The Court of Appeal for Bermuda

CIVIL APPEAL No. 11 of 2010

Between:

PETER COOPER AND ROBERT RANS
(Trustees of Norwood Bermuda Trust)

Appellants

-V-

PATRICIA HAYCOCK and GREGORY HAYCOCK
(Trustees of Bayside Trust)

Respondents

Before: Edward Zacca, President
Anthony Evans, JA
Scott Baker, JA

Appearances: Mr. Saul Froomkin for Appellant
Mr. Narinder Hargun for Respondent

JUDGMENT

Date of Hearing: Monday, 14 March 2011
Date of Judgment: Friday, 18 March 2011
Reasons for Judgment Monday, 9 May 2011

EVANS, JA

1. The Plaintiffs in this action who are the respondents to the appeal are the owners of Norwood, a substantial property in Pembroke County which they bought from the Defendants in 2006.

The defendants are trustees for Mr. Richard Aeschliman and his family, and I shall refer to him as if he were an individual defendant. He was then the owner of the whole of the Norwood Estate, and when he sold the house to the plaintiffs, he kept the remainder of the estate which was defined in the conveyance as the Retained Land. The actual definition was "Retained Land means the estate excluding the property."

2. The Plaintiffs bought these proceedings in order to enforce a covenant in the conveyance dated 23 January 2006, which was in the following terms:

> Schedule (paragraph 6)
> "Not to construct any new building on the Retained Land except for a dwelling house and ancillary buildings of a residential nature and ensure that any new dwelling house constructed on the Retained Land shall be of a traditional Bermudian design and construction which shall not materially detract from the visual prominence or amenity of the existing dwelling house on the property shown on the plan and marked "Norwood" and its ancillary buildings."

3. They brought the proceedings because the Defendant proposed to build, and had obtained planning permission for, what was described in the Planning Application as "in principle approval" for "interior alterations and an addition to the existing structure known as Norwood Boathouse". The Planning Application was objected to by the Plaintiffs and was refused, but the Defendant's appeal was allowed. Having attempted to have that decision reversed, the Plaintiffs brought these proceedings claiming that the proposed building would be in breach of the covenant quoted above.

4. The Chief Justice allowed their claim on the 5th July 2010. The Defendant now appeals against his judgment.

5. The Chief Justice held essentially that the covenant permitted a new building only if it was on that part of the Retained Land which is described in the conveyance as Lot 4. The Defendant's application relates to Plot 3 and so the Chief Justice held that it was not permitted by the covenant. He also held that the proposal is for a new dwelling house, not merely an extension to the existing building known as the Boathouse as the Defendant contends.

6. This makes it necessary to describe the Retained Land in greater detail. It consists of three out of four lots into which the original estate was divided as shown in a plan attached to the conveyance. Lot 2 was Norwood itself, the property that was conveyed to the Plaintiffs. Lot 1

alongside it was the secondary residence known as Norwood Cottage which the Defendant has occupied since the conveyance and to date. Lot 3 is adjacent to the shore and includes an existing building known as the Boathouse which the Defendant proposes to develop. Between Lot 1, that is Norwood Cottage, and Lot 3 lies Lot 4 which has no building on it at present. However, the plan showed a rectangular area on Lot 4 marked "notional building position."

7. The Boathouse situated on Lot 3 is not what its name implies. It is a cottage at the water's edge with a small dock alongside it. It is a two-storey building with bedrooms on the upper floor and it is one of the oldest buildings in Bermuda, listed as grade two accordingly. The Defendant's Planning Application relates to it. The proposal would not alter the existing structure except that one or more windows or doorways would be enlarged to provide excess to a new hallway and further accommodation beyond, also on two floors and with a separate roof structure.

8. We have been referred to recent authorities in which the modern approach to the interpretation of written documents has been graphically described, most recently by Lord Hoffman in *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] 1AC 1101 at p. 113. In *Attorney General v. Belize Telecom Ltd.* [2009] 1 WLR 1988 Lord Hoffman described the test as follows:

> "It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. See *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896 at 912-913."

9. The structure of the clause in question is clear. The opening words contain a prohibition—a negative covenant—"Not to construct any new building on the Retained Land…" followed by an exception that defines what new building or buildings the Defendant may construct on the Retained Land—"except for a dwelling house and ancillary buildings of a residential nature."

10. Issues arise as to the meanings both of the prohibition and of the exception. With regard to the former, the undertaking "not to construct any new building on the Retained Land" is said by the Plaintiffs to apply to the proposed building for two reasons, first because it is submitted

that it is "new building" and not merely an extension of or addition to the existing Boathouse, and secondly, because the prohibition includes an extension of or addition to the Boathouse in any event.

11. As for the exception "except for a dwelling house etc.", three possible interpretations have been identified in argument and maybe there are more. First, that it permits only a dwelling house on Lot 4. Second, that it permits one, but only one dwelling house built on any of the three lots which constitute the Retained Land. Or third, that it permits a new building which is a dwelling house situated anywhere in the Retained Land and maybe not limited to only one.

12. The Chief Justice decided that the first of the above is the correct interpretation of the exception and, therefore, of what was permitted by the clause. He was influenced by these considerations, that the covenant should be interpreted in its context of the whole of the conveyance and in the light of its other terms. Other terms included the legend "notional building position" which appeared in the rectangular space shown on Lot 4 in the plan, and the provisions in the fifth schedule which divided the maintenance of communal areas between Lots 1, 2 and 3, that is to say, the lots on which Norwood itself, Norwood Cottage and the Boathouse stand respectively, in one third shares "until such time as Lot 4 is developed and a dwelling house constructed thereon whereupon the shares would become one quarter each. "That is in the sixth schedule, paragraph 2. That was a clear indication, it was submitted, that the new dwelling would be located on Lot 4 and nowhere else.

13. The defendants as Appellants contended that that interpretation was not correct. The clause does not say "except for a dwelling house etc. on Lot 4" as it could have done if that was what the parties intended. And it leaves the Defendant free, it was submitted, to construct a new dwelling house on Lot 3 where the Boathouse is situated and even another dwelling house on Lot 4.

14. The second ground of the Chief Justice's decision was that the proposed building on Lot 3 was prohibited by the opening words "not to construct any new buildings", and he rejected the defendant's contention that the proposed building was "a mere extension or addition and not a

new building" as a "mere semantic quibble". The relevant paragraph of his judgment paragraph 43 should be quoted in full.

> "43. There remains one final question, and that is whether the proposed extension to the Boathouse is caught by the prohibition on new building on the Retained Land. The defendant's case appears to be that it is a mere extension or addition, and not a new building. I fear that that is a mere semantic quibble. The "extension" is double the size of the existing ground coverage. It has an entry area; a central area containing a kitchen, dining and lounge space, and then a master bedroom and bath area in a separate wing roughly matching in size the original Boathouse, the main floor of which is now to become a living area. The extension is by any standard a "new building", and the fact that it is tacked on to an existing one, does not detract from or change that."

15. It is noteworthy that the Chief Justice in this passage refers only to the size of the proposed new construction compared with the "ground coverage" or footprint of the existing Boathouse. In my judgment, it should be recognized that as a matter of ordinary language there is a difference between a "mere extension or addition" to an existing building, on the one hand, and on the other hand a new building which is separate and distinct from the first. The distinction must be a question of fact and degree in a particular case. The Chief Justice impliedly recognized the distinction although he described it as a mere semantic quibble, meaning as I understand it that he regarded it as such on the facts of this case.

16. However, that was not the view of the defendant and his advisors in relation to the application for Planning permission, as it appears from the appeal itself which I have already quoted. There are also passages in the application including the following:

> "Summary of application details-
> The application is for in principle approval for interior alterations and addition to the existing Norwood Boathouse dwelling unit which is a grade two listed building in order to create a two-bedroom house.
>
> The existing Norwood Boathouse structure would be left entirely intact. The new development would be primarily tucked in behind the existing structure and the new development would be screened by the Norwood Boathouse itself and landscaping."

Perhaps it is surprising that the application was presented to the Planning Authorities in this way. But that only emphasizes the fact that an application for a separate "new building" would have been expected to have been regarded differently.

17. In my judgment, the proposed construction should properly be regarded as an extension or addition to the existing Boathouse. Not simply because that was the basis on which Planning approval was given, but also because the proposed construction will be a composite of the existing and the new. The dwelling house which results will not be new as distinct from an extension of or addition to the old. Although it is a question of fact and degree this Court is as well placed as the Judge at first instance was to answer it by reference to the documentary evidence which includes not only plans, but also a photographic projection of how the proposed building will appear.

18. It therefore becomes necessary to consider whether the covenant "not to construct any new building on the Retained Land" prohibits the building of an extension of or addition to the Boathouse on Lot 3. If it does, that would have the remarkable result of preventing the defendant as the occupier of Norwood Cottage on Lot 1 from extending or adding to that building at any time in the future. Recognizing this as possibly an unreal result, Mr. Hargun sought to distinguish between major or significant extensions or additions to which the covenant does apply and smaller or less significant ones to which it does not. But there is no justification in the Clause in my view for making this further subdivision after differentiating between "new building" and "extension or addition" as in my judgment the Clause does require.

19. Mr. Hargun also relied upon the statutory definition of "building" in the Development and Planning Act 1974. But there the word "building" is used in a very different context in order to emphasize that the regulations apply to building works of all descriptions without regard to whether the construction is a building or of an extension of or addition to an existing building. Here the wording of the prohibition makes is necessary in my view to distinguish between those two.

20. For these reasons I would hold that the negative covenant does not prevent construction of what is properly regarded as an extension of or addition to an existing building and for that reason I would allow the appeal.

21. I should add that we were referred to the drafting history of the Clause, which it appears was revised by or on behalf of the plaintiffs in the following way. Paragraph 6 in the original draft

began with the words "to use reasonable endeavors to ensure that any new dwelling house constructed on the Retained Land shall be of a traditional Bermudian design and construction which will not materially detract from the visual prominence or amenity of the existing dwelling house on the property as shown in the plan and marked Norwood and its ancillary building". The defendant's draft as vendor therefore was concerned with the appearance of "any new dwelling house". The plaintiffs were concerned lest this might permit any number of new buildings to be constructed; therefore, they suggested the additional words containing the negative covenant and the sole exception to it which appear in the opening of the revised Clause. (This evidence was not objected to as being inadmissible although it would appear to form part of the contractual negotiations which are the sole exception to the rule that the Court in construing a document should have regard to all relevant surrounding circumstances.) It was further submitted that, since these additional words now relied upon were introduced by the plaintiffs, they should be construed in accordance with the Latin maxim, *contra proferentem*.

22. I would hold that the revised clause demonstrates an intention not to allow any new building as except as permitted by the exception. The two questions whether the exception permits one or more new buildings, or on Lot 4 only, and whether the prohibition applies to extensions and additions, depend on the wording of the amended clause.

23. As for the *contra proferentem* argument, in my judgment the meaning of the words is clear—but if it is ambiguous, I would hold that rather than *contra proferentem,* the Court's approach should be in accordance with the judgment of Lord Justice Staughton in *Youell v Bland Welch* [1992] 2 Lloyd's Rep. 127 at p 134 where he said this:

> "There are two well established rules of constructions although one is perhaps more often relied successfully than the other. The first is that in case of doubt wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation or any common law duty which arises apart from any contract. The second is…"

and then the Lord Justice refers to the *contra proferentem* rule. If the clause in the present case is ambiguous, I would prefer to rely upon the first of those propositions and to construe it so as to limit rather than extend the scope of the prohibition which it places on an otherwise lawful activity.

24. This conclusion makes it unnecessary to express a final view as to the scope of the exception, the issue which the learned Chief Justice also decided in favour of the plaintiffs, holding that it permits a new dwelling only on Lot 4. I would prefer to leave this open, because the same issue could arise in future in a different context not involving the Boathouse, and it would be unfortunate if the issue had already been decided in the present case where for the reasons expressed above, the negative covenant in my judgment does not apply.

25. I therefore would allow the appeal, vacate the Chief Justice's Order dated 5th July 2010 and dismiss the plaintiff's claim.

Signed

Anthony Evans, JA

I agree,

Signed

E. Zacca, President

Signed

I agree,

Scott Baker, JA