Neutral Citation Number: [2024] EWCA Civ 13

Case No: CA-2023-000420

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
Mr Justice Miles
[2023] EWHC 220 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

NEIL JOHN MACKENZIE	**Claimant/ Appellant**
- and -	
(1) SHARON SHAC-YIN CHEUNG **(2) INFINITY HOMES & DEVELOPMENT LIMITED**	**Defendants/ Respondents**

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- -

Mark Warwick KC and Henry Moore (instructed by **Wellers Law Group LLP**) for the **Appellant**
Carl Fain and Richard Miller (instructed by **Davitt Jones Bould**) for the **Respondents**

Hearing date: 13 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The question on this appeal is whether a charity called the Whitgift Foundation ("the Foundation") can properly authorise the present owner of land which once belonged to it (when it was the "Whitgift Educational Foundation") to develop it in a way which would otherwise involve breach of a covenant which was given to the Foundation when it sold it.

Basic facts

2. The appellant, Mr Neil Mackenzie, and the first respondent, Ms Sharon Cheung, both own properties in Selsdon Road, Croydon. Mr Mackenzie is the registered proprietor of 432 Selsdon Road ("Number 432") and Ms Cheung is the registered proprietor of 444 Selsdon Road ("Number 444"). The second respondent, Infinity Homes & Developments Limited ("Infinity"), which is a developer, has an option to purchase Number 444 and has obtained planning permission to demolish the house there and to replace it with a block of nine flats.

3. Numbers 432 and 444 were formerly in the ownership of the Whitgift Educational Foundation. Number 432 and Number 444 each formed part of land known as the Fox Farm Estate ("the Estate").

4. Number 444 was the first of the two to be sold out of the Estate. By a conveyance dated 3 October 1947 ("the 1947 Conveyance"), the Governors of the Whitgift Educational Foundation ("the Governors") conveyed Number 444 to a Mr Henry Read. The present appeal turns on the construction of that conveyance.

5. Clause 2 of the 1947 Conveyance was in these terms:

> "THE Purchaser for himself his sequels in title and assigns to the intent that the covenant hereinafter 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 hereby 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."

6. It is common ground that the reference to the "Second Schedule" was a slip and that clause 2 should instead be read as referring to the "Third Schedule" to the 1947 Conveyance. That schedule provided so far as relevant as follows:

> "4. … no part of the said land is to be used as a road or way or means of access to any adjoining property without the written consent of the Governors being first obtained.

> …
>
> 7. 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 at any time otherwise than as a private residence.
>
> 8. No building or structure of any kind shall be erected on the land until the plans and elevations and site plan shall have been submitted in duplicate to and approved by the Surveyor for the time being of the Governors and the costs of the approval of such plans and elevations amounting to two guineas in respect of each house and submission shall be paid by the purchaser and the Governors shall retain one copy of such plans. The purchaser shall build strictly in accordance with the approved plans and shall not make any alterations or additions to the property or add any further buildings without submitting plans and elevations of such alterations or additions and obtaining the approval of the Governors.
>
> …
>
> 10. The property has been stumped out. The Purchaser shall undertake the care and maintenance of the boundary stumps. Should the Purchaser at any time wish to have them restored he can do so by applying to the Surveyor for the time being of the Governors and paying his expenses in the matter.
>
> 11. 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."

7. Number 432 was conveyed by the Governors to a predecessor in title of Mr Mackenzie on 7 November 1947. The conveyance included provisions to the same effect as those quoted in the previous two paragraphs of this judgment.

8. Single detached dwelling houses have been built on both Number 444 and Number 432. On 24 March 2020, however, Croydon Borough Council granted planning permission for the erection at Number 444 of nine flats in place of the house there. The planning officer's report noted that objectors had referred to the existence of restrictive covenants affecting Number 444, but commented that this was "a private matter for the developer and is not a material planning consideration". The officer also expressed the view that "the proposal would overall result in a development that would respect the pattern and rhythm of neighbouring area and would not harm the appearance of the street scene".

9. A solicitor acting for Ms Cheung and Infinity has explained in a witness statement that the Foundation has agreed to enter into a deed of modification ("the Deed of Modification") in favour of Ms Cheung under which, in return for a payment, the

Foundation would, so far as it was able, release Ms Cheung and her successors in title from the covenants contained in the 1947 Conveyance "to the extent only necessary" to permit the construction of nine flats at Number 444.

10. The present proceedings were issued on 3 September 2021. By them, Mr Mackenzie seeks declarations that Number 444 is subject to a restrictive covenant barring the erection of flats at Number 444 which he is entitled to enforce and an injunction restraining Ms Cheung and Infinity from demolishing the house there and building flats in its place. In a defence and counterclaim, Ms Cheung and Infinity maintain that, once executed, the Deed of Modification will permit development of Number 444 in accordance with its terms. By way of reply and defence to counterclaim, Mr Mackenzie has responded that paragraph 11 of the Third Schedule to the 1947 Conveyance is to be construed as meaning:

> "The Governors are allowed to deal with any of the plots that they still owned as from 3rd October 1947 (the date of the Conveyance) as they saw fit, and without reference to the stipulations in the Third Schedule. In other words, to pass, or not to pass, on the benefit of any of the restrictive covenants in the Third Schedule in the said Conveyance."

11. On 10 December 2021, Ms Cheung and Infinity applied for summary judgment in their favour. Deputy Master Bowles ("the Master") dismissed the application and made an order which included a declaration to the effect that the proposed development of Number 444 would be a breach of covenant even if the Deed of Modification had been executed. However, Miles J ("the Judge") allowed an appeal and granted a declaration that, if the Deed of Modification were executed, development of Number 444 in accordance with it would not be a breach of covenant.

12. Mr Mackenzie now challenges the Judge's decision in this Court.

The judgments below

The Master

13. In a detailed and closely-reasoned judgment dated 6 July 2022, the Master concluded that, on its true construction, paragraph 11 of the Third Schedule to the 1947 Conveyance was:

> "intended only to clarify the fact that the Whitgift Foundation and its predecessors had no obligation, in dealing with other plots on the Estate, or on any of its adjoining or neighbouring land, to have regard to the restrictions contained in the Third Schedule and to clarify, also, that, in dealing with such plots it could, if it so chose, elect, if imposing restrictions, to depart, in any one, or more, case(s) from those imposed by the Third Schedule".

14. The core of the Master's reasoning is to be found in paragraphs 58, 59 and 67 of his judgment. In paragraphs 58 and 59, the Master said this in relation to paragraph 11 of the Third Schedule to the 1947 Conveyance:

> "58. It seems to me to be very unlikely that a paragraph which, so obviously, deals in its opening part with the Estate's future dealings with its unsold land should, then, 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.
>
> 59. It is, also, I think, 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, in my view, not obviously apt to describe a right of release. It is a much more appropriate term to use in describing, as I think it was, the Governors' entitlement to depart in new transactions from restrictions it had imposed in previous transactions."

In paragraph 67, the Master said:

> "There is nothing at all unreasonable or unlikely in the construction that I have placed on the paragraph [i.e. paragraph 11 of the Third Schedule] and nothing at all to warrant moving away from what I regard as the natural meaning of the paragraph, set in its context. The reservation of a power of release, in respect of a restriction, to be exercised by a settlor, or grantor, without recourse to, or agreement by, those entitled to the benefit of the restriction, is, or would be, a very unusual thing and not one that the court should be constrained to impose, by way of construction, on the grounds of commercial common sense."

The Judge

15. In a similarly well-reasoned judgment dated 8 February 2023, the Judge arrived at the opposite conclusion. He considered there to be "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" (paragraph 40 of the judgment); that "[o]n 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" (paragraph 44); 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" (paragraph 46); that "[a]nother 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 48); that "[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" (paragraph 50); that "[t]here was every reason for the Governors to wish to maintain control over the Estate and its development", by allowing departures from restrictive covenants as well as by imposing and enforcing them (paragraph 51); and that there was "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" since "[t]he 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" (paragraph 52).

Entitlement to the benefit of the covenants given in the 1947 Conveyance

16. There is no dispute but that Mr Mackenzie is entitled to the benefit of the restrictive covenants which Mr Read gave in the 1947 Conveyance. It is appropriate, I think, to record the basis of that consensus.

17. Someone other than the original covenantee can become entitled to the benefit of a restrictive covenant relating to land in three ways: by assignment, by annexation or under a building scheme. Where a building scheme exists, covenants will be enforceable by the owners of all plots within its scope, not merely by those owning plots which still belonged to the covenantee when the covenants were entered into. As Jonathan Parker LJ explained in *Whitgift Homes Ltd v Stocks* [2001] EWCA Civ 1732, at paragraph 9:

> "if the available evidence establishes the existence of a scheme under which similar restrictive covenants imposed on a number of properties in a defined area are mutually and reciprocally enforceable as between the respective owners for the time being of those properties (commonly referred to as a 'building scheme'), then the owner for the time being of each of those properties will be able to enforce the covenants against the owners for the time being of each of the other properties subject to the scheme. Thus, in the case of an estate which is sold off by a developer in various plots, the owner for the time being of each plot will be able to enforce the covenants against the owners for the time being of all the other plots, regardless of whether such plots were sold off by the developer before or after his own plot."

18. Where, on the other hand, the benefit of a restrictive covenant is transmitted, not pursuant to a building scheme, but as a result of annexation to land which the covenantee retained at the time the covenant was given, owners of land which the covenantee had disposed of previously will not be able to enforce the covenant. In this connection, Jonathan Parker LJ noted in *Whitgift Homes Ltd v Stocks*, at paragraph 8, that "the effect of annexation in a case where the developer of an estate sells off the various developed plots subject to restrictive covenants is that the first purchaser will not be able to enforce the covenants entered into by the purchasers of any of the other plots, whereas the last purchaser will be able to enforce the covenants entered into by all the other purchasers".

19. In the present case, it is common ground that there was no relevant building scheme but that Mr Mackenzie is nonetheless entitled to the benefit of the restrictive covenants in the 1947 Conveyance. As the Judge noted in paragraph 15 of his

judgment, 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". Having been sold a month later than Number 444, Number 432 was such a part.

Mr Mackenzie's case in outline

20. Mr Mark Warwick KC, who appeared for Mr Mackenzie with Mr Henry Moore, submitted that the Master's approach should be preferred to that of the Judge. Paragraph 11 of the Third Schedule to the 1947 Conveyance, Mr Warwick argued, is to be understood as relating only to the future, not as extending to covenants which had been given to the Governors when making an earlier sale. The word "them" in "the right to allow a departure from them" in the second part of paragraph 11 refers to the stipulations covered in the first part of paragraph 11, namely those in respect of unsold plots, not, as the Judge thought, the stipulations given by Mr Read as the purchaser of Number 444. In any case, the second part of paragraph 11 need not be interpreted in such a way as to add anything to the first part: "the argument from redundancy is seldom an entirely secure one", not least because draftsmen may adopt a "torrential style of drafting", "employ linguistic overkill and try to obliterate the conceptual target by using a number of words or phrases expressing more or less the same idea" and "say the same thing twice": see Hoffmann J in *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 150, at 158, and *Norwich Union Life Insurance v British Railways Board* [1987] 2 EGLR 137, at 138; Lord Hoffmann in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, at 274; and Neuberger LJ in *GLN (Copenhagen) Southern Ltd v Tunbridge Wells Borough Council* [2004] EWCA Civ 1279, at paragraphs 30 to 32. In the present case, Mr Warwick suggested, it is inherently unlikely that the parties intended the Governors to have power to release covenants given by earlier purchasers, especially given the nature of the Foundation and the zoning which affected Numbers 444 and 432 in 1947. As for the former, Mr Warwick suggested that the notion that a long-established charity would behave like a greedy profit-seeking business, and use paragraph 11 to make a further profit to the detriment of later purchasers, would not have occurred to anyone. With regard to the latter, Mr Warwick explained that in 1947 the area was zoned under a town planning scheme "for the erection of dwelling-houses at the rate of not exceeding eight to the acre" (to quote from a 1947 letter from the County Borough of Croydon), giving later purchasers the more reason to wish to be able to limit how many houses earlier purchasers built. In a similar vein, Mr Warwick invoked the rule against derogation from grant, arguing that for the Foundation to allow the proposed redevelopment of Number 444 would derogate from the grant of Number 432. Mr Warwick further queried why, were the Judge's construction of paragraph 11 correct, it would have been thought necessary for paragraph 4 to give the Governors an express power to consent to use as a road, way or means of access.

21. By way of fallback, Mr Warwick submitted that, even if the second part of paragraph 11 enables the Foundation to authorise *some* departures from covenants given by earlier purchasers, the power is limited in extent and cannot be used to authorise the erection of nine flats at Number 444. Mr Warwick accepted that this alternative argument had not been advanced in the pleadings, at the hearings before the Master

and the Judge or in the grounds of appeal, but he asked for permission to amend those grounds to raise it.

Analysis

22. Interpretation of a contract involves assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 ("*Wood*"), at paragraph 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". "Textualism" and "contextualism" can both be used "as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement": *Wood*, at paragraph 13. In the case of a formal document prepared by lawyers such as the 1947 Conveyance, analysis of the language which has been adopted is likely to be of central importance, but it can also be relevant to consider what, assessed objectively, the parties can be expected to have intended in the context.

23. In the present case, I agree with Mr Carl Fain, who appeared for Ms Cheung and Infinity with Mr Richard Miller, that the language of paragraph 11 of the Third Schedule to the 1947 Conveyance, read naturally, favours the Judge's conclusion. The first part of paragraph 11 was clearly meant to ensure that the Governors were not obliged to insist on the same covenants being given when they made subsequent sales. On the face of it, the second part of paragraph 11 was intended to have a *distinct* function and to give the Governors an *additional* right. The "also" at the start of the second part indicates that. Moreover, the words "reserve the right to allow a departure from them" do not strike me as apt to refer just (or, perhaps, at all) to the imposition in future sales of covenants in terms differing from those in the Third Schedule. I do not see why, as a matter of language, the "them" should be taken to apply only to unsold plots: the word must refer back to "these stipulations" and so, it would seem, simply to the stipulations found in the Third Schedule. I also doubt whether it would have been appropriate to speak of the Governors "allow[ing] a departure" from the Third Schedule stipulations if what the parties had had in contemplation was asking future purchasers to enter into covenants differing from those contained in the 1947 Conveyance. The words "allow a departure" relate much more obviously to the Governors agreeing to a person doing something which he had previously undertaken not to do. In other words, it appears to me that, as a matter of language, the second part of paragraph 11 is not an example of "torrential drafting" but is designed to give the Governors something for which the first part does not provide, namely, an ability to "allow a departure" by Mr Read (or a successor in title) from the covenants which he was giving in the 1947 Conveyance.

24. Nor, in my view, does construing paragraph 11 in that way run counter to common sense or what the parties can be expected to have intended. As Mr Fain stressed, only Mr Read and the Governors were parties to the 1947 Conveyance of which paragraph 11 formed part. It is by no means inherently improbable that either Mr Read or the Governors should have wished the Governors to be empowered to allow Mr Read and his successors in title to depart from the covenants which Mr Read was giving. So far as the Governors were concerned, such a power would have given them more control

over how the estate they were selling off was developed. That the Governors were envisaged as having a continuing role as regards plots they had previously disposed of is suggested by paragraphs 4, 8 and 10 of the Third Schedule (providing for the Governors to consent to use for access, for the Surveyor of the Governors to approve plans, elevations and site plans and for requests for restoration of boundary stumps to be directed to the Surveyor of the Governors). Further, in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 1 WLR 2409, Chadwick LJ observed in paragraph 48:

> "Where development land is sold off in plots without imposing a building scheme, it is likely that the developer will wish to retain exclusive power to give or withhold consent to a modification or relaxation of a restriction on building which he imposes on each purchaser; unfettered by the need to obtain the consent of every subsequent purchaser to whom (after imposing the covenant) he has sold off other plots on the development land. If it were otherwise he would create a situation in which the ability of a purchaser of one plot to enforce covenants against the owner of another plot depended on the order in which the plots had been sold off; a situation described by Ungoed-Thomas J in *Eagling v Gardner* [1970] 2 All ER 838, 846d, as 'a building scheme in Alice's Wonderland'."

Earlier in his judgment, Chadwick LJ had said in paragraph 41:

> "As Brightman LJ pointed out [in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594] … , a developer who is selling off land in lots might well want to retain the benefit of a building restriction under his own control. Where, as in *Roake v Chadha* [1984] 1 WLR 40 and the present case, development land is sold off in plots without imposing a building scheme, it seems to me very likely that the developer will wish to retain exclusive power to give or withhold consent to a modification or relaxation of a restriction on building which he imposes on each purchaser; unfettered by the need to obtain the consent of every subsequent purchaser to whom (after imposing the covenant) he has sold off other plots on the development land."

25. There was also reason for Mr Read to wish the Governors to have the power for which Ms Cheung and Infinity contend. Absent that power, Mr Read and his successors in title would need to obtain the consent of the owner for the time being of every piece of land to which his covenants had been annexed if they wished to do something that was not permitted under those covenants. That would require him to identify "the adjoining or adjacent land … being that part of the Governors Fox Farm Estate remaining undisposed of" at the date of the 1947 Conveyance, to work out who now owned that land and to persuade each of them to agree to what he wished to do. As the Judge said in paragraph 52 of his judgment, the interpretation of paragraph 11 for which Ms Cheung and Infinity argue would mean 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".

26. Further, I do not think the nature of the Foundation lends any support to Mr Mackenzie's case. As I have mentioned, Mr Warwick maintained that it would not have occurred to anyone that a long-established charity such as the Foundation would behave like a "greedy profit-seeking business". A perception that the Foundation would not act in that manner might, however, have encouraged those buying plots in the Estate to think that there was no harm in the Governors having power to waive or release covenants given by previous purchasers. In any case, the essential question is how a provision in the conveyance *to Mr Read* should be interpreted, and denying the Governors the ability to waive or release Mr Read from the covenants that *he* was giving would not of itself have served Mr Read's interests.

27. With regard to Mr Warwick's reliance on zoning, it is doubtless the case that all purchasers of plots in the Estate other than the very first could be expected to have preferred the Foundation to be unable to sanction departures from covenants given by earlier buyers. In whatever way paragraph 11 of the Third Schedule to the 1947 Conveyance is construed, however, someone acquiring a plot would have no certainty as to how many dwelling houses would be built on neighbouring land which the Governors had not yet sold: the Governors were under no obligation to require future buyers to covenant to erect no more than one dwelling house on a plot, nor as to how big plots should be. Once again, moreover, it is important to remember that the focus is on how the conveyance *to Mr Read* is to be understood, and reading paragraph 11 as conferring no power to authorise departures from his covenants would not without more have given him any additional confidence that he could meet zoning requirements.

28. In this context, it may be helpful to have in mind the first sale of a plot in the Estate. As Mr Warwick pointed out, there is no evidence as to what other sales the Governors may have effected. However, it is reasonable to suppose that the Governors incorporated provisions in similar terms to the Third Schedule to the 1947 Conveyance not only when selling Numbers 444 and 432, but in other transactions as they disposed of the Estate. From the point of view of the first such purchaser, the Judge's construction of paragraph 11 would only to have been to his advantage since (a) it would have enabled the Governors to waive or release covenants he was giving and (b) the rival approach to paragraph 11 could not have served to constrain any previous purchaser since there will not have been any. Mr Warwick suggested that the meaning of paragraph 11 might have changed over time, as the Governors entered into different sales, but I cannot accept that.

29. As for the argument that the Judge's construction of paragraph 11 of the Third Schedule would render the reference in paragraph 4 to "without the written consent of the Governors being first obtained" redundant, I do not think it can be inferred from the fact that the parties made specific provision in relation to use "as a road or way or means of access to any adjoining property" that they did not intend the Governors to have a general power to waive or release Mr Read's covenants.

30. Turning to derogation from grant, there is a principle that a grantor "having given a thing with one hand is not to take away the means of enjoying it with the other": *Birmingham, Dudley & District Banking Co v Ross* (1888) 38 Ch D 295, at 313, per

Bowen LJ. As Nicholls LJ noted in *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, at 267, Lord Denning MR said this about the doctrine of derogation from grant in *Molton Builders Ltd v City of Westminster* (1975) 30 P&CR 182, at 186:

> "It is a general principle of law that, if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other."

31. In the present case, the conveyance by which the Governors sold Number 432 in November 1947 made no reference to the covenants which Mr Read had given when he bought Number 444, but, the benefit of those covenants having been annexed to such parts of the Estate as had not yet been sold, the purchaser of Number 432 will nonetheless have acquired the benefit of them. That being so, Mr Warwick argued that the Foundation would impermissibly derogate from the grant effected on the sale of Number 432 if they authorised the proposed redevelopment of Number 444.

32. A fundamental problem with this submission is that, if paragraph 11 of the Third Schedule to the 1947 Conveyance is correctly construed in the manner for which Ms Cheung and Infinity contend, the covenants of which the purchaser of Number 432 gained the benefit were always qualified. It will from the start have been possible for the Foundation to authorise a departure from the stipulations found elsewhere in the Third Schedule. That suggests that execution of the Deed of Modification would not involve the Foundation taking away anything which it had given. The Foundation will, at most, have given the purchaser of Number 432 and his successors an ability to enforce the covenants found in paragraphs 1 to 10 of the Third Schedule *subject to* the Foundation's right to allow departures from them pursuant to paragraph 11. In *Earl of Plymouth v Rees* [2020] EWCA Civ 816, [2020] 4 WLR 105, Lewison LJ observed in paragraph 21:

> "In the case of a lease or tenancy agreement what has been granted is the right to exclusive possession of the land, for the term of the lease or tenancy, on the terms of the lease or tenancy. If a landlord exercises rights in accordance with the terms of the lease or tenancy that cannot amount to a derogation from grant, because those rights are part of the grant itself."

Similarly, the exercise by the Foundation of a power granted by the Third Schedule itself cannot, as it seems to me, amount to a derogation from any grant of the benefit of the covenants given in that schedule.

33. In any event, there is, I think, no question of redevelopment of Number 444 in accordance with the Deed of Modification having such a serious effect on Number 432 as to give rise to a derogation from grant. When the Governors sold Number 432, the purchaser acquired a plot of land with the ability to build a house on it. The proposed redevelopment of Number 444, which is a little way down the road, would have no physical impact on Number 432, nor make it difficult to live there. The redevelopment could, at worst, have some impact on the character of the neighbourhood and, conceivably (I do not know), views from Number 432. I note,

however, that the planning officer considered that the redevelopment "would respect the pattern and rhythm of neighbouring area and would not harm the appearance of the street scene".

34. It is also relevant to refer to the decision of Neville J in *Mayner v Payne* [1914] 2 Ch 555. In that case, a Mr Webb had laid out an estate for building subject to certain stipulations, but reserving to "the vendor" "the right of allowing a departure from these stipulations in any one or more cases". Mr Webb sold certain lots to the plaintiff, who, in turn, sold one of them to a predecessor in title of the lot's present owner. Mr Webb having purported to release the lot from one of the stipulations, the plaintiff brought proceedings in which he alleged that Mr Webb had had no power to do so.

35. Neville J dismissed the action. He said at 565:

> "What was effected by the deed was that the land was conveyed subject to stipulations set forth in the schedule, which were the local law that had been imposed by the original vendor. Then comes the covenant, which was both with the person who conveyed and also with the owners of any land to which the stipulations related, other than the land thereby conveyed, to observe, perform, and comply with the said stipulations. It seems to me that it is merely a covenant to obey the law of the locality as it stood, and when we examine what that law was we find it was a law which could be varied at the option of Mr. Webb, the original vendor, who reserved by the sixteenth condition the right of allowing a departure from the stipulations in any one or more cases. I think, therefore, that in this case there has been no breach of the covenant, and consequently the question of the right of the plaintiff to sue the present defendants does not arise."

36. In other words, Neville J took a reservation in much the same terms as the second part of paragraph 11 of the Third Schedule to the 1947 Conveyance to mean that the stipulations at issue "could be varied at the option of Mr Webb". While, as Mr Warwick pointed out, one must beware of taking a decision as to the meaning of similar wording in another document as authoritative (see e.g. *Rees v Peters* [2011] EWCA Civ 836, [2011] 2 P&CR 18, especially at paragraphs 27 to 30, per Sir Stephen Sedley), it seems to me that *Mayner v Payne* lends a degree of additional support to the Judge's construction of paragraph 11.

37. It remains to consider Mr Warwick's fallback position: that, even if paragraph 11 of the Third Schedule to the 1947 Conveyance allows the Foundation to authorise *some* departures from Mr Read's covenants, the Deed of Modification is outside the power. As I have said, Mr Warwick sought permission to amend the grounds of appeal to raise this point. For his part, Mr Fain submitted that this Court should not entertain the point but that it is not in any event a good one.

38. I agree that the point is not a good one. In the first place, paragraph 11 speaks simply of "a departure", without drawing any distinction between types of "departure". Secondly, I do not see why the parties to the 1947 Conveyance (viz. Mr Read and the

Governors) should have wanted the Governors to have power to sanction only some "departures". Thirdly, it is difficult to see where a line could be drawn between "departures" that could be authorised and those that could not, and, strikingly, Mr Warwick has not even now put forward criteria by which the two categories of "departure" could be distinguished. In the circumstances, I would refuse Mr Mackenzie permission to amend his grounds of appeal.

39. In short, the Judge was in my view correct. It seems to me that the second part of paragraph 11 of the Third Schedule to the 1947 Conveyance empowers the Foundation to waive or release covenants given in that schedule and so that, if the Deed of Modification is executed, development of Number 444 in accordance with it will involve neither a breach of covenant nor a derogation from grant.

Conclusion

40. I would dismiss the appeal.

Lord Justice Nugee:

41. I agree.

Lord Justice Peter Jackson:

42. I also agree.