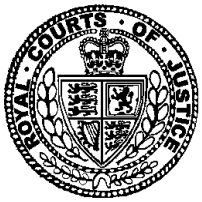

Neutral Citation Number: [2024] EWHC 439 (Ch)

Case No: CH-2023-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE ORDERS OF DEPUTY MASTER BOWLES DATED 28 APRIL 2023 AND 17 JULY 2023
CLAIM NO: PT-2022-000440

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

Date: 01/03/2024

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

- -

Between :

KAREN REEVE

Appellant

- and –

(1) AIDAN GREGORY MCDONAGH
(2) TAMARA SUSAN JULIET MCDONAGH

Respondents

- -
- -

Mr Charles Auld (instructed by **Nalders LLP**) for the **Appellant**
Mr Tom Weekes KC (instructed by **McDonaghs Solicitors Limited**) for the **Respondent**

Hearing date: 14 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00 am on 1 March 2024, by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE JOANNA SMITH DBE

Mrs Justice Joanna Smith :

1. This is the hearing of an appeal from orders made by Deputy Master Bowles ("**the Master**") following the trial of a Part 8 Claim, commenced by the Respondents to this appeal, seeking relief under section 84(2) of the Law of Property Act 1925 ("**the LPA**"). On 28 April 2023, the Master declared upon the true construction of a covenant ("**the 1958 Covenant**") contained in a transfer dated 24 January 1958 ("**the 1958 Transfer**"), determining that it does not prevent the Respondents from replacing their existing house pursuant to the grant of planning permission. On 17 July 2023 he ordered that the Appellant should pay the Respondents' costs of the proceedings.

The Background

2. The Master dealt with the background facts, which are not contentious, although they are somewhat convoluted, in paragraphs [1]-[9] of his judgment. They are as follows:

3. In the 1920s, a housing estate (comprising vacant plots) was laid out in Poole. A big house called Barnwood together with a small lodge (known as "The Lodge") was built on one plot at the junction of Brudenell Avenue and Brudenell Road some time before World War II. The Lodge was situated close to the eastern boundary of the plot to the south of Barnwood. From the available plans, Barnwood appears to have had a terrace or veranda from which its residents could enjoy sea views downhill to Poole Harbour, Brudenell Road being only one road back from the shore-line.

4. By the 1958 Transfer, Mr Gordon Saul (then the freeholder of Barnwood) retained for himself The Lodge and the southern section of the plot, while he sold Barnwood and the northern section of the plot to Mr Herbert Donaldson, thereby dividing the plot in two. The Lodge itself formed only a relatively small part of the land retained by Mr Saul. There is no available copy of the 1958 Transfer but Entry 4 to the Charges Register of the Respondent's registered freehold title records that Mr Saul (as transferor) entered into the following covenant with Mr Donaldson (as transferee):

> "…the Transferor for himself and his successors in title to benefit [Barnwood] and to bind [the Lodge] hereby covenants with the Transferee that **no additional buildings whatsoever shall at any time be erected on [the Lodge]**" (**emphasis added**).

5. It is common ground before me, and it was accepted by the Master in [23] of his judgment, that at least part of the purpose of the 1958 Covenant was to protect the sea views available in 1958 from Barnwood.

6. At some time between 1958 and 1988, The Lodge was renamed Rose Cottage which explains why the Master's judgment sometimes refers to "The Lodge/Rose Cottage". For the purposes of this judgment I shall refer to it hereafter as Rose Cottage.

7. On 6 June 1988, the then freeholders of Barnwood (Mr and Mrs Roger Grigg) and Rose Cottage (Mr Thompson and Ms Henty) entered into two transfers ("**the 1988 Transfers**"), whose material effect was as follows. Dividing the Rose Cottage plot north/south, Mr Thomson and Ms Henty transferred to Mr and Mrs Grigg the western section of the Rose Cottage plot, leaving for themselves a relatively narrow strip of

land, on which Rose Cottage was situated, running along the entire eastern boundary of the plot. The transferred section was itself divided east/west into two further plots with the plot adjoining the existing Barnwood site coloured blue on the relevant plan ("**the Blue Land**") (the expectation being that it would be incorporated into Barnwood's garden) and the southern most plot coloured pink ("**the Pink Land**") (with the expectation that a new house would be constructed there). The Pink Land and the Blue Land are marked clearly on a plan annexed to a Trust Deed entered into by the parties on the same date.

8. It is common ground that under the doctrine of unity of seisin, the 1958 Covenant was extinguished by the 1988 Transfers as it affected the Blue and Pink Land, but remained in force as it affected Rose Cottage and the retained garden land immediately surrounding Rose Cottage.

9. By a Deed intended as "supplemental" to the 1988 Transfers and entered into on the same day ("**the 1988 Deed**"), which the Master described as part of "the overall arrangements" between the two sets of freeholders, Mr and Mrs Grigg granted to Mr Thompson and Ms Henty at clause 3:

> "…the right to erect a rear extension at the side of [Rose Cottage] to form a garage and at first floor to form a dining room and kitchen and to convert the existing garage at the said property to a bedroom in accordance with the plan annexed to a grant of planning permission in respect thereof dated the 23rd day of December [1985] together with a pitched roof on the said extension and the [1958 Covenant] relating to the erection of additional buildings on the [Rose Cottage land] shall be deemed to be modified pursuant to the terms of this clause…"

10. The Deed went on to provide at clause 4 that:

> "Save as modified by clause 3 hereof it is hereby agreed and declared that [the 1958 Covenant] contained in [the 1958 Transfer] shall remain in full force and effect".

11. At paragraph [7] of his judgment, the Master explained that:

> "While it is common ground between the parties, that the apparent construction placed upon the 1958 covenant, by the parties to the 1988 deed, namely that, unless and to the extent modified by the 1988 deed, it prohibited any extension, or addition, to the original Rose Cottage building, cannot, in itself, afford any guidance to the proper construction of the 1958 covenant, it is contended, on behalf of Ms Reeve and as explained later in this judgment, that the construction of the covenant, as understood and as acted upon by the parties to the 1988 deed, estops the parties, as privies and successors to the parties to the 1988 deed and, in particular, estops Mr and Mrs McDonagh, from asserting a construction of the 1958 covenant which is inconsistent with the construction of that covenant adopted and applied by the parties in 1988.

12. The Pink Land (now known as 1a Brudenell Road) was sold by Mr and Mrs Grigg to a developer in 1990 and a new house was erected on the site. The transfer to the developers, Duncan Estates Ltd, contained restrictive covenants referred to by the Master in his judgment at [8]. Nothing is said to turn on them. I note, however that, in so far as they seek to protect sea views from Barnwood, the Master observed that they replicated earlier covenants, for the protection of sea views (including covenants restricting the height of any house or building on the land), contained in earlier conveyances in 1924 and 1926 involving the sale of land, of which Barnwood and The Lodge formed only part. These earlier conveyances are not available at this remove of time, but it is common ground between the parties that although the covenants from these conveyances would have been recorded on the face of the Property Register for Barnwood and Rose Cottage at the time of the 1958 Transfer (and remain on the Property Register now) and so would have been within the knowledge of the parties to that transfer, they would likely have lapsed by that time and/or it would have been impossible to identify with any certainty the identity of the beneficiary of those covenants and/or they were likely not enforceable.

13. In about 2009 or 2010, the freeholder of Barnwood demolished the existing house and replaced it with two new houses, now known as 4 Brudenell Avenue (on the west side of the plot) and 4a Brudenell Avenue (on the east side of the plot immediately to the north of Rose Cottage). Each of these properties has the benefit of the 1958 Covenant.

14. Rose Cottage (whose address is 1 Brudenell Road) was transferred to the Respondents on 18 July 2018 and is subject to the 1958 Covenant which is registered as Entry 4 in the Charges Register. The Appellant purchased 4a Brudenell Avenue in June 2021. The benefit of the 1958 Covenant is registered as Entry 2 in the Property Register.

15. On 26 October 2021, the Respondents obtained planning permission reference APP/21/01090/F ("**the Planning Permission**") to demolish Rose Cottage and to erect a bigger house ("**the Proposed Development**"). The Proposed Development, at just over 417m², is very substantially bigger than Rose Cottage, at 147m², and will occupy almost the whole of the Rose Cottage plot. I understand that as at the date of this appeal, Rose Cottage has been demolished and foundations laid for the Proposed Development.

The Appeal

16. With the permission of this court, the Grounds of Appeal are threefold:

    i) that the Master was wrong to determine that the 1958 Covenant does not prevent the Respondents from carrying out the development authorised by the Planning Permission and that he should have found that, on a true construction of the 1958 Covenant, the carrying out of the Proposed Development would be a breach of the 1958 Covenant.

    ii) in the alternative, that the Master was wrong to hold that no estoppel arose from the execution by the parties' respective predecessors in title of the 1988 Deed. He should have found that the Respondents are estopped from asserting a construction of the 1958 Covenant which is inconsistent with the construction "adopted and applied" by the parties' respective predecessors in title. In particular he should have held that the Respondents cannot now assert that the Proposed Development does not breach the 1958 Covenant.

iii) if, however, the Master was correct to find that the 1958 Covenant does not prevent the Respondents from carrying out the Proposed Development, he was wrong to order that the Appellant should pay the Respondents' costs. He ought to have applied the "normal" costs rule applicable to an application under section 84(2) LPA and ordered that the Respondents should pay the Appellant's costs, assessed on the indemnity basis, until the 28 September 2022 and that, thereafter, there should be no order as to costs.

17. By a Respondents' Notice, the Respondents seek to uphold the Master's decision on estoppel on different grounds.

Ground 1 – Interpretation of the 1958 Covenant

18. The Master decided that on its true interpretation, the 1958 Covenant does not prevent the Respondents from implementing the Planning Permission, observing at [35] that this conclusion reflected the proper construction of the 1958 Covenant "having regard to its language and context". The Master summarised his understanding of the legal principles relevant to the question of construction in a case such as this at paragraphs [19] and [20] of the judgment, and no criticism is made of that summary. However, the Appellant contends that his application of those principles was wrong, and caused him to arrive at an erroneous interpretation of the words used in the 1958 Covenant.

19. The competing constructions advanced by the parties were recorded by the Master in paragraphs [10] and [11]. The Appellant submitted (as she does before this court) that any building erected on the land that is the subject of the 1958 Covenant, whether in addition to, or replacement of, the original Rose Cottage, constitutes an additional building, for the purpose of the covenant, since such a new building would be "additional" to the building which was on the land in 1958. She also advanced a secondary submission, namely that even if a replacement building is not caught by the 1958 Covenant, any building work extending beyond the envelope of the original Rose Cottage would be restricted. I shall refer to these submissions together as "**the Appellant's Construction**".

20. The Respondents submitted, on the other hand, that the 1958 Covenant was intended to apply only to the erection on the land that is subject to that covenant of "buildings additional to Rose Cottage"; it does not restrict the erection of a building in replacement of Rose Cottage and it does not impose any limitations on the extent, size or footprint of any building erected by way of replacement of Rose Cottage. To find otherwise would be "absurd", not least because it would preclude the replacement or substitution of Rose Cottage in the event it were to be destroyed by fire or had merely reached the end of its natural life. I shall refer to this as "**the Respondents' Construction**".

21. The Master preferred the Respondents' Construction, explaining his reasons at [21]-[34]. Without setting those out in full, I can summarise by saying that at paragraphs [21]-[26] the Master made (unchallenged) findings as to four surrounding circumstances which he regarded as relevant to the construction, namely (i) the importance of the preservation of sea views from Barnwood which he described as "a material consideration for the owners of Barnwood", rejecting the Respondents' submission that the 1958 Covenant was "solely a density covenant"; (ii) the fact that at the time of the 1958 Covenant, Rose Cottage formed only a "relatively small part of the land subjected to the covenant, which land was otherwise clear of any other buildings";

(iii) the fact that the 1958 Covenant did not form part of "a building scheme" and so was not imposed by a developer to enhance the value of land with the benefit of the covenant, but was instead entered into by Mr Saul in respect of his own retained land; and (iv) that at the time of the 1958 Covenant there was "some scope for releasing Mr Saul, or the subsequent owners of Rose Cottage, from the full rigours of the covenant, as construed [by the Appellant] by way of application, as at that date, to the Lands Tribunal" pursuant to section 84(1) LPA to modify or discharge the covenant. I pause to observe that it was the Respondents' submission at the appeal that any comfort that Mr Saul would have gained from this would, however, have been minimal.

22. Against that background the Master said he was satisfied that the 1958 Covenant did not have the reach contended for by the Appellant, essentially because (i) the natural and ordinary meaning of the words used in the 1958 Covenant supported the Respondents' Construction (paragraph [28]); (ii) the focus of the parties at the time would have been to protect Barnwood from any new building on the unbuilt bulk of the retained land (paragraph [30]); (iii) if the parties had intended a construction consistent with the Appellant's Construction they would have said so in terms (paragraph [32]); (iv) it is inherently unlikely that Mr Saul would either have agreed to a covenant in such terms (paragraph [33]) or that he would have intended to fetter the use of his own land to the extent contended for by the Appellant (paragraph [34]).

The Approach to Construction

23. The general principles of contractual interpretation (summarised correctly by the Master) are well known and have been set out in a trio of Supreme Court authorities. I was referred in particular to *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, per Lord Neuberger at [14] to [23]. There is no need for me to set those principles out again here. Suffice to say for present purposes that Mr Auld, on behalf of the Appellant, emphasised that amongst the factors to be considered when examining what a reasonable person (having all the background knowledge which would have been available to the parties) would have understood the language to mean, was the overall purpose of the clause.

24. In this context, Mr Auld submitted that restrictive covenants are taken for a purpose and that it is therefore both legitimate and important to approach the exercise of construction by seeking to determine what that purpose is. He relied upon the following extract from *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365, a Court of Appeal case involving the construction of a restrictive covenant, per Lord Donaldson at 388:

> "…I have no doubt that the general guidance contained in the judgment of Lindley LJ in *Rolls v Miller*, 27 Ch.D. 71, 87 as to the approach to be adopted is still good law. He said:
>
> 'Now the first question to be considered is what is the object of this covenant? The covenant must be construed consistently with that object, and on the other hand, something may fall within the scope of the covenant which does not fall within the words. One must look, therefore, at both the words and the object.'

> In other words, if the covenant is to require or prevent a particular course of action, it must fall within both the object and words of the covenant".

25. Mr Auld accepted that if the Appellant's proposed construction of the 1958 Covenant could not be brought within its words, then its purpose would not be determinative, but he submitted that if there is ambiguity, then the purpose is an important factor to be taken into account. I did not understand Mr Weekes KC, on behalf of the Respondents, to disagree with this.

26. However, Mr Weekes drew my attention to the following cautionary words of Neuberger LJ (as he then was) in *GLN (Copenhagen) Southern Ltd v Tunbridge Wells Borough Council* [2004] EWCA Civ 1279, a case involving the interpretation of restrictions preventing the use of land as a cinema or for purposes ancillary thereto, (at [51]):

> "…While deprecating the notion that one should construe a covenant in an artificially narrow way simply because it is restrictive of the use to which an owner can put his property, I am of the view that a restrained, rather than a generous interpretation of such a covenant is normally appropriate".

27. Mr Weekes described this as an application of the "clear words principle", namely that if a construction would produce an unfair result, the court will often require clear words to support the construction in question (see Lewison: *The Interpretation of Contracts* (7th Ed, 2020 at 7.169 – 7.174)). He submitted that it was justified in the case of a restrictive covenant where there was obvious potential for unfairness or prejudice to the covenantee if an overly generous interpretation was placed on the provision (i.e. an interpretation which had the effect of widening the restrictions on what the covenantee could do with his land). The Appellant did not seek to challenge the correctness of this approach in the context of restrictive covenants.

Decision

28. Having considered the submissions made by the parties with care, and bearing firmly in mind the principles of construction to which I have referred, I cannot see that the Master erred in concluding that the 1958 Covenant does not prevent the Respondents from carrying out the Development. I, too, prefer the Respondents' Construction. My reasons are as follows.

The Natural and Ordinary meaning of the Words

29. I agree with the Master that the natural and ordinary meaning of the words of the 1958 Covenant, read in context, is that the covenantor, by covenanting that "no additional buildings whatsoever" should "at any time be erected on" his retained land, promised no more than that no buildings in addition to, in the sense of 'as well as' the already existing building (Rose Cottage), should be erected on that land (Judgment para [28]).

30. The word "buildings" in this context is plainly not intended as a verb – it is not referring to building work. I agree with the Respondents that the ordinary meaning of the words "additional buildings" is to convey the impression of 'further' or 'ancillary' structures.

In other words, separate structures built on the retained land which are additional to the existing building (Rose Cottage), such as a new freestanding garage or a holiday cottage. In my judgment (as the Master held) the words "additional buildings" do not naturally or obviously convey an intention that Rose Cottage itself would be affected by the covenant.

31. Specifically, those words are not apt:

    i) to convey an intention that no change (by way of building work) may be made to the existing building, i.e. Rose Cottage. Mr Auld's primary submission is that even a replacement or substituted building is "an additional building". He argues that the replacement of Rose Cottage will have the practical effect that there will be a building on the plot in the form of the Development which was not present in 1958, such that it will be "additional" to the original building. He makes a similar point in relation to the building of an extension to Rose Cottage. However, in my judgment, this is a construction that depends upon straining the meaning of the words "additional buildings" to cover scenarios (such as a "replacement building" or the building of an extension) which stray beyond their natural and ordinary meaning.

    ii) to cover the Appellant's "fall back" position that, while the words of the 1958 Covenant permit the replacement of Rose Cottage with an exact facsimile, they do not cover any building work, whether it be an extension or a larger replacement building, which extends beyond the original envelope of Rose Cottage. This construction is, in my judgment, equally strained. As I observed to Mr Auld during submissions, the point might have a little more traction if the words of the 1958 Covenant said "additional building", which might be interpreted as covering all additional construction work, but that is not what they say.

32. Mr Auld submitted that the 1958 Covenant was "remarkably strong and fixed", by which he meant that it precluded any building on the land at Rose Cottage "whatsoever", including building work in relation to Rose Cottage itself. While I agree with Mr Auld that the word "whatsoever" adds a particular emphasis to the phrase "no additional buildings whatsoever", I reject his suggestion that it somehow conveys an intention that nothing on the Rose Cottage site would ever change, including Rose Cottage itself. I agree with the Master that if the parties had intended to preclude the replacement of Rose Cottage by a substitute building, or to place limits upon the size and footprint of any replacement building, or to preclude any alteration, or extension of Rose Cottage, one would have expected the covenant to make that clear. The use of the word "whatsoever" is wholly inadequate for such purpose. To my mind its presence is designed instead to emphasise that there should be no more than one building on the Rose Cottage plot.

The Purpose of the 1958 Covenant and the facts and circumstances known to the parties

33. Unfortunately the original 1958 Transfer is not available and so it is impossible to take a step back and examine the 1958 Covenant in the context of the transfer document as a whole. However, it is possible to make some deductions as to its likely purpose (as the Master did) having regard to the circumstances pertaining at the time of the transfer.

34. The 1958 Covenant was imposed by Mr Saul on Rose Cottage at the time of selling off Barnwood. As the Master said, at that date, the bulk of the retained land (i.e. the garden of Rose Cottage) was "open and unbuilt" and afforded Barnwood sea views which would have been important to the then purchasers. Looking at the plan of the two plots from that date, Barnwood's view across the Rose Cottage plot was largely unobstructed: Rose Cottage lay to the south east, and so, looking from Barnwood's veranda, it was the Rose Cottage garden that was immediately in front and downhill from Barnwood. I agree with the Master that a covenant which stopped any additional building on that expanse of garden and "protected…both the existing views from Barnwood and also precluded any overbuilding on Mr Saul's retained land, would have provided the purchaser of Barnwood with both the protections which…a purchaser in such circumstances, would have been likely to have required" (judgment at [29]).

35. When the Master said (at [23]) that the 1958 Covenant was not solely a "density covenant", but was also intended to protect sea views, I understand him to have meant that the 1958 Covenant was effectively designed to achieve the two (complementary) aims he identified in [29]. I reject Mr Auld's submission that this was in any way inconsistent with the Master's interpretation of the wording of the 1958 Covenant. That submission appears to me to suffer from the application of hindsight (something Mr Auld himself warned against). It is based on the proposition that absent any restriction on building work to Rose Cottage itself, the purpose of retaining sea views and restricting overbuilding is wholly undermined. However, that is to focus on the Rose Cottage site as it now is: a much-diminished plot of land occupying a strip on the eastern side of the original plot. This is the very point that the Master clearly had in mind in the judgment at [30] when he observed that the protection afforded by the 1958 Covenant was destroyed, not by the Proposed Development, but by its release in respect of the bulk of the retained land consequential upon the purchase of that land by the then owners of Barnwood in 1988.

36. Accordingly, I reject Mr Auld's submission that the Respondents' Construction does not reflect the desired purpose of the covenant, or that it would render the covenant "entirely useless" in the sense of removing its ability to provide the required protections. Of course there was a risk that Rose Cottage might be replaced with something bigger, but the covenant would still preclude its replacement with more than one building, thereby continuing to afford some protection in respect of the sea views together with preventing harm to the amenity of Barnwood from mass development, or sub-division of the site.

37. Mr Auld submitted that a vendor in the position of Mr Saul would not want to impose a covenant on his own land unless it was necessary to do so. I agree, but to my mind that is also an argument for the proposition that the 1958 Covenant is likely to have a narrow reach.

38. As the Master observed, the 1958 Covenant did not form part of a building scheme designed by a developer to protect the quality and value of plots put out for sale (judgment at [25]). It was a private sale. Mr Saul was selling Barnwood, thereby bringing about a sub-division of the existing plot. It seems to me to be a reasonable inference that the process of arriving at the terms of sale would have involved a negotiation. In particular, I reject the submission made in the Appellant's skeleton that Mr Saul would have had no option other than to agree to an "absolute covenant"

imposing a perpetual restriction on all building work on the Rose Cottage land. Given that Mr Saul was the seller, this appears to me to be unreal.

39. On the one side in that negotiation would be the need for protection for Barnwood from any further buildings on the land at Rose Cottage which might impede its sea view (or as the Master put it, "any new building on the unbuilt bulk of the retained land" at [30]), including protection against the sub-division and sale of that land for additional houses (which must have been a potential prospect at that time, given that, in this transaction, Mr Saul was himself sub-dividing the Barnwood plot). On the other side were the interests of Mr Saul, who was retaining Rose Cottage for himself.

40. Having regard to that factual matrix, I consider it to be most unlikely that the parties, or reasonable people in the position of the parties, would have intended the 1958 Covenant to preclude (for ever) building work of any description to Rose Cottage itself. Not only would such a covenant have severely impeded the vendor's ability to carry out any works he might choose to Rose Cottage (including works required to replace Rose Cottage in the event of, by way of example, a fire or collapse due to subsidence), it could also have had far-reaching consequences on the use and value of the land (as the Master recognised at [32] and [34] of the judgment). As he said, "[s]uch a covenant would constitute such a major interference with Mr Saul's rights in respect of his own land that, if intended by the parties, the clear expectation must be that explicit and specific words, to that effect, would have been used".

41. I respectfully agree. In my judgment (taking first the Appellant's primary construction), it is inconceivable that the parties could have intended that the land would remain bare in the event of Rose Cottage being destroyed by fire or falling into ruin and being demolished: "…houses do not last for ever and therefore re-building was inevitable at some point" (*HAE Developments Ltd v The Croft Ealing Ltd* [2023] 2 P&CR 12 at [93]). Even on the Appellant's secondary construction, the suggestion that a houseowner will never do anything at all which involves building outside the envelope of an existing house is extremely restrictive. I consider it most unlikely that reasonable parties in the position of the parties to the 1958 Transfer would have entered into such an agreement.

42. I do not consider the words of the 1958 Covenant to be ambiguous but, if they are, then the potentially draconian effect of the Appellant's Construction supports, in my judgment, "a restrained, rather than a generous, interpretation" of that covenant.

43. In his reply submissions, Mr Auld suggested that the existence of the covenants in the 1924 and 1926 transfers restricting the height of all building work on the Rose Cottage site[1] was a potentially relevant part of the background matrix because, although they were unenforceable by Barnwood, "the draftsman of the 1958 Covenant could have copied [them] but did not". I understood him to pray this in aid of the far-reaching Appellant's Construction. However, to my mind, if anything, this submission appears to me to provide support for the Respondents' Construction. Knowing of the wording of the previous covenants from the 1920s, the parties to the 1958 Covenant chose not to enter into a "blanket" restriction on the height of development or on the works that

[1] "…no house or building should be erected on the land to which these covenants relate containing more than one storey above the ground floor".

could be done to Rose Cottage itself. Instead they deliberately sought to protect only against "additional buildings".

44. Finally, I do not consider that the existence of a statutory entitlement to seek a discharge or modification in respect of the 1958 Covenant (pursuant to section 84(1) LPA, as then in force) weighs heavily in the balance, notwithstanding Mr Auld's submissions to the contrary. The Master found, and I acknowledge, that there would have been some scope for obtaining a release from the 1958 Covenant pursuant to section 84(1) LPA and it appears to be common ground that this is relevant factual background which would have been within the knowledge of both parties to the transfer. However, I agree with Mr Weekes that the provisions of section 84(1) LPA as they stood at the time (paragraph (aa) not yet having been enacted) would have provided little comfort to a reasonable party in the position of Mr Saul owing to the discretionary nature of the jurisdiction and the very limited nature of the available grounds for modification. I certainly do not consider that the potential for modification would have featured large in the intentions of the parties and it certainly does not persuade me that there is a need to depart from the natural and ordinary meaning of the words.

Commercial Common Sense

45. The Appellant submits that the Respondents' Construction is "absurd" and contrary to commercial common sense. She says that, if the Respondents' Construction is correct, it would in theory have been possible for Mr Saul to have knocked down Rose Cottage and erected a block of flats anywhere on the Rose Cottage plot immediately after the 1958 Transfer (subject to planning constraints).

46. I am not swayed by this submission. As Lord Neuberger made clear in *Arnold v Britten* at [17]:

> "…reliance…on commercial common sense and surrounding circumstances…should not be invoked to undervalue the importance of the language of the provision which is being construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously gleaned from the language of the provision".

47. To my mind the language of the 1958 Covenant is clear. That, theoretically, Mr Saul could have demolished Rose Cottage and built a block of flats or a multi-storey hotel (subject to planning restrictions) is not a reason for departing from the natural language of the covenant, nor does it justify a conclusion (as I have explained) that the purpose of the covenant is entirely undermined. In the circumstances that now prevail, the Appellant is unhappy with the Proposed Development, which will substantially increase the size of Rose Cottage, but as Lord Neuberger went on to say at [19]:

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties, is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been

> perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

48. Finally, I should address a couple of discrete submissions made by the Appellant as to alleged errors made on the part of the Master (in so far as they raise issues that I have not already addressed):

    i) First, Mr Auld submitted that, in [28] of the judgment, the Master overlooked the fact that the 1958 Covenant continued to apply to the garden land around Rose Cottage at 1 Brudenell Road and that this was an error. I disagree. When the Master said that the covenant was "not a covenant about" Rose Cottage, he was merely identifying that the covenant was not a covenant that was intended to preclude building work to Rose Cottage, including its replacement. He made this abundantly clear in the final sentence of that paragraph when he said "[the covenant] was about the building of additional buildings, other than the Lodge/Rose Cottage, **and the preclusion of such building on Mr Saul's retained land**" (**emphasis added**).

    ii) Second, Mr Auld submitted that the Master supported his conclusions on construction by reference to the subjective intentions of the parties in 1958, referring specifically to paragraphs [30]-[34] of the judgment. Mr Auld is of course right to say that the subjective intentions of the parties are to be disregarded in any exercise of construction (*Arnold v Britten* at [15]), but I do not read the Master's judgment as relying on subjective intention. There is of course no evidence of what the parties in fact thought at the time. His observations to the effect that "it is highly unlikely" that the parties/or Mr Saul would have intended a certain outcome and that "if the parties had intended" a particular outcome "one would have expected the covenant to say so" appear to me to be entirely conventional. They form part of the analysis as to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language of the contract to mean.

Conclusion on Ground 1: Construction of the 1958 Covenant

49. The Appellant's Construction requires the court to depart from the natural and ordinary meaning of the words of the 1958 Covenant and, effectively, to read in words that are not there. The court is unlikely to take such a step unless there are very good reasons to do so, but there is none here. Indeed the consequence of departing from the natural and ordinary meaning of the words would be to accept an absolute restriction on any replacement or extension of Rose Cottage, which is such an extreme outcome that, absent very clear words indeed, it cannot possibly have been intended.

50. The Respondents' Construction, accepted by the Master, reflects the natural and ordinary meaning of the existing words and is entirely consistent with the purpose of the covenant, having regard to the surrounding circumstances at the time of the 1958 Transfer. That the covenant would not have restricted the replacement of Rose Cottage by a much more substantial building does not, to my mind, diminish the extent to which it would have been perceived as protective by reasonable parties at the time.

51. Ground 1 of the Appeal is dismissed.

Ground 2 – Estoppel

52. By way of alternative, the Appellant asserts an estoppel at the time of entry into the 1988 Deed, as explained by the Master in his judgment at [6]-[7]. It is clear from the judgment (at [15]) that the Master was focussing on an alleged estoppel by convention, which, it is common ground, is a reliance-based estoppel. At [17] of the judgment, the Master rejected the possibility of estoppel, finding an absence of detrimental reliance.

53. At the hearing of the appeal, it became clear that the Appellant is pursuing this ground on the basis of estoppel by deed or by contract, which it was acknowledged really amount to the same thing. This form of estoppel does not require detrimental reliance and was not addressed by the Master in his judgment. Neither counsel was able to remember whether it had been argued before the Master, although they both accepted that, if it had been argued, he had not dealt with it (because he had focussed only on estoppel by convention).

54. In any event, the Respondents do not take issue with the point being raised on appeal. They seek to rely upon their Respondents' Notice as to the different or additional grounds on which this court should uphold the Master's decision (namely that there is no estoppel by deed or by contract that would prevent the Respondents from replacing Rose Cottage). If permission to rely upon an argument based upon estoppel by contract/deed is needed because the matter was not raised below, I am content to grant permission for it to be argued on the appeal.

The Law

55. There was nothing between the parties as to the law. Estoppel by deed is a sub-species of contractual estoppel (see *Richards v Wood* [2014] EWCA Civ 327 per Lewison LJ at [16]). They operate in similar ways. At their heart is the principle that the parties to a contract may agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. If the agreement is made under seal, or if consideration moves from both sides, then as long as the agreement as to the state of affairs is made with the necessary contractual intention, it will bind both sides. The upholding of a contractual estoppel or estoppel by deed is thus simply the enforcement of a contractual term and the question of what that term is will be a matter of construction for the court. There need be no mistake or misrepresentation and no detrimental reliance. (See Spencer Bower: Reliance-Based Estoppel (5th Ed, 2017) at 8.67-8.69 and 8.79-8.80).

56. Mr Weekes drew my attention to *PW&Co v Milton Gate Investments Ltd* [2004] Ch 142 per Neuberger J at [148], [149], [152] and [155]-[156]:

> "148. The principle of estoppel by deed is explained in summary form in Halsbury's laws of England, 4th ed reissue, vol 16 (1992), para 1018:
>
> 'Estoppel by deed is based on the principle that, when a person has entered into a solemn engagement by deed as to certain facts, he will not be permitted to deny any matter which he has so asserted…The averment relied upon to work an estoppel must be

> 'certain to every intent' without any ambiguity, but may be contained in the recital or in any part of the deed'.
>
> 149. Estoppel by deed differs from estoppel by convention, not only by virtue of the relatively restricted circumstances in which it can arise (as described in the passage I have just quoted), but also in that it requires no subsequent conduct or any other act of reliance by the party invoking the estoppel…
>
> 152. …In *Greer v Kettle* [1938] AC 156, 170 Lord Maugham said, after referring to the fact that the court had decided that an estoppel by deed can arise from a recital in a deed: 'Subsequent cases laid down that the recital must relate to specific facts, must be certain, clear and unambiguous, and would not avail persons who were not parties or privies to the deed…
>
> 155. It may, at least at first sight, seem out of keeping with the modern, relatively flexible view of estoppel that such a strict approach should be adopted to any type of estoppel. However, as I have mentioned, unlike other estoppels, an estoppel by deed will, if its strict conditions are satisfied, normally operate as an estoppel without more…An estoppel by deed is described in Halsbury, vol 16, para 1018 as 'a rule of evidence', and there is, therefore, normally no question of considering the issue unconscionability, which looms so large in relation to other estoppels, including estoppel by convention.
>
> 156. In those circumstances, it is not hard to understand why the court should tend to limit the ambit of estoppel by deed. After all, if a provision in a deed…is sufficient to indicate a common understanding or common assumption, then, if there is subsequent conduct based on that understanding, such that it would be unconscionable for one party to resile from the common understanding, then estoppel by convention would frequently come into play."

57. It is clear that the ambit of estoppel by contract and estoppel by deed is limited. It must be possible to extract a clear statement of fact from the deed or contract together with an intention by the parties to bind themselves to that statement. An unexpressed assumption underlying the drafting of a contract or deed will only be sufficient if it amounts to an agreement which is necessarily implicit in the express terms of the deed (see Spencer Bower at 8.88(4)).

58. Neither party drew my attention to the fact that the operation of an estoppel by deed is limited to actions founded on the deed (because the agreement of the parties made by assent to the relevant recital is interpreted as agreement to admit the proposition recited only for the purposes of the deed and the transaction effected thereby (Spencer Bower at 8.86)). To my mind, this would appear to cause a significant difficulty for the Appellant's case of estoppel by deed. However, assuming I am wrong about that (and I heard no argument on the point), I nevertheless consider that the Appellant's case on estoppel fails in any event.

59. The Appellant's case is that, by reason of the terms of the 1988 Deed to which I have already referred, the Respondents (as successors in title) are estopped from denying that the 1958 Covenant (i) precludes the right to *extend* Rose Cottage; and (ii) precludes the right to build *outside the envelope* of Rose Cottage. This is because it is said that the parties to the 1988 Deed jointly acted on a shared understanding that "the proposed extensions could be prohibited by the 1958 Covenant".

60. The Appellant does not contend, as Mr Auld made clear in his reply, that there is an estoppel in relation to the *replacement* of Rose Cottage. For this reason, I consider the Respondents' Notice, which focuses only on the reasons why there can be no estoppel in relation to the replacement of Rose Cottage, to address the wrong issue.

61. In any event, the Appellant's case is, in my judgment, unsustainable because:

i) The 1988 Deed records the agreement by which Mr and Mrs Griggs granted to Mr Thompson and Ms Henty the right (1) to erect an extension to form a garage; (2) to form a dining room and kitchen at first floor level; (3) to convert the existing garage to a bedroom; and (4) to construct a pitched roof on the extension.

ii) Pursuant to that agreement it was also agreed that the 1958 Covenant "shall be deemed to be modified" to enable the proposed works to go ahead lawfully, but that otherwise it would remain in full force and effect. On the interpretation of the 1958 Covenant that I have accepted, this deeming provision was, in fact, unnecessary because the proposed works would not have breached the covenant in any event.

iii) There was no unambiguous agreement as to the true interpretation of the 1958 Covenant, much less any unambiguous agreement as to the meaning of the words "additional buildings". There may have been an unexpressed assumption that (unless amended) the 1958 Covenant would preclude the proposed works. However, I reject the submission that that is necessarily implicit in the words used by the parties.

iv) It is not clear which of the works it was thought might be covered by the 1958 Covenant, just as it is not clear whether the decision to "deem" the 1958 Covenant to be "modified" came about by reason of (i) a shared agreement that the 1958 Covenant precluded the planned works (or some of them), such that a deeming provision was necessary to relax the terms of the covenant, or (ii) a disagreement, or at least uncertainty over the scope of 1958 Covenant, such that the parties thought it necessary or prudent to resolve the disagreement/uncertainty by providing for the modification of the 1958 Covenant to permit the planned works. There is nothing in the words used by the parties to enable me to determine this issue one way or another, and so nothing to enable me to find an implicit agreement which the parties to the 1988 Deed have agreed without saying.

v) I agree with the Respondents that the 1988 Deed had the practical effect of making clear, or putting beyond doubt, that notwithstanding the 1958 Covenant, Mr Thompson and Mr Henty could carry out their proposed works lawfully. I do not accept, however, that it evidences a "certain, clear and unambiguous"

agreement as to the scope of the 1958 Covenant, specifically that (as the Appellant contends) the 1958 Covenant precludes building works to Rose Cottage which extend beyond its existing envelope. At best, the 1988 Deed evidences the existence of a preparedness to enter into an agreement which puts beyond doubt the lawfulness of the proposed works. It is not possible to say that there must have been a shared assumption or agreement as to the scope of the 1958 Covenant, much less to say that it is clear that the parties intended to be bound by that assumption or agreement. I reject the Appellant's case that the words used in the Deed are sufficient to give rise to the estoppel (whether contractual or by deed) for which she contends.

Conclusion on Ground 2: Estoppel

62. For the reasons I have given, I reject the Appellant's case that, if she is wrong in her interpretation of the 1958 Covenant, nevertheless the Respondents are estopped from contending that the 1958 Covenant did not preclude building work that extended beyond the envelope of the existing Rose Cottage structure.

63. Ground 2 of the Appeal is accordingly dismissed.

Costs

64. Having found in favour of the Respondents, and made a declaration accordingly, the Master then heard argument on the question of costs on 17 July 2023 and determined that the Appellant should pay the Respondents' costs, to be the subject of detailed assessment on the standard basis if not agreed. He ordered a payment on account of those costs in the sum of £35,000.

65. The Master's reasons appear from a transcript which the parties have put together from their notes of his short *ex tempore* judgment. In essence, the Master:

    i) recognised that there is a rule of practice that claimants seeking to "clear their title" under section 84(2) LPA will ordinarily pay the costs of so doing up until the point at which the defendant is able fully to determine whether to oppose the proceedings, after which point the defendant is at risk of paying his own costs in the event that he is unsuccessful in opposing the claim, but will not have to pay the costs of the winning party;

    ii) identified that the question for him was whether the facts of this case fall within that rule of practice or whether this "is simple hostile litigation carrying the usual costs consequences of such litigation"; and

    iii) found that "this case falls upon the hostile litigation side of the line" such that the usual costs consequences under CPR, namely that the unsuccessful party will be ordered to pay the costs of the successful party, should apply (CPR 44.2(2)(a)).

66. The Appellant argues that the Master was wrong to arrive at this decision on costs. She recognises that the question of costs was a matter for the Master's discretion, but she submits that, in failing to apply the rule of practice, the Master erred.

67. The appeal court will only interfere with the exercise of a judge's discretion where that exercise of discretion has "exceeded the generous ambit within which reasonable disagreement is possible" (*Tanfern v Cameron-MacDonald* [2000] 1 WLR 1311, CA per Brooke LJ at [32], citing from the decision of Lord Fraser of Tullybelton in *G v G* [1985] 1 WLR 647 at 652C).

68. Having considered the authorities to which I was referred by the parties with care, I am not satisfied that the Master was outside that "generous ambit within which reasonable disagreement is possible".

69. The rule of practice was clearly articulated by Stamp J in *Re Jeff's Transfer (No.2)* [1966] 1 WLR 841, citing the decision of Cross J in *In re Jeffkins' Indentures* [1965] 1 WLR 375:

> "…a plaintiff seeking a declaration that restrictive covenants do not affect his property is expected to pay his own costs. He is also expected to pay the costs of any defendants who enter an appearance down to the point in the proceedings at which they have had a full opportunity of considering the matter and deciding whether or not to oppose the application. Any defendant who then decides to continue, and appears unsuccessfully before the judge, does so at his own risk as to his own costs at that stage. Such defendant would not, however, be ordered to pay the plaintiff's costs".

70. However, Stamp J declined to apply the rule in the factual circumstances of that case. The plaintiff had made an application to the Lands Tribunal under section 84(1) LPA for modification of a covenant restricting him from erecting a cottage. The objectors/defendants (some 30 in number) had intervened and asserted title to plots which they said enjoyed the benefit of the covenant. Stamp J observed at 851H that:

> "[t]he objectors did this in order to prevent the plaintiff from building his cottage and to obtain compensation if, in the event, the Lands Tribunal thought fit to modify the restrictive covenant".

71. Against that background, the matter had been adjourned to the High Court so that the plaintiff could apply under section 84(2) LPA for a declaration as to whether the restrictive covenant was now enforceable, if so by whom, or alternatively, whether any of the objectors were entitled to enforce it. The court found that the objectors did not have the benefit of the covenant and so were not entitled to enforce it. At 852A-C, Stamp J said of the costs of the section 84(2) application:

> "I can see no ground for not making the usual order in a case of hostile litigation between two parties, one of whom is wholly unsuccessful. The question which had to be decided was whether the defendants were entitled to the benefit of these restrictions and I see no reason to treat them otherwise than if they had been plaintiffs in an action brought against [the plaintiff] to restrain him from building in breach of the covenant which he had entered into".

72. The rule of practice was considered by Lightman J in *University of East London Higher Education Corpn v Barking and Dagenham London Borough Council* [2005] Ch 354 at 376-377 in the context of the Civil Procedure Rules. Lightman J noted (at [4]) that the proceedings in that case had been commenced by the claimant under section 84(2) LPA to clear its title and that section 203(5) LPA "expressly confers on the court a discretionary jurisdiction to make orders as to costs on such applications". He then referred to *In re Jeffkins Indentures* for the statement by Cross J of the rule of practice and noted that it had been confirmed in *In re Wembley Park Estate Co Ltd's Transfer* [1968] Ch 491, 507, per Goff J.

73. At [8]-[11], Lightman J considered the extent to which the rule of practice could survive the advent of the CPR, observing that the question raised was "whether the rule of practice should be given effect as a reason for making a different order [i.e. different to the general rule now set out in CPR 44.2(2)(a))]". Lightman J then explained the rationale for the rule of practice, before setting out some observations on the rule of practice:

> "10. The rationale for the rule of practice is that the claimant applying for the declaration is seeking for his own benefit the protection of a court order against the existence of any adverse rights and for this purpose must join as defendants all persons or representatives of all persons who may have adverse rights. The court must for this purpose be satisfied that there are not adverse third party tights whether or not such defendants take part in the proceedings. The policy of the law in these circumstances is to encourage the defendants to contribute to the investigation by reassuring them that until the full facts are known and an informed decision whether to oppose the application can be reached they will be indemnified against costs incurred, and that thereafter (in case their decision to oppose proves erroneous) by doing so they will be put at no risk of incurring an adverse order as to costs. It is just that, as the price of the exercise of the court's extraordinary jurisdiction in his favour, the claimant should provide the fullest available information to third parties to enable them to make an informed decision whether to oppose the application and to act on such information and pay for the costs of this exercise; and that after this exercise has been completed the claimant should pay the costs of the defendant if the defendant succeeds in his objection, but should have no right to recover his own costs if the objection fails.
>
> 11. As it seems to me the rationale for the rule of practice is equally applicable today at it was prior to the CPR and both the rule of practice and the rationale are, subject to three minor glosses, fully consistent with the CPR. The first gloss is that the rule of practice is a guideline in the exercise of the discretionary jurisdiction as to costs rather than a rule. It has less rigour than a rule and is more flexible. The second is that there is a need to reflect the emphasis placed by the CPR on pre-action disclosure. The rule of practice reflected a time when full disclosure was

> only to be expected after the proceedings had been commenced. The opportunity to obtain such disclosure after the CPR may and indeed generally should, be afforded before proceedings are commenced and the defendant may be able to take an informed decision whether to oppose the application before the proceedings commence. In either event the claimant should be obliged to pay the costs of the exercise, but the exercise may be completed before the proceedings commence. The third relates to the level of costs. Under the pre-CPR practice the entitlement of the defendant was to costs on a common fund or solicitor and client base. The equivalent basis today is indemnity costs.

74. Against that background, Lightman J went on to decide where the costs lay on the facts of that case by reference to "both the rule of practice as a guideline, the respective successes and failures of the parties and justice" (at [14]).

75. In his judgment on costs, given immediately, the Master mistakenly referred to Lightman J applying the analysis in "*Re Jeff's Transfer (No 2)*" as to the rule of practice. However, this apparent error does not, to my mind, undermine the exercise of his discretion. It may have occurred because the parties had only provided the Master with a copy of *Re Jeff's Transfer (No 2)*, as they did on appeal, referring within the judgment of Stamp J to the rule of practice as articulated by Cross J in *In re Jeffkins' Indentures*, without providing a copy of the latter case. In any event, the Master correctly identified that the rule of practice was discussed and adopted in *University of East London* as still reflecting the law post CPR and, admittedly using a shorthand, he identified that the question for him was whether this was "simple hostile litigation carrying the usual costs consequences of such litigation". He was not wrong to do so and indeed this is the very approach that was adopted by Stamp J in *Re Jeff's Transfer (No 2)*.

76. The Master concluded that this was hostile litigation, essentially because this was not a case where the Respondents felt themselves at risk of breach of covenant or felt a need to "clear the title" before starting the Proposed Development. They commenced the proceedings only because, as he recorded, "the [Appellant's] solicitors initiated hostilities in November 2021 by threatening to apply for an injunction". I accept that the circumstances of this case are different from the circumstances applicable in *Re Jeffs Transfer No 2*. However, it would be equally possible to say in this case that the approach taken by the Appellant was designed to prevent the Respondents from implementing the Proposed Development.

77. Mr Auld sought to argue that the Master misunderstood the operation of the rule of practice and that, in particular, he failed to understand that someone with the benefit of a restrictive covenant "should not be put at risk on costs". However, this is to forget that, as Lightman J made clear, every case must be considered on its own facts and that, post CPR, the so-called rule of practice is not an inflexible rule. The Master was of the view that the stance adopted by the Appellant was hostile and that it precipitated this litigation. The Master plainly took into account that the Respondents felt themselves to be "on the defensive", saying that there is "nothing in [the] papers to indicate that they felt the need to make a pre-emptive application under section 84". He also took into account the argument that the Respondents could have risked an injunction application, observing that he did not consider this to be a "sufficiently relevant factor to change the overall position in this litigation". He dismissed an argument on

mediation, which was not made before me, and finally, he took into account the fact that the Respondents' view of the merits, i.e. their view that they were not at risk of breach of covenant, had been vindicated.

78. The Master concluded that, in the circumstances, "it is very difficult, I think impossible, to designate this as anything other than hostile litigation" and that accordingly "the usual costs consequences should apply". Whatever decision this court might have made in the Master's place, there is no proper basis on which I could find that his determination fell outside the generous ambit within which reasonable disagreement is possible.

79. Ground 3 of the Appeal is accordingly dismissed.