In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 67

BETWEEN:

PATRICIA HAYCOCK and GREGORY HAYCOCK
(as trustees of the Bayside Trust)

Plaintiffs

- and -

PETER NEWBOLD COOPER and ROBERT RICHARD RANS
(as trustees of the Norwood Bermuda Trust)

Defendants

Dates of Hearing: 7, 9 and 10 June 2010
Date of Judgment: 5 July 2010

Narinder Hargun of Conyers Dill & Pearman Limited for the Plaintiffs; and
Saul Froomkin QC of Mello Jones & Martin for the Defendants.

JUDGMENT

INTRODUCTION

1. This case concerns the interpretation of a conveyance of real estate, and in particular of a restrictive covenant contained therein. The real estate concerned is an historic dwelling-house, Norwood, which formed part of a large, waterside estate in Pembroke parish owned by the defendants as trustees for a Mr. Richard Aeschliman and his family. The estate was sub-divided, and the lot on which Norwood itself stood was conveyed to the plaintiffs, who hold it on trust for their daughter and son-in-law ('the Tafurs'), who now live in the house.

2. The conveyance between the parties is dated 23rd January 2006. The covenant in issue is to be found in paragraph 6 of the Sixth Schedule ('Clause 6'[1]), and is one given by the vendor in favour of the plaintiff purchasers. By it the vendor covenants:

> "Not to construct any new buildings on the Retained Land except for a dwelling house and[2] 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. The Retained Land (being the remainder of the original estate not conveyed to the purchasers) was divided into three lots numbered 1, 3 and 4[3]. There was an existing dwelling, 'Norwood Cottage,' on Lot 1; another dwelling, 'Norwood Boat House,' on Lot 3 ('the Boathouse'); and Lot 4 was vacant and not built upon. Mr. Aeschliman, the beneficiary under the defendant trust, lived in Norwood Cottage, on Lot 1. However, at some point he determined to extend the Boathouse to provide a home for himself and his wife. When this became known to the purchasers of Norwood they opposed it, and objected to the planning application. The Planning Board refused planning permission, but on appeal to the Minister the appeal was allowed and approval for the construction given. The purchasers then lodged an appeal to the Supreme Court against that decision, but abandoned it in favour of these proceedings.

4. The Statement of Claim seeks declarations as to the meaning and effect of Clause 6, and damages for its breach. The declarations sought are in the following terms:

> "1. A declaration that the covenant contained in Clause 6 of the Sixth Schedule to the Deed of Conveyance between the Defendants and the Plaintiff dated 23 January 2006, whereby the Defendants undertook "not to construct any new building on the Retained Land" is binding on the Defendants, their successors in

[1] Strictly it is paragraph 6, but I have followed the usage in the pleadings, and referred to it throughout as 'Clause 6'.
[2] In some of the defendants' evidence and submissions this "and" is transcribed as an "or" and argument is advanced on that basis. It is now accepted that this was a transcription error.
[3] Norwood itself stood on Lot 2, which in the Conveyance is referred to as 'the Property'.

title and agents (including Norwood Limited) accordingly, binds Lot 3 on the plan attached to the Conveyance.

2. A declaration that the proposed development by the Defendants' agents (Norwood Limited) by way of additions to the Boathouse on Lot 3, as approved in principle on appeal by the Minister of the Environment, is in breach of the covenant contained in Clause 6 of the Sixth Schedule against the construction of any new buildings on the Retained Land.

3. Further and in the alternative, a declaration that the proposed development on Lot 3 is in breach of the covenant in Clause 6 of the Sixth Schedule in that it materially detracts from the visual prominence or amenity of the property known as "Norwood" on Lot 2."

5. In the event, the claim for damages was not pursued. The damages claimed had been the legal costs sustained in respect of the planning objection. Mr. Hargun in closing accepted that the question of damages would not arise until there was a breach of the covenant by reason of actual construction.

6. The Defence raised issues as to the proper construction of the conveyance, to which I will return below. It also alleged that the plaintiffs were estopped from now bringing these proceedings as they had elected to make a planning objection instead. There was also a counterclaim for rectification of the conveyance to accord with the defendants' construction. The plea of estoppel and the claim for rectification were addressed in the evidence, and were maintained until the close of the defence case. At that point Mr. Froomkin formally abandoned them on the basis that the Originating Motion seeking to appeal the Minister's decision did not go to judgment, and that the evidence did not disclose a mutual mistake sufficient to support rectification. Mr. Hargun, in his closing speech sought the costs of those issues in any event, arguing that most of the evidence went to the question of rectification, and that he estimated that two thirds of the preparation and court time and been spent on those two issues alone. In the event, that does not arise, as I find for the plaintiffs, but I indicate in case the matter goes further that, had I found for the defendants on the construction issue, I would nevertheless have thought that this was a proper case for a split costs order and awarded the plaintiffs their costs of those two issues

in any event, and I would have accepted Mr. Hargun's attribution of the time and expense devoted to them.

7. Mr. Hargun also made it clear in closing that it had never been the plaintiffs' case that any representations made by the defendants' real estate agents had been embodied in the contract or become a contractual term. He said that the evidence addressing any such representations was directed to the question of rectification, and that he accepted the "entire agreement" clause in the conveyance. I consider that that is made clear by the wording of paragraph 2 of Mrs. Tafur's witness statement, and I do not therefore need to address the law on that further.

THE LAW

8. As to the correct approach to the construction of a conveyance, or any other document, both sides accept the five principles set out by Lord Hoffman in Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896 at 913:

> "(1) Interpretation is the 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is

what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

9. Those principles were further qualified by Lord Hoffman himself in Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251 at [39], in the following terms:

"I should in passing say that when, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 913, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

10. And the principles were again further explained by Lord Hoffman in March 2009 in Attorney General of Belize v Belize Telecom Ltd. (PC) [2009] 1 WLR 1988 at 1993, [16]:

"Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. 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, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

11. And finally, for the purposes of this summary of the law, Lord Hoffman returned to the issue in July 2009 in Chartbrook Ltd. v Persimmon Homes Ltd (HL) [2009] 1 AC 1101 at 1113, [21]:

> "When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties ("12th January" instead of "13th January" in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; "any claim sounding in rescission (whether for undue influence or otherwise)" instead of "any claim (whether sounding in rescission for undue influence or otherwise)" in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896) is no reason for not giving effect to what they appear to have meant."

THE EVIDENCE

12. Given the law, as set out above, much of the evidence was not really relevant. Indeed, Mr. Hargun says that it was advanced to meet the case on rectification, which has now been abandoned. However, I find the background facts to be these. Mr. Aeschliman is the Settlor and Protector of the Norwood Bermuda Trust, of which the defendants are the trustees. Prior to the sale of Norwood itself to the plaintiffs the Norwood Estate[4] comprised four lots, one of which (Lot 2) was then conveyed to the plaintiffs for $4M. That Lot was designated in the conveyance as the 'Property'. The remaining land was then designated in the conveyance as the 'Retained Land', which was defined as "the Estate excluding the Property".

[4] The Estate is defined in the First Schedule to the Conveyance.

13. Mr. Aeschliman had conveyed the Estate to the trustees in 1988. At that time the Estate had comprised one large lot with three dwelling houses on it, namely Norwood itself, Norwood Cottage and the Boathouse. At some point prior to that Mr. Aeschliman had decided that it would be best to sell of Norwood itself and keep the Retained Land for his family. In or about 1985, with the help of various advisors, he formulated a plan for subdivision of the Estate into four lots, and that plan was approved in principle by the Development Applications Board ("the DAB") in 1986. However, that subdivision was not then implemented, and matters fell into abeyance. Then, from about 2000 onwards, Mr. Aeschliman started to make more concerted attempts to sell Norwood, and there followed a series of negotiations with potential buyers, which involved differing subdivision proposals. These intervening proposals were not shared with the plaintiffs and in my judgment have no bearing on the interpretation of the Conveyance. I do note however that, before the plaintiffs came on the scene, a proposal to sub-divide the Estate into five lots was refused planning permission, thereby effectively limiting the Estate to four lots.

14. In response to the refusal of a five-lot subdivision, a new proposal was drawn up and this became the "Final Plan of Subdivision" which was approved by the DAB on 30th March 2005, and registered on 28th April of that year. That was then the plan that was used for the negotiations with, and eventual sale to, the plaintiffs, who came on the scene in October 2005, when Mr. Aeschliman decided to put Norwood up for sale by sealed bid. That same plan was eventually annexed to the Conveyance, and as such is capable of bearing upon its interpretation.

15. The plan has four lots. It shows the existing buildings, being 'Norwood Cottage' on Lot 1; 'Norwood' itself on Lot 2; and the Boathouse on Lot 3. Lot 4 was at that time (and as far as I can tell from the evidence, still is) vacant, but the plan has on it a red rectangle with the legend 'Notional Building Position'.

16. The Boathouse is a small building, on the water-side, which pre-dates Norwood itself, and is said to be one of Bermuda's few remaining 17th century structures. As such it has a certain historic significance, although it is only classed as a Grade 2 Listed Building, while

Norwood is Grade 1[5]. The Boathouse is also rather small, being a two storey building, with a site coverage of 624 square feet, and a total floor area of 1248 square feet.

17. Mr. Aeschliman says that he always had in the back of his mind that one day he might make modest alterations and additions to the Boathouse in order to provide a retirement residence for himself. However, he says that at no time did the Tafurs or the plaintiffs ask him about any plans for the future development of the Retained Land, and more particularly the Boathouse. He says that if he had been asked he would clearly and unequivocally have indicated the possibility of eventually renovating the Boathouse into such a "modest retirement residence" for himself.

18. I heard evidence from the Tafurs and from the realtors involved in the sale as to whether, and to what extent, the Boathouse and other development on the Retained Land featured in the pre-contractual negotiations. Again, I do not think that this has much relevance, now that the claim for rectification has gone, but I record it for completeness, and to foreclose any suggestion at a later stage that things were otherwise.

19. Mrs. Tafur says that when she was shown the property in August 2005 she was given three binders of materials, one of which contained planning materials. She says in her witness statement that the purpose of including this material was to emphasize to prospective purchasers that there could be no further development on the property other than the development already approved in the subdivision application considered by the DAB and confirmed in a letter of 29th October 1986. However, in cross-examination she accepted that that was only an assumption that she made about the purpose of the inclusion of the letter. The letter itself said:

[5] The listing of historic buildings is provided for by section 30 of the Development and Planning Act 1974. The grading of listed buildings does not have statutory status, but derives from the practice of the Department of Planning, and from the Development Control Guidance Notes, but nothing turns on that. Grade 1 refers to buildings that have survived in essentially their original condition and are of such exceptional interest and architectural or historical value that they should largely be preserved in their present form, both structurally and decoratively. Grade 2 listed buildings are those that have survived in essentially their original condition and are of such special interest and architectural or historical value that alterations and additions should be limited to works that do not impinge on those parts of the building to be protected and preserved.

> "The applicant is further advised, with regard to the future development of Lot 3, that any proposal to substantially increase the size of Norwood Boathouse will not be favourably considered."

And Mrs. Tafur then goes on to say that the agent, Karen Sinclair, drew her attention to this and said words to the effect "the Boathouse cannot be developed". However, in cross-examination Mrs. Tafur accepted that the letter of 29th October had continued to indicate that a detached structure on Lot 3, north-east of the 9 meter contour line, might be acceptable, and that two structures on Lot 3 were preferable "in terms of protecting the environment of the area, to a major re-development of the boathouse".

20. Mrs. Tafur also says that she had a specific conversation with Mrs. Sinclair about future development, which was a matter of concern to her, and was told that the only other development which could or would take place on the property was the development of a residential house on Lot 4, and Mrs. Tafur gave evidence of how Mrs. Sinclair explained that that would be to the side of Norwood and out of direct view.

21. Mrs. Sinclair's primary response to that evidence is to rely upon the elaborate and comprehensive disclaimers in the documentation. However, she also expressly denies ever having said that there could or would be no development at the Boathouse, but she did recall discussing, among other things that –

> (i) "the Boathouse was a Grade 2 listed building, which meant that there were restrictions on its development and any application must be approved by the Department of Planning (with HBAC) guidance".
>
> (ii) "the Boathouse would be subject to the restrictions and covenants contained within the Conveyance, as well as subject to the discretion and approval of the DoP in relation to any future development application".
>
> (ii) "Norwood Estate could not be sub-divided any further".

(iii) "the vendor's intention for the development of any new building on Lot 4 would be on the side farthest from Norwood, and would also be governed by the covenants and discretion of the DoP in relation to any future development".

22. The difference between these two versions is not that great, and may largely turn upon nuance and the vagaries of personal interpretation. For what it is worth, I accept Mrs. Sinclair's version, notwithstanding the rather stilted language in which it is expressed. I consider it unlikely that, as a professional real estate agent, she would have ventured such firm representations as alleged by Mrs. Tafur. However, for the purposes of this case, I think that nothing turns upon it. What is important is that Mrs. Tafur was not told about Mr. Aeschliman's intentions in respect of the Boathouse, and that his plans for it formed no part of the shared matrix of fact.

23. In his witness statement Mr. Aeschliman relies upon a subsequent e-mail from Mr. Tafur of 18th April 2007, in which it was said: "When we bought Norwood we . . . were aware that you wanted to add a bathroom downstairs at the Boathouse". To the extent that Mr. Aeschliman relies upon that, I think it amounts to an implicit acceptance of the fact that he did not share his real plans with them. Mrs. Haycock gave evidence about that bathroom, and says that Mr. Aeschliman told her of his intention in respect of that in the first quarter of 2007, when he showed her round the Boathouse in advance of new tenants moving in. He explained to her that he wanted to add on a small bathroom[6], but did not mention his bigger plans. I accept her evidence on when that occurred, and think that Mr. Tafur (who did not give evidence) probably got the timing wrong. But again it does not really matter, the point being that the proposed substantial additions were not part of the shared context prior to the sale.

24. The Tafurs had also pursued the possibility of a right of first refusal in relation to the Boathouse (and indeed Lots 1 and 4 as well), and were told by Mr. Aeschliman that in

[6] There is a minor and inconsequential difference between their testimony on this, Mrs. Haycock saying that Mr. Aeschliman explained that the bathroom would involve pushing out the wall a few feet on the south-east side. Mr. Aeschliman, however, said that it only involved internal excavation, and did not impact the outside wall. Either way, the bathroom was a very small thing.

principle he had no problem with that, but that he did not want it to be part of the formal legal documentation. Mrs. Tafur says that he said that they had a 'gentleman's agreement' for the right of first refusal. A side-letter to that effect was indeed prepared, but was never executed by Mr. Aeschliman. Again the only real relevance is that this did not prompt him to disclose his plans and intentions for the Boathouse, of which the Tafurs remained unaware.

25. To complete the narrative, after completion of the sale and purchase, Mr. Aeschliman's architect wrote, on 15th April 2006, to the Chairman of the Historic Buildings Advisory Council ('HBAC'), attaching "a concept plan to convert the current 1 bedroom cottage to a 3-bedroom[7] retirement cottage". It is plain that by then Mr. Aeschliman had started to move towards implementation of his plan to convert the cottage to a retirement home for himself. He says that that letter was purely exploratory, but accepts that he did not tell the plaintiffs or the Tafurs about it. It may be that his architect, who also acted for the Tafurs in respect of a dock they were proposing, saw a potential conflict, because for whatever reason he wrote a rather odd e-mail of 25th April to both the Tafurs and Mr. Aeschliman, in which he explained that his professional Code of Conduct prohibited conflicts of interest, and to avoid any problem he asked if they could share any plans that they might have directly with each other. In response to that the Tafurs sent their plans for their dock to Mr. Aeschliman, but he did not send his plans for the Boathouse to them, nor did he tell his architect that he had not done that.

26. In fact, Mr. Aeschliman did not reveal his proposals until in or about February 2007, when he took a sketch along to a dinner party which he attended with the plaintiffs at Norwood. They had invited him to look at the renovation work they were carrying out. His news, about his plans for the Boathouse, was not well received, and relations between the plaintiffs and the Tafurs on the one hand and Mr. Aeschliman on the other have been strained ever since. The plaintiffs, and the Tafurs, take the view that the proposed additions to the Boathouse will create a substantial new building which lies right in their view from

[7] By the time of the planning application this had been scaled back to two bedrooms, one of which would be on the lower level of the existing Boathouse.

Norwood out across the water, and will also detract from the prospect of Norwood when seen from the water.

27. The application for planning permission for the additions to the Boathouse was submitted on 16th March 2007, and there were objections. The objectors included the plaintiffs, who objected by letter of 17th April 2007. Mr. Aeschliman makes the point that in that letter they did not rely upon the covenant, but based their objection upon planning considerations only, being the Bermuda Plan 1992 Planning Statement as it related to Green Space and Open Space. I do not think that there is any significance in that, and it can have no bearing on the actual construction of the Conveyance in general and Clause 6 in particular.

28. Eventually the in-principle application was refused on 11th July 2007, the Board stating that:

> "The Board does not consider a 1,240 square feet addition to an existing historically listed Grade 2 building of 624 square feet in site coverage to be a minor addition and furthermore, the addition is not considered to preserve or enhance the quality and character of the special building."

That was then conveyed to Mr. Aeschliman's architect, and to the objectors, by a letter of 18th July 2007. There then followed an appeal, in which there was another round of objections, including a letter from the plaintiffs of 12th January 2008. An Inspector was appointed, who reported on 12th March 2008, and then by letter of 2nd April 2008 the Permanent Secretary for the Ministry of the Environment and Sports conveyed the decision of the Minister allowing the appeal and granting planning permission in principle "for alterations and additions to existing boathouse-listed building site." Indeed, Mr. Aeschliman is at pains to point out that throughout the planning process his documentation made it plain that his application was concerned with alterations and additions to the Boathouse, rather than a new building.

29. Although I have set out the planning history for completeness, it really has little or no bearing on the issues of construction before me. In particular I am not at all assisted by the description of the proposed development as "alterations and additions to" an existing building. The question whether the addition amounts to a new building is really a question of mixed fact and law. The facts are these: the existing Boathouse has site coverage of a mere 624 square feet. The addition will add a further 1,240 square feet. In other words the addition will (give or take a few square feet) have double the footprint of the existing building, and will create a combined structure of triple the site coverage. The new construction will be situated behind the existing Boathouse, when viewed from the water, although that may be little consolation to the plaintiffs, as it effectively orients the new construction towards them.

THE CONVEYANCE

30. The Conveyance itself is largely unremarkable. By Clause 4 the vendor "for themselves and their successors in title to the Retained Land and so as to bind the whole and every part of the Retained Land . . . hereby covenants with the Purchaser for the benefit of the whole and every part of the Property to observe and perform the covenants stipulations and restrictions set out in the Sixth Schedule."

31. As to the genesis of Clause 6 itself, it was amended during the drafting stage of the Conveyance at the request of the purchasers. Mrs. Tafur explains this in her evidence:

> "19. Thirdly, I was concerned to note that paragraph 8 of the Sixth Schedule of the draft Conveyance provided:
>
> > "to use reasonable endeavours to ensure that any new dwelling house constructed on the Retained Land shall be of a traditional Bermudian design and construction which should not materially detract from the visual prominence of the existing dwelling house on the Property shown on the Plan and marked "Norwood"".
>
> "20. I was concerned that the reference to "any new dwelling" in paragraph 8 could be construed as reference to more than one new dwelling. I had been assured that the only new development would be one new dwelling on Lot 4. I wanted to make

sure that any future development was limited to one new dwelling and no more. Accordingly, CD&P, upon my instructions, amended paragraph 8 as follows:

> "not to construct any new building on the Retained Land except for a dwelling house and ancillary buildings of a residential nature and ~~To use reasonable endeavours~~ to 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".

"21. The proposed amendments to paragraph 8 made it clear to me that the Vendors were prohibited from constructing any new buildings on the Retained Land except for one dwelling house. The new dwelling house had already been referred to in the amendments to the Fifth and Sixth as being built on Lot 4."

32. The reference to the "amendments to the Fifth and Sixth Schedules" is to the following. Paragraph 1 of each of those Schedules respectively contains provisions for the maintenance of the common services. Thus, in paragraph 1 of the Fifth Schedule, the purchaser undertakes the obligation to keep in good repair the access road and the "communal service media", which essentially means the common utility infrastructure, situated on the property. The Vendor, in a parallel covenant in paragraph 1 of the Sixth Schedule, undertakes a similar obligation in respect of the communal service media on the Retained Land. Paragraph 2 of each Schedule then contains provisions concerning the sharing of the costs of maintaining that common infrastructure. In paragraph 2 of the Fifth Schedule the purchaser covenants to pay the vendor a fair proportion of the costs of complying with its maintenance obligations, and there is a like provision in the vendor's covenants in the Fifth Schedule. Thus, by paragraph 2 of the Fifth Schedule the vendor covenants –

> "To pay to the Purchaser within 14 days of demand a fair proportion of the costs properly and reasonably incurred by the Purchaser in complying with its obligations contained in paragraph 1 of the Fifth Schedule such fair proportion being 33% of said costs shared on a one third basis between the owner of Lots 1 – 3 as shown on the Plan until such time as Lot 4 is developed and a dwelling house constructed thereon whereupon the fair proportion shall be 25% of said costs shared on a one quarter basis between the owner of Lots 1 – 4 as shown on the Plan."

33. Paragraph 2 of the respective schedules had originally simply read "To pay to the Vendor [Purchaser] within 14 days of demand a fair proportion of the costs properly and reasonably incurred by the Vendor [Purchaser] in complying with its obligations contained in paragraph 1 of the Fifth [Sixth] Schedule." However, that was changed during the negotiations to include the reference to the proposed dwelling house on Lot 4, so as to ensure that it also shared in the communal costs when built.

34. In my judgment that cluster of reciprocal obligations is very important as demonstrating that it was within the contemplation of the parties that at some point Lot 4 would be developed by the building of a dwelling-house. That is part of the contextual matrix against which Clause 6 falls to be construed.

35. Turning then to Clause 6 itself it was, as noted above, altered as part of a negotiation process during the final stages of drafting. In respect of it, I accept Mr. Hargun's submission that the use of "a" in the context "a dwelling house" denotes the singular, and means "one dwelling house". I do not think that that really needs authority, but it is supported by Crest Nicholson Residential (South) Ltd. v McAllister [2002] EWHC 2443 (Ch), at [15] where Neuberger J (as he then was) said:

> "First, as a matter of ordinary language, the indefinite article "a" tends to carry with it the concept of singularity as opposed to plurality. Restriction to use as "a private dwelling house" appears to me, at least in the absence of contextual or factual contra-indications, to mean restriction to a single dwelling-house."

36. Neuberger J also went on to hold that there was authority in support of that proposition, in the form of Dobbs v Linford [1953] 1 QB 48, although in doing so he rightly observed that "the invocation of authorities, in the context of an issue of interpretation of a particular contract or covenant, can be dangerous . . . ". I take that caution to heart, although there is force in the learned Judge's later observations in [30] "that it is not illegitimate to bear in mind the desirability of certainty and consistency in relation to the court's approach to the prima facie meaning of fairly common expressions in conveyances, leases, and, indeed, other types of document."

37. In this case there is nothing in the context to detract from the ordinary meaning of "a dwelling house", and indeed that conforms with the shared understanding of the parties in respect of Lot 4. I do not think that this is altered by the continuation of the Clause, which reads "and ensure that any new dwelling house constructed on the Retained Land shall be of traditional Bermudian design . . . ". Mr. Froomkin argues that "any" there connotes the possibility of multiplicity. I do not think that it does. It could have been better expressed. The form may in part be due to a hang-over from the original form of the paragraph. But in context to my mind it plainly means that if a new dwelling house is built then that building must comply with the requirements as to design, materials and impact, which follow. I do not think that it can sensibly be read as enlarging the number of possible dwelling houses from one. I find, therefore, that Clause 6 expressly prohibits any "new building" on the retained land except for one dwelling house.

38. The question then is where that dwelling house is to go. On the face of it, Clause 6 says nothing about that. However, Mr. Hargun argues that, in the context of the document when read as a whole, the permitted dwelling house allowed by Clause 6 can only be a reference to the proposed dwelling house on Lot 4. He relies upon the old rule that a clause in a deed should not be considered in isolation but should be construed in the context of the document as a whole, citing the following by Lord Watson at page 272 of Chamber Colliery Company Limited v Twyerould (1893) HL, which is reported as a note to Beard v Moira Colliery Company Limited at [1915] 1 Ch. 268:

> "I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

I accept that argument, although I think that the old rule as to deeds should nowadays be viewed as a particular application of the more general rules of interpretation formulated by Lord Hoffman, the document as a whole being an inseparable part of the 'matrix of fact' against which any given part of it must be construed.

39. Looking at the Conveyance as a whole, there is the plan, with its "Notional Building Position". That is the only indication of any proposed new building on the whole of the Retained Land. It is accepted by Mrs. Sinclair that the fact that a building was proposed for that Lot, and its siting, was discussed with the purchasers prior to the sale. There are also the reciprocal provisions in the respective paragraphs 2 of the Fifth and Sixth Schedules, which plainly envisage the construction of a dwelling house on Lot 4, when they say – "until such time as Lot 4 is developed and a dwelling-house constructed thereon". When that is all taken together I have no doubt that the reference to "a dwelling house" in Clause 6 is a reference to "the dwelling house proposed for Lot 4".

40. Of course it could have been expressed better. It would have been easy for the draftsman to have inserted into Clause 6 the words "on Lot 4" immediately after "residential nature", making it plain that that was where the permitted dwelling-house was to go. But as Neuberger J observed in Crest Nicholson Residential (South) Ltd. v McAllister (*supra*) at [14]:

> "As with any issue of constructions, other than where the answer seems plain, the fact that one can reformulate a particular interpretation so as to make it clear, can always enable the opponent of that interpretation to contend that, if that were the meaning intended, it would have been only too easy to express it in that way. As [counsel] sensibly accept, such an argument rarely takes a dispute as to construction further. The very reason that the question of interpretation is before the court is normally because the provision has not been as clearly drafted as it might have been."

41. Mr. Froomkin relies upon the *contra proferentem* rule, but I do not think that it avails him. To the extent that the rule survives, it is in my view a long-stop when the court is otherwise unable to ascertain the meaning of the contract. In this case there is no room for its application, the meaning of the provision being capable of objective ascertainment applying the ordinary rules of construction. In any event I consider that, for the purpose of the application of that rule, the vendor is properly to be regarded as the proferror of a conveyance, and it does not detract from that that the wording of a particular clause may have been suggested or required by the purchaser.

42. In paragraph 11 of the Counterclaim the defendant had advanced the argument that Clause 6 was intended to deal only with use, and not with construction. That was pleaded in support of the claim to rectification, and I assume that it falls away with that claim. However, to the extent that any such argument may still be advanced, I reject it on the facts. There had originally been separate paragraphs in the Fifth and Sixth Schedules dealing with user, by which the parties covenanted not to use Norwood or the Retained Land except for private residential purposes and not carry out any trade or business thereon. These covenants came out during the negotiation process, the purchasers preferring to deal with the question of user by a side-letter. This was to have been the same side-letter which addressed the question of the right of first refusal on the other lots, but it was never executed by Mr. Aeschliman. Against that factual background I consider that any argument along the lines advanced in paragraph 11 of the Counterclaim is insupportable.

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.

44. The plaintiffs also plead that the proposed addition to the Boathouse detracts from the visual prominence and amenity of Norwood and therefore contravenes the further provisions of Clause 6 that any new building should not do so. There was little evidence led on this, beyond Mrs. Tafur's opinion in paragraph 29 of her witness statement, and the photographic mock-up produced by the defendants' architects which is annexed to the Statement of Claim. The plaintiffs bear the burden of proof on this, and in the absence of more I do not think that they have discharged it. However, this was essentially an alternative to their main case, and given that I have come to the conclusion that there is an

absolute bar on any new building on Lot 3, my finding on this subsidiary issue does not affect the outcome in any way.

CONCLUSIONS

45. I therefore find that the covenant contained in Clause 6 prohibits any new building on any part of the Retained Land except for the proposed new dwelling house on Lot 4. I find that the proposed extension to the Boathouse, as approved in principle by the Minister of the Environment, is a new building and would, therefore, be in breach of Clause 6. I therefore grant the declarations sought in paragraphs 1 and 2 of the prayer to the Statement of Claim. For the reasons given above I refuse the declaration sought at paragraph 3. The claim for damages was, as noted at the outset, abandoned. For completeness, I dismiss the Counterclaim.

46. I will hear the parties on costs.

Dated this 5th day of July 2010

Richard Ground
Chief Justice