

In 1808 Mr Tulk had sold 'all that piece or parcel of land, commonly called Leicester Square garden or pleasure ground, with the equestrian statue… standing in the centre thereof, and the iron railings and ironwork around the garden, and all easements and ways etc'. The buyer, Mr Elms, covenanted with him in return that he 'his heirs and assigns shall and will, from time to time, and at all times for ever here after …keep and maintain the said piece or parcel of ground and square garden … in its present form….as a square garden and pleasure ground, in an open state, uncovered with any buildings, in a neat and ornamental order…'

Moxhay, a builder, subsequently became the owner of the land and, as the report of the case puts it, 'formed a plan, or scheme for erecting certain lines of shops and buildings thereon'. Tulk objected but Moxhay proceeded to cut down several of the trees and shrubs, pulled down the iron railings around the garden and erected a hoarding. An action followed and an injunction was granted restraining him from converting or using the garden for any purpose other than as a 'square garden or pleasure-ground'. An appeal was made against the injunction to the Lord Chancellor.

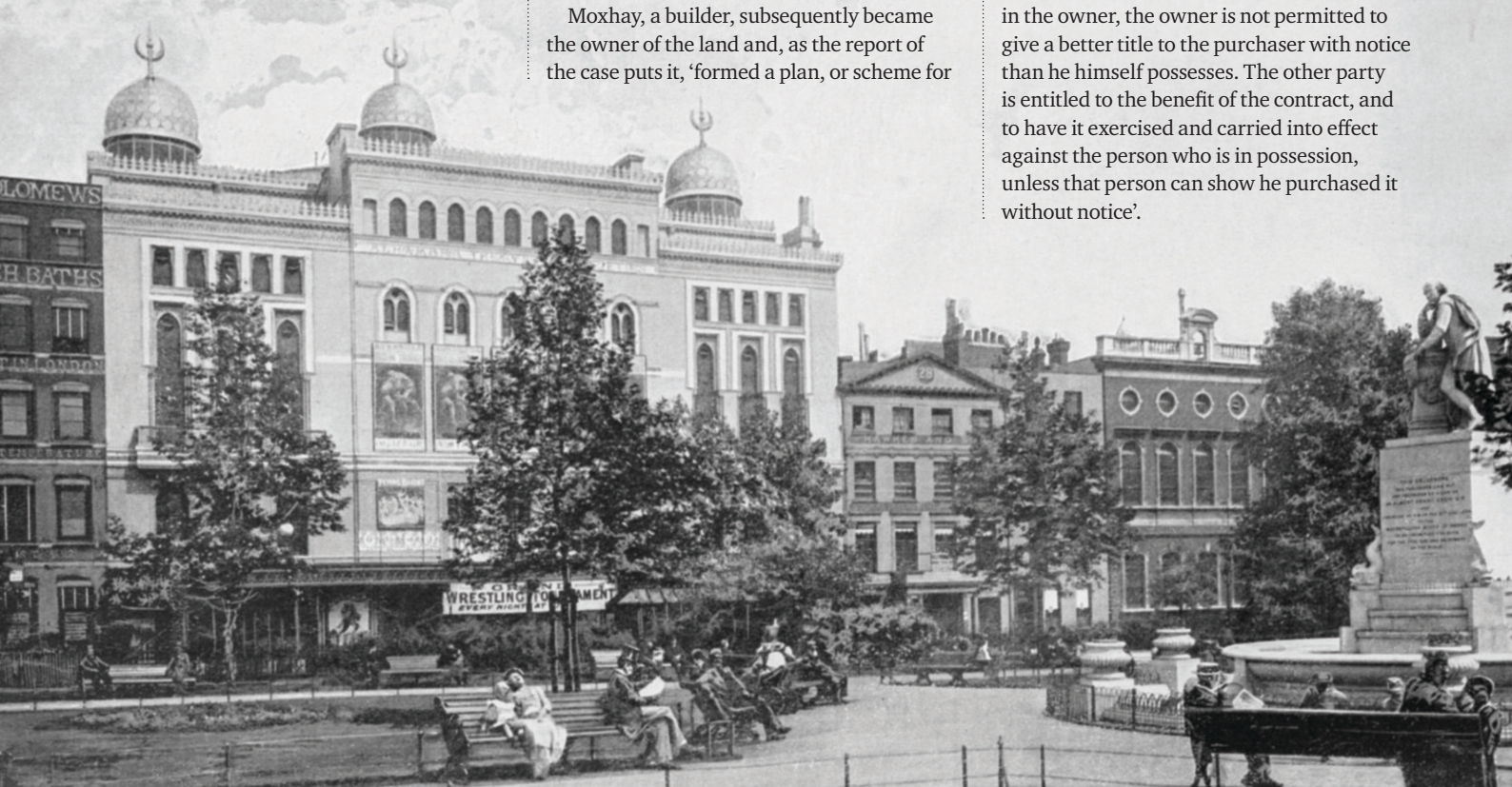
The basis of the decision

The injunction was upheld on the simple ground that it would be inequitable not to enforce the covenant when the original purchaser of the land would inevitably have paid less for the land by reason of the restriction and if he was able to sell it to a third party who was free from the restriction, he would be able to get a greater value for it. Lord Cottenham said: 'That would be most inequitable, most unjust and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding.'

As the Lord Chancellor's put it, 'you will not be permitted to hand over that property, and give to your assignee or your vendee a higher title, with regard to interest as between yourself and your vendor, than you yourself possess'.

It was, however, based on equity—'the party who takes the land takes it subject to the equity which the owner of the property has created'.

This equity was said to be attached to the land, binding on persons subsequently taking so long as they were aware of it—'if there [is] an equity attaching to the property in the owner, the owner is not permitted to give a better title to the purchaser with notice than he himself possesses. The other party is entitled to the benefit of the contract, and to have it exercised and carried into effect against the person who is in possession, unless that person can show he purchased it without notice'.



It was admitted by Moxhay that the land was acquired by him with notice of the covenant, and, said Lord Cottenham, 'it seems to me to be the simplest case that a Court of Equity ever acted upon, that a purchaser cannot have a better title than the party under whom he claims'.

Out of this simple point subsequently developed, however, a very large body of law, with added requirements that must be met if a subsequent owner of land is to be bound by a covenant entered into by a predecessor in title, such as the need for the covenant to be restrictive of user and for the covenantee's land to be benefited. These were developed on the basis that they fitted-in with the facts of *Tulk v Moxhay*, though they did not actually form any part of the judgment or the reasoning of Lord Cottenham.

So what of Leicester Square itself in 1848?

Leicester Square was very different then to the present day. The garden in the middle was surrounded largely by houses. There was also a German hotel, in which Karl Marx was living in 1848, and where he was often visited by fellow revolutionaries. It is an interesting thought that the English courts were protecting the landscape views of, among others, German revolutionaries.

This bizarre fact is added to when it is realised that great Chartist riots took place in Trafalgar Square in early 1848—something the railings around Leicester Square would have prevented there.

And what of the people involved in the case?

Charles Augustus Tulk died within a month of the decision in the case, on 16 January 1849.

Edward Moxhay, who had hoped to make a lot of money by the development of the garden, was heavily in debt after losing the case. He died just three months after it, on 19 March 1849.

Lord Cottenham had 15 children. After the case he suffered from ill health and ceased to be Lord Chancellor in June 1850. He went abroad on doctors' advice and died in Lucca on 29 April 1851, his 70th birthday.

The history of the Square after Tulk v Moxhay

In 1851 James Wyld (a distinguished geographer and for some years MP for Bodmin) acquired the garden and sought to erect a great globe there—over 60 feet in diameter.

Tulk's heirs (who still owned some property around the square) threatened to take proceedings to prevent the erection of the globe, but reached an agreement with Wyld to allow him to erect it and keep it there for a period of 10 years. This was on an undertaking by him to then remove it, restore the garden to its former condition, and sell it back to members of the Tulk family, whose forbear had sold it with the original covenant.

The globe was duly built and the equestrian statue (which was in fact of George I on horseback) was buried beneath it. The inside of the globe was hollow and the public could enter it and view the surface of the earth on its internal surface.

Its erection coincided with the Great Exhibition at Crystal Palace and the globe attracted more visitors than any other London attraction aside from the Great Exhibition itself.

In 1862, the agreement for the placing of the globe expired. Wyld initially failed to remove it, which led to another legal dispute, before it was finally removed later that year and the equestrian statue and the railings restored. The garden was sold in parts to various members of the Tulk family with one part retained by Wyld.

Ironically, the garden then fell into disrepair in the hands of the members of the Tulk family itself, who had by their forbear's original covenant sought to have it maintained properly by whoever owned it.

Further changes in the law & legal action by the Tulk family

The garden became such a disgrace to the capital that in 1861 Lord Redesdale told the House of Commons he would introduce a bill to ensure the state of it was improved. In 1863 the Act 26 Vict. c. 13 was passed for 'the protection of certain gardens or ornamental grounds in Cities and Boroughs'. This enabled the Metropolitan Board of Works in London (and corporations elsewhere) to take over and improve certain neglected enclosed gardens or ornamental grounds.

Again the Tulk family had changed the law—this time by statutory intervention and this time on the basis of their own neglect.

Even more ironically, however, while following the passage of the Act the Metropolitan Board of Works took charge of the garden, John Augustus Tulk, the owner of one of the parts of it, then sued the Board for trespass in the Court of Queen's Bench on the grounds that the square was technically not within the definition of the type of garden to which the Act applied (though it had in fact been introduced because of it). Like his forbear, he succeeded in his action (pity the draftsman).

The subsequent history of the Square—the Tulks finally lose a case

The garden continued as a result to be unmaintained, and the statue had by 1873 been virtually destroyed by acts of vandalism.

Subsequently, John Augustus Tulk went to live in Algiers, for the sake of his health, and allowed an advertising agent to erect a hoarding in the garden. He was now subject to legal action by residents and in 1873 the Master of the Rolls ruled that the current members of the Tulk family were not permitted to use it other than as a garden and required the hoarding to be removed. The Tulks had finally lost—on their forbear's own original point.

Philanthropy in the Square revives—the garden protected for the public

In 1874 Lord Grant (a wealthy industrialist, and MP for Kidderminster) bought the garden (for a total, for the various portions, of £11,060—the equivalent now of about £1.2m) and presented it to the Metropolitan Board of Works for the nation. It was laid out at Grant's expense in lavish fashion.

It seems that whoever was associated with the square was somewhat blighted, however, and within four years he had lost his fortune and was insolvent.

Leicester Square now, & the ongoing legacy of the case

The garden is now the responsibility of Westminster City Council, whose fortunes fluctuate like those of all local authorities, and although it no longer contains Lord Grant's elaborate Italianate fountain, the land remains an important open space of value to the public.

170 years on, though mainly surrounded now by entertainment places and restaurants, the land which is the subject of the covenant remains as an open space. Had it not been for that covenant—entered into before any planning laws were conceived—the square would, by reason of the erection of buildings in the garden in the middle, as long ago as 1848 have been entirely built up, and the entire feel of this iconic part of London would have been much more dense and very different. So *Tulk v Moxhay* was historically important not only to the law, but to the feel of this part of London even today. Now, of course, these things would be controlled by planning laws, but not in 1848, when there were none.

What might the knock-on effects otherwise have been—what would the outside shots of the many film premieres at the Odeon Leicester Square now have looked like, for example? In reality there may have been none, as such up-market facilities may in the 1930s well have been established elsewhere instead.

Anyone who thinks land law is not interesting in terms of what it covers, or is devoid of the human factor, need look no further. NLJ

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