Neutral Citation Number: [2023] EWHC 220 (Ch)

Case No: CH-2022-000169

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/02/2023

Before :

MR JUSTICE MILES

- -

Between :

(1) SHARON SHAC-YIN CHEUNG
(2) INIFNITY HOMES & DEVELOPMENTS LIMITED

Defendants/ Appellants

- and -

NEIL JOHN MACKENZIE

Claimant/ Respondent

- -
- -

Carl Fain (instructed by **Davitt Jones Bould**) for the **Appellants**
Mark Warwick KC (instructed by **Wellers Law Group LLP**) for the **Respondent**

Hearing date: 2 February 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 8 February 203 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Miles:

Introduction

1. This case concerns restrictive covenants affecting land in Croydon, previously part of an estate.

2. By order of 22 August 2022 Deputy Master Bowles declared (to paraphrase) that 444 Selsdon Road, South Croydon CR2 ODF (**No. 444**) is subject to a restrictive covenant whereby no building may be erected thereon except for one detached dwelling house and the property shall not be used at any time otherwise than as a private residence. He also declared that the claimant was entitled to enforce the covenant.

3. The defendants appeal from that order.

The facts

4. These may be taken from the Deputy Master's clear and comprehensive judgment of 6 July 2022.

5. The claimant is the freehold owner of residential premises at 432 Selsdon Road, South Croydon (**No. 432**). This is a detached dwelling house, formerly being part of land owned by a charity called the Whitgift Educational Foundation (**the Foundation**) and known as the Fox Farm Estate (**the Estate**).

6. The first defendant is the freehold owner of No. 444, also a single detached dwelling house. It was also formerly part of the Estate, and owned by the Foundation.

7. No. 444 was conveyed from the Estate by a conveyance dated 3 October 1947 (**the October 1947 conveyance**). No. 432 was sold from the Estate by a conveyance dated 7 November 1947. So at the date when No. 444 was transferred from the Estate, No. 432 was still part of it.

8. The October 1947 conveyance was made between the Governors for the time being of the Foundation as named in the First Schedule (the Governors) and Mr Henry Vernon Read as Purchaser. Clause 2 provided:

> "The Purchaser for himself his sequels in title and assigns to the intent that the covenant hereafter contained shall run with the land and bind the same into whosoever hands the same shall come but not so as to render the Purchaser his sequels in title and assigns personally liable in damages after he or they shall have parted with all interest in the property herby conveyed hereby covenants with the Governors their successors and assigns for the benefit of the adjoining or adjacent land now the property of the Foundation and being that part of the Governors Fox Farm Estate remaining undisposed of at the date hereof and every part thereof that the Purchaser his sequels in title and assigns will at all times hereafter observe and perform the stipulations which are contained in the Second Schedule hereto."

9. It is common ground that the reference to the Second Schedule was a slip and that the intention of the parties was to refer to the Third Schedule.

10. The stipulations contained in the Third Schedule included several references to the Governors. At paragraph 8 there was a stipulation that no building or structure would be erected on the land until the relevant plans been submitted to and approved by the surveyor for the time being of the Governors.

11. Paragraph 7 was a stipulation that:

> "No building shall be erected on the said land except one detached dwelling house and the stables or garage offices and outbuildings thereto, which said property shall not be used oat any time otherwise than as a private residence'.

12. Paragraph 11 provided that:

> "The Governors reserve the right to deal with any of the plots situated upon this estate or any of their adjoining or neighbouring land without reference to and independently of these stipulations and also reserve the right to allow a departure from them in any one or more cases".

13. In this judgment references to paragraphs are to the paragraphs of the Third Schedule to the October 1947 conveyance.

14. It is common ground that (a) the Whitgift Charities Act 1969 created, in place of the existing structure of the Foundation, a corporate body called the Whitgift Foundation; and (b) all powers previously held, or retained, by the Governors under any existing deeds (including any rights or powers arising under the Third Schedule) vested in the Whitgift Foundation and since that date have been exercisable by the Whitgift Foundation.

15. It is also common ground that the restrictive covenants in the Third Schedule are (subject to the defendants' contentions based on paragraph 11) enforceable as restrictive covenants by the claimant, as the owner of No. 432, against the first defendant, as owner of No. 444 and against any purchasers of No. 444. It is agreed that the effect of clause 2 of the October 1947 conveyance, read with section 78 of the Law of Property Act 1925, was to annex the benefit of the covenants to every part of the Estate which was undisposed of at the date of the October 1947 conveyance.

16. As already mentioned, No. 432 was conveyed out of the Estate in November 1947, after the creation of the covenants over No. 444 and therefore the owner of No. 432 has the benefit of the covenants.

17. It is also common ground that the conveyances made by the Governors of these two plots and others did not give rise to an enforceable building scheme. The parties were at one in saying that (whatever else it achieved) the first part of paragraph 11 made plain that the Governors were not intending to create mutually binding obligations: they were to be at liberty to convey the retained land to other buyers without requiring like restrictions.

18. The second defendant has an option to purchase No. 444 from the first defendant.

19. The catalyst for the case was an application by the second defendant for and grant by Croydon Borough Council, on 24 March 2020, of planning permission for the

demolition of the existing house at No. 444 and the construction and erection in its place of a block of nine residential apartments.

20. Mr Mackenzie sought in this action a declaration that No. 444 is subject to a restrictive covenant in the terms of paragraph 7 and that that covenant is enforceable by him as against the defendants.

21. The defendants' response to the claim was that, pursuant to paragraph 11, the Whitgift Foundation has the right to modify or vary the restrictive covenants affecting No. 444. A draft deed of modification has been agreed in principle between the first defendant and the Whitgift Foundation, which if executed would permit the first defendant (or the second defendants as purchaser from her) to develop the land free from the restrictions in paragraph 7. The defendants, by way of counterclaim, seek a declaration to that effect.

22. By the draft deed of modification agreed between the first defendant and the Whitgift Foundation, in consideration of a payment (the amount of which has been redacted in the copy before the court), the Whitgift Foundation has agreed "in so far as it is able to release" the first defendant and her "successors in title … from the obligations under the covenants and stipulations contained in the [October 1947 conveyance] to the extent necessary" to implement the planning permission granted to the second defendant.

23. The defendants sought summary judgment in their favour on the counterclaim and the hearing came before the Deputy Master.

The Deputy Master's judgment

24. The Deputy Master summarised the principles of contractual interpretation at [47] by reference to *Arnold v Britton* [2011] UKSC 50 and *Wood v Capita* [2017] UKSC 24.

25. The Deputy Master said that the question of interpretation in the present case was suitable for summary determination. Neither party contended before him that there was any issue about the factual context so as to warrant a trial.

26. The Deputy Master found in favour of the claimant's interpretation. He decided that clause 11 did not allow the Whitgift Foundation to vary or modify the obligations of the owner of No. 444.

27. His reasoning (appearing between [54] and [67] of the judgment) may be summarised as follows:

    i) The context of paragraph 11 was that the Governors were not intending to create a building scheme, or a system of mutually enforceable covenants over or in respect of the Estate. That intent was manifest from clause 2 of the October Conveyance which explicitly annexes the covenants to the Governors' retained land and makes no attempt to introduce a system of mutually enforceable covenants across the Estate.

    ii) Paragraph 11 is consistent with that approach. The opening part of the paragraph signals that the Governors have not bound themselves in their dealings with

other parts of the Estate to impose equivalent, or any, restrictions, in respect of any of their future dealings with the Estate.

iii) The latter part of the paragraph, on the claimant's construction, is completely consistent with the Governors' plain intentions, in that it serves to make clear that the Governors' freedom of action in respect of unsold parts of its Estate included their right, if they so chose, to impose limited, or different, restrictions to those contained in the Third Schedule.

iv) The opening part of the paragraph sets out the general position. The latter part, so construed, makes specific the Governors' right to depart in its dealings with other parts of its land from restrictions previously imposed.

v) It may well be that, as a matter of strict logic, this construction of the latter part of the paragraph already falls within the ambit of the opening, or general, part of the paragraph. That, however, is no more than a typical example of a legal draftsman's desire for clarity and completeness.

vi) The natural meaning of the words used corresponds with the Governors' intent, as set out above. The opening words of the paragraph are plainly directed to the Governors' future dealings with the Estate. The latter words take their tenor from the earlier words and are also, therefore, directed to the Governors' future dealings with the Estate.

vii) It is very unlikely that a paragraph which deals, in its first part, with future dealings in unsold land should, in its second part, be intended to give a right of departure, or release, from restrictions already imposed in respect of lands already sold out of the Estate.

viii) It is striking that, if the latter part of paragraph 11 was intended to give a right of release from the burden of restrictions already imposed, it did not say so in terms. The word "departure" is not obviously apt to describe a right of release. It is a much more appropriate term to use in describing the Governors' entitlement to depart in new transactions from restrictions it had imposed in previous transactions.

ix) He did not overlook the case of *Mayner v Payne* [1914] 2 Ch 445 where a right to allow a "departure" was interpreted as including a power to release a covenant. But the words of different contracts have to be read in their context and should not be read across from case to case.

x) This is not a case where commercial common sense requires the meaning urged by the defendants. There is nothing unreasonable or unlikely in the claimant's reading of the clause. The reservation of a power to release to be exercised by the "settlor, or grantor" without recourse to those affected by the release is or would be very unusual and the court should not be constrained to reach that view by appeals to commercial common sense.

Grounds of appeal and submissions

28. There is one ground of appeal: that the Deputy Master's interpretation of paragraph 11 was wrong.

29. There is no challenge concerning the principles (taken from *Arnold v Britton* and *Capita v Wood*). The court has to decide how the words would be understood by the reasonable reader armed with the background knowledge reasonably available to the parties. I shall not waste space on yet another summary of those principles, but shall apply them.

30. The defendants' principal submissions were in outline as follows:

    i) The natural reading of paragraph 11 is that it reserves two separate and distinct rights to the Governors (now the Whitgift Foundation). These are (a) the right to deal with any of the plots situated on the Estate or any of the Governors' adjoining or neighbouring land without reference to and independently of the stipulations in the Third Schedule; and (b) the right to allow a departure from the stipulations in the Third Schedule in one or more cases.

    ii) The first is a right in relation to future dealings or disposals with the retained land.

    iii) The second is a right in relation to the land being conveyed – i.e. No. 444. It allows the Governors to release any of the stipulations.

    iv) This is not torrential or even repetitive drafting. The words used by the parties give rise to two distinct rights.

    v) The words are apt to allow a release from the current restrictions. They are not concerned only with the content of new stipulations in subsequent conveyances of the conveyed land (as found by the Master in [59] of the judgment).

    vi) The rights of a later purchaser of a plot out of the Estate from the Governors to enforce the stipulations are always subject to the rights of the Governors (in paragraph 11) to allow a departure from the stipulations. The original purchaser of such a plot (including No. 432) and any subsequent purchaser would have been able to see this in the public documents.

    vii) The case is akin to *Mayner v Payne* where the wording was similar to that used in the present case. The draftsmen in the present case may have been aware of *Mayner*. The court will construe agreements in the light of the existing state of the law, and this includes caselaw, particularly where knowledge of the earlier decision may be imputed to the parties.

    viii) The defendants' interpretation accorded with commercial common sense as it meant that, on the one hand, the owner of No. 444 would have to approach and reach agreement with only one body (the Governors) when seeking a waiver or release, rather than locating and negotiating with many landowners; and on the other hand, it retained control of the development of the Estate in the hands of the Governors. The Master was wrong to conclude that the defendants' interpretation had surprising or unexpected consequences.

31. The claimant argued that the Deputy Master was right for the reasons he gave. Since the Deputy Master largely adopted the arguments of the claimant in the court below I shall not repeat all of the claimant's submissions here (they are largely captured in the summary given in paragraph [27] above). However the claimant emphasised the following further points:

    i) Paragraph 11 is concerned with future dealings with the retained land and the ability of the Governors to deal with it without having to require similar covenants. This is clear from the second part of the paragraph; the second part has to be seen in that context.

    ii) Since the clause is looking to future dealings, it would be surprising to read the second part as allowing the obligations contained in conveyances already made (including those contained in the conveyance of No. 444) to be overridden or waived by the Governors.

    iii) The second part of clause 11 may have added nothing materially to the first part; but if it did it was dealing with the case where the Governors sold a plot with some (rather than no) covenants, but where these differed from those in the Third Schedule.

    iv) A purchaser of another plot, such as No. 432, would be able to read Schedule 3 with his lawyers and would assume that he had an unconditional right to prevent the owner of No. 444 from building anything other than a detached house.

    v) The phrase "departure from" is more apt to describe the imposition of different covenants (i.e. different in content from those in the Third Schedule) than to describe a waiver. If the rights of owners of other plots such as No. 432 were to be removed clearer words would be required.

    vi) The Deputy Master was right to give *Mayner* little or no weight. Cases about other contracts should not be relied on when construing contracts. In any case *Mayner* was a case about a building scheme where it makes more sense for a landowner to retain the right to release or vary covenants.

Analysis and conclusions

32. I start by returning to some uncontroversial points.

33. The first is that the purchasers of parts of the Estate from the Governors (and later owners of such parts) made after the October 1947 Conveyance are entitled to the benefit of the stipulations in the Third Schedule.

34. Second, where the Third Schedule refers to the Governors it is referring to them and not to subsequent owners of plots. For instance the qualified covenant in paragraph 8 requires the advance consent of the surveyor of the Governors to building plans. This is a reference to the surveyor for the Governors, not to the purchasers of plots from them.

35. Third, likewise the reference to "the Governors" in paragraph 11 is to the Governors themselves rather than to subsequent purchasers of the retained land from them (since the 1969 Act it has meant the Whitgift Foundation).

36. The context of the October 1947 conveyance was that the Foundation, a substantial charity, owned the Estate and the parties would have anticipated that it would be selling off plots over time.

37. I turn to the words used in the conveyance and the Third Schedule and ask how they would be understood by a reasonable reader.

38. There was some common ground on this. The parties were agreed that the first part of paragraph 11 was intended to allow the Governors to deal with their retained land (and indeed other land) without any need to require purchasers to enter into stipulations such as those contained in the Third Schedule. The parties agreed that this was to avoid anyone suggesting that a building scheme had been created.

39. The second part of the paragraph (starting "and also reserve") has some significant features: (a) the second use of the verb "reserve"; (b) the use of the words "and also"; and (c) the difference of subject-matter of the two parts of the clause. As to (c), the first part of the clause is concerned with dealings with the retained estate land (or adjoining or neighbouring land) independently of the stipulations in the Third Schedule; the subject matter of the second part is allowing a departure from the stipulations in the Third Schedule. This is brought out linguistically by the use of two separate verbs – the first in concerned with dealing with the retained land; the second with allowing departures.

40. In my judgment these features are strong pointers that the parties intended the second part of paragraph 11 to reserve a right separate and distinct from that reserved in the first part. I do not think that the second part repeats or elucidates or expands on the first part. As a matter of language and grammar the two parts have different functions and purposes. The second part cannot be read as a clarification or iteration of the first.

41. Given this conclusion, it appears to me that the court should seek if possible to give effect to each of the two separate and distinct parts of paragraph 11. The claimant drew my attention to well-known cases which say that arguments based on redundancy in commercial contracts carry little force since drafters often needlessly overload their drafting with words having the same or similar shades of meaning. But here the conclusion that the two parts of the clause have different functions and purposes is not a mere appeal to redundancy; it is a positive explanation for the two distinct parts of the paragraph.

42. There is therefore little warrant for reading down the second part of paragraph 11 as if its scope was governed or controlled by the first part. The first part is concerned with the Governors' subsequent dealings with retained and other land. The second part reserves to the Governors a right to do something else: i.e. to allow departures from the stipulations entered into by the purchaser of No. 444 (i.e. the dealing effected by the conveyance itself).

43. It also follows that there is nothing in the second part of paragraph 11 to suggest that the parties intended it to be concerned with (still less, limited to) covenants contained in later conveyances of retained land from the Estate.

44. I find it hard to see how that would work as a matter of language. On a natural reading of the words used, the second part of paragraph 11 can only be concerned with "these stipulations" i.e. those entered by the purchaser of No. 444 and not by those given by subsequent purchasers of other plots.

45. For these reasons, I respectfully disagree with the conclusion of the Deputy Master that the scope of the second part of paragraph 11 is the same as that of the first part. I do not think that it is natural to read down the second part as referring to stipulations contained in later conveyances (of other plots). On the contrary, it seems to me clear that the material words are referring to the right of the Governors to allow departures by the owner of No. 444 from "these stipulations" i.e. those in the Third Schedule to the October 1947 conveyance of No. 444.

46. It also appears to me that, on their natural and ordinary meaning, the words "the right to allow a departure" from those stipulations are broad enough to encompass a waiver of or release from those obligations. For instance, erecting a semi-detached dwelling on No. 444 would be a departure from paragraph 7 and, on a natural reading, clause 11 gives the Governors the right to allow that to happen.

47. It also seems to me that this is a significantly more natural reading of the words than that suggested by the claimant, i.e., that it covers only the case where the Governors have chosen to impose restrictive covenants on subsequent purchasers out of the Estate, but where these covenants differed from those in the Third Schedule. It is to my mind rather strained to describe that as the Governors "allowing a departure" from the stipulations in the Third Schedule. One would not naturally regard that as "allowing a departure" from the stipulations; rather it would amount to agreeing or imposing different stipulations altogether.

48. Another pointer in favour of the defendants' interpretation is that there are other parts of the Third Schedule which give the Governors a continuing function even where some of the retained land has been sold and purchasers of such land have the benefit of the covenants. Paragraph 8 has already been mentioned. If the owner of No. 444 wishes to build on the land he or she has first to obtain the consent of the surveyor of the Governor. It was common ground that the owner of No. 444 would not be able to act on the consent of those other landowners. This shows that the parties to the October 1947 conveyance did not see anything surprising in the Governors continuing to have this supervisory role. It is in fact easy to see why they would have agreed this: it put the process of seeking and obtaining consent in the hands of one body rather than in those of the (potentially) multiple purchasers of other plots.

49. The claimant argued that the defendants' reading would be commercially surprising or unusual. The claimant said that once other landowners had acquired rights to enforce the covenants (by buying plots out of the Estate) one would not expect the Governors to be able to override their rights by waiving or releasing the stipulations in the Third Schedule. That would be taking away from the owners the rights they had apparently acquired. While that might theoretically be possible in a properly worded contract, much clearer words would be required than appear in paragraph 11.

50. There are a number of reasons why I am unable to accept these arguments. The first is that the argument proceeded as if the Third Schedule stopped at the end of paragraph 10. It does not. A purchaser of a retained plot from the Governors can only obtain the benefit of the restrictions contained in the Third Schedule and these also contain paragraph 11, which on its face operates as a qualification. In short the claimant's argument assumes what it seeks to establish.

51. Second, it does not strike me as surprising that the Governors should have retained the right to allow departures. The Estate owned by the Governors was a large one. There was every reason for the Governors to wish to maintain control over the Estate and its development. One means of control was to impose and enforce restrictive covenants; but another was to allow departures from them. Moreover, an owner of a large estate may well consider that it will be able to earn money by charging for appropriate waivers. Counsel for the claimant said that there was no evidence that the Governors had anything of the kind in mind in 1947 but the question does not turn on their subjective intentions but the extent to which the rival contentions conform with commercial sense.

52. Third, I consider there is some force in the defendants' submission that from the perspective of the parties in 1947 there was good sense in vesting the right to allow departures from the covenants in the Governors. It was contemplated that the Governors would make subsequent sales of retained land to purchasers. These might well be numerous. The second half of paragraph 11 means that, if the owner of No. 444 wished to seek an agreed departure from the stipulations in the Third Schedule, he or she would be able to deal with one body (the Governors) rather than having to track down and reach agreement with a multiplicity of parties, each of whom would have had a potential right of veto. By reserving the power to the Governors, the route to a permitted departure is simplified and unified in one body.

53. The scheme for seeking a release or waiver is similar to seeking consent under paragraph 8: in each case the owner of No. 444 has to seek to the approval of the Governors (or their surveyor).

54. So I am not persuaded that there is anything commercially surprising about the defendants' interpretation of the Third Schedule. Indeed, it appears to me that the factor considered in the previous two paragraphs above tell in favour of the defendants' reading.

55. I do not think there is any force in the claimant's submission that a lawyer for a purchaser reading the Third Schedule would have concluded that a purchaser of a plot such as No. 432 would have had the benefit of an unqualified covenant against the erection of anything other than a detached house. First, it is illegitimate to ask what people might subjectively have thought about the drafting, particularly after the event. But, second, for the reasons already given, the lawyer would also have read paragraph 11. The lawyer's advice would have depended on the proper interpretation of that paragraph, which is the point of controversy.

56. Overall I have reached the conclusion that the defendants are right about the way the words of the contract would have been understood by a reasonable reader having the background knowledge available to the parties. In reaching this conclusion I have not relied on the decision in *Mayner*. I agree with the claimant's submission that it is

illegitimate to read a decision about the meaning of a contract in one case as even persuasive authority about the meaning of a different contract. It might have been different had *Mayner* been used in a textbook containing conveyancing precedents. But it appears to have a shy and retiring history, being footnoted for a different point by Preston & Newsom, and referred to in the first time in over a century by counsel in this case.

57. For these reasons the appeal is allowed. The defendants invited me to make an appropriate declaration and the claimant did not argue otherwise if I concluded in the defendants' favour. I shall make that order.