85/18

BETWEEN	Donald Eric Gordon Sayers	Plaintiff (A.R.B.)
AND	Alan Excoffon Duchemin and Gloria Duchemin (née Mackay) his wife	DEFENDANTS (J.C.S.)

BEFORE:- The Deputy Bailiff, and Jurats J.H. Vint and P.G. Baker

12th February, 1985.

JUDGMENT

The Deputy Bailiff:

The parties to this action are neighbours. Their properties abut a public road called "Bon Air Lane", in the Parish of St. Saviour, or as it is sometimes called "La Rue du Froid Vent". There are mutual restrictive covenants, which are in favour of each property, and the covenant with which we are concerned is as follows: "Que lesdits Acquéreurs ne pourront en aucun temps sous aucun prétexte que ce soit établir sur ladite propriété présentement vendue soit auberge, forge, briquetterie, manufacture, boutique, usine ou aucun commerce quelconque". We are not concerned however, with that part of the restrictive covenant, which continues: "et qu'il ne sera bâti sur chacun desdits becquêts de terres pris par ledit Alistair Mackenzie Forteath, Ecuier, comme sus est dit, qu'une seule maison bourgeoise avec offices en dépendant et que tels maison et offices seront construits à une distance minima de deux cent seize pieds à l'Est dudit chemin public appelé "Bon Air Lane" ou "Rue de Froid Vent" et que chacun de tels maisons et offices en dépendant seront d'un coût minimum de mille livres sterling".

The issues which we have to decide are two; it is said, on the part of the Plaintiff, Dr. Sayers, that the relevant part of the clause I have just read out restricts any

building whatsoever to the West of the line 216 feet from the "Rue de Froid Vent" or "Bon Air Lane". On the other hand, Mr. Clyde-Smith, for Mr. and Mrs. Duchemin, against whom it is sought to enforce these restrictions, because it came to the notice of Dr. Sayers firstly that certain works had been carried out, and that other works were intended, has argued that that clause does no more than restrict building to the East of the line to a certain type of house with its usual dependant offices, and that the clause being silent as to the rest of the land, it is only by necessary implication that we should find for the Plaintiff, and before we could do so, we would have to find that there was an express term, which he says cannot be found in the restrictive clause itself.

It is perfectly true that, because of the amended answer, and the allegations in that answer, if we were to find that the clause restricted anything at all being placed or built to the West of the 216' line, it may well be that certain things it is claimed by the Defendants, which Dr. Sayers has built himself on his land, would themselves be contravening the restriction.

Now it is quite clear to us that, in looking at a clause of this nature, in order, as we must, to find the intention of the parties, we have to look quite clearly at the wording of the clause itself, and as this Court has already said on a number of occasions, but in particular in the case of Blackburn v. Kempson (née Johnson), reported in Jersey Judgements (1971), page 1747, and I read from page 1756, the intention of the parties is to be gathered from the document itself; I read the extract:

> "The object of all interpretation of a written instrument is to discover the intention of the author. That intention must be gathered from the instrument itself; the function of the Court, therefore, is to declare the meaning of what is written in the instrument, and not of what was intended

to have been written. Prima facie, words must be taken in their ordinary sense, but where words are susceptible to more that one meaning, assistance may be obtained from the context in which they appear, and courts will give effect to that interpretation which appears to be most consistent with the intention of the parties to the instrument".

Our task has been somewhat eased because both parties have agreed that the restrictive clause may be broken down into four parts, and that the intention, as expressed in that clause, relates to four aims or objectives, which it was hoped the imposition of that clause would achieve. The four parts, which we must, of course, look at as a whole, as well, are: firstly the restriction on business; secondly, the restriction on the type of middle class house to be built; thirdly, the restriction of that middle class house with its 'offices' to be set back 216' from the lane; and fourthly, although this is perhaps somewhat out of date today, having regard to the catastrophic fall of the value of money, the house and its offices were to be built to a minimum sum of £1,000. Before the properties, and there were others in this area as well, were developed, there was a virgin piece of land which in the 1930s was developed as a housing scheme. The draughtsman, in order that the general value of the neighbourhood could be kept up, decided that his objectives would be fourfold. First, he endeavoured to provide a reasonable ratio between open space in front of the buildings and the house and its "offices" as well, so that there would be a "high-class", to use a phrase much-beloved by estate agents, a "high-class" residential area. And of course, that very suggestion is taken from the Blackburn case as well, and in particular that was to be achieved by setting back any house built with its offices to at least 216' from "Bon Air Lane". Thirdly, there was to be a minimum building standard; and fourthly, the fourth obejctive was to endeavour to create in general terms, a pleasing neighbourhood. There are a number of matters to be noted, as regards this phrase, before we consider the matter in slightly more detail. The first is that the word used in the covenant is the word

"bâtir", and as Mr. Clyde-Smith has pointed out, that is in contradistinction to the word "ériger", or he might have added "construire". Both the latter words have a wider meaning than "bâtir", and we are satisfied that we should take the more restricted meaning of what "bâtir" means, that is to build (a building). Secondly, on the authority of another Jersey case, the case of Arbaugh (née Ogden) v. Leyland et uxor, reported in Jersey Judgments, 1967, page 745, it is clear that in certain circumstances moveables can, in fact sometimes infringe a "servitude réele", which the clause certainly is, and we are satisfied also, in this connection, that in certain circumstances, walls, for example, can likewise infringe that clause.

It seems to us that in interpreting the clause, we have either to have a strict interpretation, and reach the conclusion that it was intended, having regard to the four purposes I have mentioned, to prevent anything at all being built West of the line, or whether there should be a more reasonable interpretation placed, as Mr. Clyde-Smith has urged, on the clause, so that the owners of all the plots, and not just these two persons in dispute at the moment, should be able to enjoy to the full their "bourgeois-type" property, a phrase which we had used before us by counsel, reasonably unencumbered. We are going to take the latter view. We think that persons in 1985 who buy these properties with that clause in, are entitled, subject to certain restrictions we are going to mention in a moment, to use their properties West of the line as they think fit. But of course, there are a number of restrictions to which one has to have regard. Whilst, on the one hand, we accept that there have to be clear words before a complete restriction is imposed on anything done West of 216' line, that does not mean to say that persons can have an absolute 'carte blanche'. It is a question of size, of scale, of permanency and, even in some cases, possibly of habitation, although that is unlikely to arise, as it would obviously offend. And if that is correct, then there is something to be said for the Plaintiff's anxiety that, although, as we have found, the Defendants are entitled to

carry on certain things, that does not give them, as I have said 'carte blanche' to do all the things which Mr. Clyde-Smith has urged they can do without restrictions at all. In the Order of Justice itself, we have been asked to impose an injunction. Firstly, "to cease building, constructing, or erecting, or causing to be built, constructed or erected, any driveways, retaining walls, fences or any other things of any nature, whatsoever, within 216' of the said public road "Bon Air Lane". Now, that of course was the position in February, 1984, before the driveway which we saw was in fact constructed with its retaining wall, and some other fences were put round the perimeter of the property of the Defendants. And secondly, "to refrain from building, constructing, or erecting, or causing to be built, constructed or erected within 216' of the said public road "Bon Air Lane" any fences, walls, sheds, greenhouses, garages, swimming pools or any other thing of any nature or kind whatsoever". And the second request to the Court really covered something which Dr. Sayers feared and had believed was going to happen. We are not satisfied that what we saw, that is to say the driveway, the retaining walls of the driveway, the existing fences do infringe the restriction, and we are therefore not going to make the Order under paragraph a) as requested. Under paragraph b), of paragraph 8 of the Order of Justice we think there is some merit in what Mr. Binnington has said, particularly having regard to his client's belief that the swimming pool may well be covered over, or have a building over it of some sort; therefore, whilst we are not going to grant the paragraph b), we are going to add a rider to it. We are going to say that before any plans in respect of a swimming pool or anything of that nature, and I should say here that the words "or other things of any nature" in both a) and b) really are limited to the eiusdem generis rule covering the kinds of things which are described in both these sub-paragraphs, the plans for that swimming pool should be submitted to the legal adviser of the Plaintiff; and if it is considered that those plans offend against the four guiding principles which were behind the intention of the clause, and I am not going to repeat them again, but I have stressed the

question of openness of the site, the size, the permanency, the kind of building, whether it's wood or whether it's brick, or whether it's in the ground, or whether it's above ground and so on and so forth; all these things have to be taken into account in examining those plans. We think it is right that the Plaintiff to that extent should be protected. Should there be any plans for substantial fences, walls, sheds, greenhouses, or garages - and so far as walls and fences are concerned, other than those we have seen, or those any higher than what we have seen, again those plans should be submitted to the advocates or solicitors for the Plaintiff.

So far as the question, which is still outstanding and which we have not applied our minds to yet of the 216' building line itself, a number of matters were urged upon us as to why we should change that line, because, it is said, by Mr. Clyde-Smith, that there had been a widening of "Bon Air Lane" for a number of reasons. He produced the Parish Records of the Roads' Committee which he admitted are not as full as they perhaps might have been; he showed us the widening, which had taken place at the North and South ends of "Bon Air Lane" adjacent to these two properties; as far as the South is concerned Mr. Smith gave evidence, and showed us where it had been widened in front of his property to the South of these two properties which are in dispute, and also to the North, adjacent to "Milford Farm" where he showed us, on the site, the gable which, he said, if one ran down a line would take us somewhere, some 5 or 6 feet to the West of the existing walls built (he said) back from the old fossé, which had been the Western end of the boundaries of the field on which the properties were built. It was a fossé which sloped, and therefore the wall was taken back towards the fossé, and indeed incorporated it to some 6'. Advocate Clyde-Smith also showed us some tree stumps bordering a property on the West of "Bon Air Lane", which indicated, he said, that on that side of it there had been no widening; therefore the widening must have been on the East side. He also produced a surveyor's plan, and he suggested that the word

"lane" as opposed to "road", indicated that it was a country lane with a rural bank. As far as the contracts are concerned, we find it difficult to draw any firm conclusion from these contracts; one of them, at least, refers to a wall, the others refer to a fossé; the measurements from East to West are by no means consistent. They are perhaps marginally more consistent with Mr. Clyde-Smith's argument than otherwise. All in all, we have reached the conculsion that "Bon Air Lane" probably was widened; but we are unable to say by how much and we think, having said that, that the parties should agree between themselves, if that is possible; if not, they will have to come back and advance further arguments with further evidence to us for us to reach a conclusion of measurement. But they should try to agree amongst themselves, as we have said, by what amount the figure of 216 should be altered. I have to add this; that as regards the patio which was shown in photograph 13, and which we also saw this morning, to the North and on the West side of the Defendant's house, that is to say a patio with two pillars and a sort of pierced wall, we do not think that that, even if it comes within the 216', would infringe the restriction.

We think therefore that that is as far as we can go to help the parties today. And therefore we are not going to make the Order asked for in the Order of Justice.

It follows also from what we have said that we are going to dismiss the Counterclaim, because we are not satisfied that any of the items which Dr. Sayers has installed on his property that is to say a tennis-court, a wall for his garden, a cider cursher and various things really can be said to infringe the restriction. Under the circumstances and having regard to our findings, we are not prepared to make any order for costs.