Neutral Citation Number: [2018] EWCA Civ 1895

Case No: A3/2017/1983

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge Paul Matthews (sitting as a Judge of the High Court)
[2017] EWHC 1647 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2018

Before :

LORD JUSTICE NEWEY
and
SIR BERNARD RIX

- -

Between:

(1) PATRICIA ANN JONES **(2) DAVID JONES**	**Appellants (Claimants)**
- and -	
(1) TIMOTHY PAUL OVEN **(2) RUTH OVEN**	**Respondents (Defendants)**

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Mr Timothy Morshead QC (instructed by **Birketts LLP**) for the **Appellants**
Mr Andrew Butler QC (instructed by **Birkett Long LLP**) for the **Respondents**

Hearing date: 24 July 2018

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Approved Judgment

Lord Justice Newey:

1. The parties to this appeal own adjoining properties near Little Baddow in Essex. The appellants, Mr and Mrs Jones, are the proprietors of New Lodge Farm, which is registered under title number EX342457. Neighbouring premises now known as "Bremners" and registered under title number EX788526 belong to the respondents, Mr and Mrs Oven.

2. The litigation concerns a strip of land of four metres' width on the eastern edge of Bremners and immediately adjacent to New Lodge Farm ("the Strip"). Mr and Mrs Oven are contractually obliged to transfer the Strip to Mr and Mrs Jones pursuant to a provision in the transfer under which they acquired Bremners on 16 December 2005 ("the 2005 Transfer"). The question raised by the present appeal is whether, once the Strip has been transferred to Mr and Mrs Jones, it will be subject to restrictive covenants that they entered into in 2002-2003, when they sold land including the Strip to City & Country Residential Limited ("CCR").

3. Mr and Mrs Jones entered into two contracts with CCR on 7 November 2002. Both related to land then comprised in New Lodge Farm. One of them ("the Unconditional Contract") provided for the sale to CCR of land hatched red on an attached plan ("the Red Land") and was completed on 15 November 2002. The transfer included a covenant by Mr and Mrs Jones (as the "Transferor") in the following terms:

> "The Transferor (jointly and severally) (and which expression shall include their successors in title) covenant with the Transferee (and its successors in title) set out herein such covenants to bind Title No. EX342457 and each and every part thereof and to benefit the Property and the land comprised in Title No. EX488252 and each and every part thereof Together With any additional land acquired by the Transferee namely: –
>
> (a) Not to do or allow to be done on the Transferor's Retained Land anything which may unreasonably be or grow to be a nuisance or annoyance to the Transferee or its successors in title in connection with the use by the Transferee and its successors in title of the land now comprising Title No. EX488252 and the Property and any additional or other lands acquired by the Transferee ('the Transferee's land') and 'nuisance and annoyance' includes anything which materially affects the use and enjoyment of the Buyer's Land for residential purposes Provided That nothing herein shall restrict:-
>
> (i) the use of any buildings on the Transferor's Retained Land for recreational uses ancillary to the Transferor's use and enjoyment of the dwelling house known as New Lodge Farm or the use of such buildings for commercial stabling; or
>
> (ii) the use of any land for schooling of horses; or
>
> (iii) the use of any land for residential purposes

> (b) That there will not be at any time any storage of any materials of a noxious or offensive nature on the Transferor's Retained Land
>
> (c) Any buildings now or hereafter located on the Transferor's Retained Land will not be used for the keeping of agricultural livestock save for equines…"

The "Property" was the Red Land, while the "Transferor's Retained Land" referred to "the land hatched blue on [the attached plan]" ("the Blue Land"), which lay just to the east of the Red Land in New Lodge Farm. The Strip formed part of the Blue Land.

4. The other contract of 7 November 2002 ("the Conditional Contract") provided for the sale to CCR of land hatched green on an attached plan ("the Green Land") subject to a grant of planning permission. The Green Land was part of the Blue Land, abutted the Red Land and encompassed the Strip. By clause 6 of the special conditions, the transfer was to contain the provisions set out in the first schedule, which included a covenant on the part of Mr and Mrs Jones in terms corresponding to those quoted in the previous paragraph.

5. Clause 8 of the special conditions provided for the re-transfer of the Strip in certain circumstances. The clause had its origins in a barn (or barns) which straddled the boundary between the Green Land and the balance of the Blue Land. As the Judge explained (in paragraph 24 of his judgment):

> "The eastern barn (or part of barn) was on the land retained by [Mr and Mrs Jones], and still exists today. The western barn (or part) was part of the green land and was sold to CCR by the second, conditional contract."

6. Clause 8 of the special conditions was to apply if the western barn (or part) ("the Western Barn") standing on the Green Land was demolished. It was in these terms:

> "In the event of the Buyer or its successors in title
>
> (i) voluntarily; or
>
> (ii) in order to comply with Planning Authority requirements and of a planning consent obtained by the Buyer and being implemented by the Buyer
>
> demolishing that part of the barn shown edged brown on Plan A the Buyer shall at no cost to the Seller transfer to the Seller the land having a width of four metres between the points A, B, C and D shown cross hatched black on the plan marked A within twenty eight days of the demolition of that part of the said barn and thereafter erect a fence one metre high along the boundary between the points A and B (such fence to be of a style as the Buyer shall determine but to be stock proof) and which fence shall be thereafter maintained by the Seller. The provisions of

> this clause shall not merge with or become extinguished on completion."

The "part of the barn shown edged brown on Plan A" was the Western Barn. The "land having a width of four metres between the points A, B, C and D shown cross hatched black on the plan marked A" comprised the Strip.

7. The Conditional Contract was completed on 9 June 2003. In accordance with the special conditions, the transfer ("the 2003 Transfer") included a covenant by Mr and Mrs Jones in terms which were materially identical to those set out in paragraph 3 above. Once again, the "Transferor's Retained Land" was identified as "the land shown hatched blue on the Plan", but, unsurprisingly, the land so hatched no longer encompassed the Green Land, that being the subject of the transfer.

8. It was from CCR that Mr and Mrs Oven bought Bremners in December 2005. Mirroring the Conditional Contract, the 2005 Transfer required the Strip to be transferred to Mr and Mrs Jones at no cost if the Western Barn was demolished. The relevant clause stated:

> "In the event of the Transferee [i.e. Mr and Mrs Oven] or its successors in title demolishing [the Western Barn] the Transferee shall at no cost transfer to David Jones and Patricia Ann Jones … the [Strip] within 28 days of the demolition of [the Western Barn] …."

The 2005 Transfer also contained a provision which included the following:

> "the rights and other matters contained in this Transfer are to the exclusion of all other matters contained in the Registers of Title numbers EX488252 EX696394 EX709656 … and the benefit of any matters contained or referred to in those Titles shall not pass herewith nor shall the benefit of any covenants benefiting the Estate pass with the Property".

"Estate" was defined as:

> "The Transferor's estate known as New Lodge Chase … the extent whereof is now or was formerly registered under Title Numbers EX488252, EX696394, EX709656 together with any adjoining or adjacent land which the Transferor may acquire within the Perpetuity Period".

9. In 2009 Mr and Mrs Oven demolished the Western Barn. The Judge said this about the circumstances (in paragraph 29 of his judgment):

> "The evidence of [Mr Oven] (which I accept) was that [Mr and Mrs Oven] had no intention of demolishing the barn at the outset. But they found that they could only obtain planning permission for the construction of garages and additional bedrooms if they maintained the overall 'footprint' of the building within certain limits. They would have to, and did, demolish the barn. It is

> common ground that this was the initial trigger for the obligation to arise on the positive covenant entered into by [Mr and Mrs Oven] to transfer the 4 metre wide strip to [Mr and Mrs Jones] free of charge within 28 days. That transfer however did not happen. Each side explains differently why it did not happen."

(Mr Andrew Butler QC, who appeared for Mr and Mrs Oven, told us that his clients did not accept that this passage precisely reflected their position, but it is not necessary to explore the point further.)

10. In 2015, Mr and Mrs Jones issued proceedings in which they sought, among other things, an order for the Strip to be transferred to them by Mr and Mrs Jones. They based their claim on the clause providing for that in the 2005 Transfer. Not themselves being parties to that transfer, they relied on the Contracts (Rights of Third Parties) Act 1999.

11. In their defence and counterclaim, Mr and Mrs Oven accepted that Mr and Mrs Jones were entitled to invoke the Contracts (Rights of Third Parties) Act. They maintained, however, that "the Joneses must accept that the 2002 Restrictive Covenant will apply to the 4 Metre Strip as it does to the rest of what the Joneses' conveyance to CCR describes as '*the Retained Land*'" and counterclaimed for a declaration that "on transfer of the 4 Metre Strip, the Joneses will hold the same subject to the terms of the 2002 Covenant". The "2002 Restrictive Covenant" was defined to refer to the covenants in the terms set out in paragraph 3 above that Mr and Mrs Jones had given when conveying parts of what had become Bremners to CCR.

12. Mr and Mrs Oven's defence asserted that the result for which they contended:

> "can and should be achieved by one or more of the following routes:
>
> 22.1 by construing the phrase '*the Retained Land*' in the Joneses' conveyances to CCR and the 2002 Restrictive Covenant contained therein as meaning not only the land that the Joneses were then retaining, but also land which might be reconveyed to them in the future;
>
> 22.2 by implying a term to that effect into those instruments; or
>
> 22.4 by granting specific performance of the 2005 Positive Covenant on terms that the Joneses abide by the 2005 Restrictive Covenants in relation to the 4 Metre Strip".

13. The dispute came before His Honour Judge Paul Matthews, sitting as a Judge of the High Court, in June 2017. Argument focused on the construction of the covenants that Mr and Mrs Jones had given in 2002-2003. Thus, the Judge recorded counsel then appearing for Mr and Mrs Jones as having made submissions to this effect (see paragraph 41 of the judgment):

> "[Counsel] for the claimants, in relation to the construction of the conveyancing documents, submitted that the 2002 transfer

> from the claimants to CCR subjected the Strip to the restrictive covenants, as part of the retained land, whereas the 2003 transfer from the claimants to CCR of land *including* the Strip extinguished the covenants in relation to the land so transferred. He argued that [the] phrase 'retained land' in the 2003 transfer could not be construed so as to include land, such as the Strip, which was re-transferred to the claimants subsequently. It was not what it said, and the background did not permit the court to conclude that something must have gone wrong with the language. He referred to *Investors Compensation Scheme Ltd and West Bromwich Building Society* [1998] 1 WLR 896, at 913D, per Lord Hoffmann. He accepted that it might be 'a curiosity' that, if the barn were demolished and the Strip re-transferred, it would not be subject to the same covenants as the retained land adjacent to it. But it was nothing more."

14. The Judge ruled in favour of Mr and Mrs Oven. In the first place, he concluded (in paragraph 69 of his judgment) that "the phrase 'retained land' in the 2002-2003 restrictive covenants is to be construed as including the land which is subsequently re-transferred to the claimants pursuant to the terms of the transfer itself". As to this, the Judge said:

> "Something has gone wrong here with the drafting. It is plain that the intention of the parties was that the land which the claimants retained in the vicinity of the defendants' land was to be burdened by covenants in order to enhance its value to the defendants' predecessors in title and to make it viable to undertake the residential development. Construing the phrase 'retained land' in the way submitted by the claimants would subvert that intention. Construing the phrase in the way submitted by the defendants would support that intention."

The Judge observed (in paragraph 68):

> "It does not help the defendants if the claimants are restrained from putting a muckheap or keeping pigs on the retained land, but can do so on the Strip, which is even closer to their property than the retained land."

15. In the alternative, the Judge considered that a term fell to be implied. He said (in paragraph 70 of his judgment):

> "If I am wrong about that, and it is not possible to resolve the situation by the process of construction of the phrase 'retained land', then I consider that a term is necessarily to be implied in order to give business efficacy to the transaction. As I have said, the point of the restrictive covenants being entered into by the claimants in relation to any of their land was in order to make the development viable. To my mind, it is inconceivable that the parties realised that the drafting of the restrictive covenants (on the construction preferred by the claimants) would create this

> situation. It was not a deliberate omission. If the parties had appreciated at the time that the Strip, in the event that it was re-transferred to the claimants, would not be subject to the covenants, then, to put it at its lowest, that would have put the viability of the development at risk. In my judgment, without a term implied to the effect that if land is transferred back to the claimants pursuant to the terms of the transfer that land is to be subject to the same covenants as the retained land, the transaction would lack commercial and practical coherence. Such a term would not be inconsistent with any of the express terms. On the contrary, it would support and give coherence to those express terms. If therefore I was wrong about construction, I would hold that such a term was to be implied into the transfer."

16. In the course of his judgment, the Judge recorded that the following points were common ground:

    i) "[T]he effect of the transfer of the Strip to CCR (which already owned the land having the benefit of the earlier restrictive covenants burdening the Strip, amongst other land) was *to extinguish* those restrictive covenants so far as relating to the Strip itself. This was because both the dominant and the servient land (to that extent) were vested in the same person: see *Re Tiltwood, Sussex* [1978] Ch 269, 280" (see paragraph 23 of the judgment). The Judge continued:

    > "The transfer however contained restrictive covenants by the claimants identical to those in the 2002 transfer, burdening their retained land (which now no longer included the Strip) in favour of CCR's land (which now did)";

    ii) "[T]here was no perpetuity issue involved, by reason of the provision for the re-transfer of the strip to the claimants on an uncertain event (the demolition of the barn) and the possible arising or imposing of restrictive covenants in favour of the defendants on that re-transfer" (paragraph 63).

17. The Judge accordingly granted a declaration in these terms:

> "On the true construction of the Transfer dated 9 June 2003 made between the Claimants [i.e. Mr and Mrs Jones] as transferors and [CCR] as transferee on Land Registry TP1 by which part of title number EX342457 was transferred, the expression 'the Transferor's Retained Land' included the strip of land marked on the plan annexed to the transfer between the points A, B, C and D (hereafter in this order, the 'Strip') as from the time that the same is transferred to the Claimants in accordance with this order; as a consequence, the Strip will be burdened by the restrictive covenants contained in box 13 of the transfer from that time."

18. There is no appeal against Judge Matthews' conclusions on either the construction of the 2002-2003 restrictive covenants or the implication of a term. Mr Timothy Morshead QC, who appeared for Mr and Mrs Jones on this appeal (but not at the trial), submitted

that, through no fault of his own, the Judge did not deal with the true issue. Mr and Mrs Jones were, he pointed out, relying on the provision for transfer of the Strip contained in the 2005 Transfer, not that to be found in the Conditional Contract. While counsel then appearing for Mr and Mrs Jones may (like his opponent) have directed his arguments at whether the 2002-2003 restrictive covenants would, either as a matter of construction or by implication, extend to the Strip if re-transferred to Mr and Mrs Jones, that question was in fact immaterial. All that mattered was whether the 2005 Transfer imposed such obligations on Mr and Mrs Jones, and it did not. Mr Morshead summarised his contention in these terms in his skeleton argument (at paragraph 23):

> "For [Mr and Mrs Jones] to be bound on a disposition pursuant to the 2005 Transfer by covenants imposed by the 2003 Transfer, it would be necessary for the Court to have found that the 2005 Transfer included a term requiring [Mr and Mrs Jones] to grant to [Mr and Mrs Oven] restrictive covenants in the form of those in the 2003 Transfer. No such term (whether express or implied) was found by the Court, or alleged by [Mr and Mrs Oven] …."

19. For his part, Mr Butler supported the Judge's decision. While the Judge did not express his conclusions in quite these terms, he in effect held, so Mr Butler said, that Mr and Mrs Jones covenanted in the 2003 Transfer (on the strength of either construction of the reference to the "Transferor's Retained Land" or implication) that, if the Strip returned to their ownership, they would not do or allow to be done on it the various things specified in the restrictive covenants or, in other words, that the covenants would then apply as much to the Strip as to the remainder of the Blue Land. On the basis of that (unchallenged) conclusion, the restrictive covenants, Mr Butler said, will bite when Mr and Mrs Oven transfer the Strip back to Mr and Mrs Jones. It is irrelevant, according to Mr Butler, that Mr and Mrs Oven will make the transfer pursuant to the obligation to that effect imposed by the 2005 Transfer instead of the Conditional Contract. For the restrictive covenants to apply, it is enough, on Mr Butler's case, that Mr and Mrs Jones are once again the owners of the Strip.

20. Mr Morshead countered that, as regards the Strip, Mr and Mrs Oven cannot have acquired the benefit of the covenants given in the 2003 Transfer. Section 78 of the Law of Property Act 1925 is not in point, Mr Morshead argued, so Mr and Mrs Oven could have become entitled to the benefit of the covenants only by means of an express assignment, and there was no such assignment. Mr Butler, on the other hand, maintained both that section 78 is applicable and that, in any event, it is not now open to Mr and Mrs Jones to deny that Mr and Mrs Oven have the benefit of the covenants that Mr and Mrs Jones entered into in 2002-2003.

21. At this stage, I need to return to the pleadings. Paragraph 13 of the defence and counterclaim asserted that, "[a]s a result of the 2005 Transfer, the benefit of the 2002 Restrictive Covenant had passed to the Ovens". Mr and Mrs Jones answered, in paragraph 7 of their reply and defence to counterclaim, that it was "denied that the benefit of the [2002 Restrictive Covenant] passed to the Defendants under the 2005 Transfer". That led Mr and Mrs Oven to say the following in their reply to defence to counterclaim:

> "4. Paragraph 7 is the self-same point which was advanced before HHJ Lochrane on the Joneses' appeal against the

> refusal to set aside judgment in default in Claim No 2 CM 00135. It was rejected by the Learned Judge on that occasion, it being observed in para.29 of the judgment … *inter alia* that the Joneses' construction of the 2002 Transfer made '*absolutely no logical sense*'. In the circumstances, the Joneses are estopped from taking the point in these proceedings. Further or alternatively, it is an abuse of process for them to do so.
>
> 5. Further and in any event paragraph 7 is denied for the reason given by HHJ Lochrane, namely that the phrase 'the Estate' is generally used in the 2005 Transfer in contradistinction to 'the Property', and on its proper construction generally means 'the Estate apart from the Property'.
>
> 6. The Ovens will also rely on the following further points which were advanced before HHJ Lochrane but which the Learned Judge did not find it necessary to consider, namely:
>
> 6.1 the interpretation advanced by the Joneses would oust the effect of s.78 *Law of Property Act* 1925, and it is not possible to contract out of that provision;
>
> 6.2 the Joneses are not parties to the 2005 Transfer, which is accordingly *res inter alios acta* so far as they are concerned;
>
> 6.3 they themselves expressly granted the 2002 Restrictive Covenant to CCR '*and its successors in title*'."

22. The judgment of His Honour Judge Lochrane mentioned in this passage was given on 7 November 2012 in the County Court at Chelmsford in proceedings that Mr and Mrs Oven had brought against Mr and Mrs Jones. Judge Lochrane explained in paragraph 24 of his judgment that counsel then appearing for Mr and Mrs Jones had argued that the clause quoted in the second of the excerpts from the 2005 Transfer set out in paragraph 8 above "makes it plain that the benefit of the covenants contained in the transfer between [Mr and Mrs Jones] and [CCR is] excluded from the transfer between [CCR] and [Mr and Mrs Oven]". Judge Lochrane considered this submission "unsustainable" (paragraph 38), taking the view that there was "no realistic prospect of successfully claiming … that when the clause withdraws from the purchase by [Mr and Mrs Oven] from [CCR] the benefit of covenants benefitting the estate, that also meant any benefits of covenants benefitting the property" (paragraph 34).

23. At all events, on 13 June 2017, nine days before the start of the trial before Judge Matthews, Mr and Mrs Jones' then counsel sent an email to Mr Butler (who then, as now, was representing Mr and Mrs Oven) in which he said:

> "When we spoke in advance of the PTR I mentioned that I would let you know if [I] was intending to take at trial the point pleaded at paragraph 7 and following in the Reply and Defence to Counterclaim, i.e. the point that your clients did not get the benefit of the 2002 covenants when they took their land from CCR. I have instructions to concede this point: it is now accepted on behalf of my clients that yours have the benefit of these covenants.
>
> Obviously that still leaves in issue the question of whether the 4-metre strip is burdened by those covenants."

24. Against that background, it is no surprise that the trial before Judge Matthews was concerned with what the 2002-2003 covenants meant rather than whether Mr and Mrs Oven had the benefit of them. There was no longer any issue between the parties on the latter point. That being so, there was no need for either counsel to develop a case, or for the Judge to rule, on the matters that had been raised by paragraph 7 of the reply and defence to counterclaim and paragraphs 4-6 of the reply to defence to counterclaim. Mr Butler was right when he noted in his skeleton argument for the present appeal (at paragraph 5) that, before the Judge, it "was not in dispute that, as successors in title to [CCR], [Mr and Mrs Oven] took the benefit of the 2002 Restrictive Covenant". Further, neither in Mr and Mrs Jones' grounds of appeal nor in the skeleton argument filed on their behalf was it stated that they wished to be allowed to withdraw the concession that their counsel had made in advance of the trial and on the basis of which that trial had been conducted.

25. In all the circumstances, I agree with Mr Butler that it is not open to Mr and Mrs Jones to deny that Mr and Mrs Oven have the benefit of the covenants that Mr and Mrs Jones gave in 2002-2003 (in particular, by the 2003 Transfer). I did not understand Mr Morshead to apply to withdraw the concession made by his predecessor, but in any case I do not think it would be just for us to allow Mr and Mrs Jones to revive the point that was conceded. Had the question of whether Mr and Mrs Oven could claim the benefit of the 2002-2003 covenants still been live when the case came on for trial, it would have been necessary for the parties to explore matters that, given the concession, were never gone into before Judge Matthews and which, in fact, were not the subject of any detailed argument before us either. It is symptomatic that the bundle of authorities with which we were supplied did not include section 78 of the Law of Property Act 1925. The parties were not expecting to advance arguments on the meaning and implications of that provision, let alone on the other matters mentioned in paragraphs 4-6 of the reply to defence to counterclaim.

26. It follows, in my view, that the appeal should be dismissed. On the basis that Mr and Mrs Oven have the benefit of the 2002-2003 covenants and, specifically, those given in the 2003 Transfer, there is, as it seems to me, no good answer to the argument outlined in paragraph 19 above. Contrary to Mr Morshead's submissions, it does not matter that Mr and Mrs Jones are not seeking the return of the Strip pursuant to the Conditional Contract but under the 2005 Transfer. The position is rather, as Mr Butler said, that the covenants in the 2003 Transfer will bite on the Strip when it is transferred back to Mr and Mrs Jones.

27. The conclusions I have arrived at thus far mean that I do not need to address the cross-appeal.

Sir Bernard Rix:

28. I agree.