85/97

24th September, 1985.

COURT OF APPEAL

BETWEEN	Alan Excoffon Duchemin and Gloria Duchemin (nee MacKay)	APPELLANTS
AND	Donald Eric Gordon Sayers	RESPONDENT

JUDGMENT

MR. JUSTICE HOFFMANN: The plaintiff, Dr. Sayers, and the defendants Mr. and Mrs. Duchemin are neighbours living in Bon Air Lane in the Parish of St. Saviour. Each of their houses is subject to a restrictive convenant, which we know was first imposed in about 1932. The covenant contains a number of provisions with which we are not directly concerned, such as the prohibition of various commercial activities upon the land, and a requirement that any house to be built upon the land is to be of a certain minumum value. The parts of the covenant which do concern us are first, a provision that "Qu'il ne sera bati sur chacun desdits becquets de terre".....and I can pass over the next few words....."qu'une seule maison bourgeoise avec offices en dependant et que tels maison et offices seront construits a une distance minima de 216 pieds" to the east of Bon Air Lane.

Dr. Sayers bought his house as long ago as 1964. The defendants Mr. and Mrs. Duchemin acquired their house in 1982, and soon after their purchase began various works of construction in their garden within a distance of 216 feet of the road. For example, they laid out a new drive connecting the house to Bon Air Lane, which involved the construction of granite retaining walls; they built a patio in front of their house; and they also began the construction of a low cavity wall along the side of their lawn. Dr. Sayers took objection to these works, saying that they were an infringement of the covenant. He was even more concerned at the possibility that further works might be undertaken in the future. A tennis court, a swimming pool and greenhouses were mentioned as possible future projects.

There was correspondence between the parties and their advocates and it became clear that there was a fundamental difference of opinion between the parties over the construction of the covenant. Dr. Sayers took the view that no works of construction of any kind were permitted within 216 feet of the road. The Duchemins were advised that the prohibition was only upon the house itself or the "offices en dependant" being built within the 216 feet

of the road. Other works which did not amount to the house or the "offices" but which were accessory to the ordinary use of the dwelling were in the view of their advisers not prohibited by the covenant. This controversy culminated, so far as the correspondence is concerned, in a forthright letter dated the 15th December, 1983, written by Mr. Clyde-Smith, representing the Duchemins, in which he said that there had been what he described as interference by Dr. Sayers in his clients' use of their land. He went on to set out what he alleged to be Dr. Sayer's construction of the covenant, namely "that it entitles your clients to prevent my clients building a driveway or carrying out any other similar kinds of works in the garden area between the main road to the west and the property to the east". He then said that in his view, his clients would only be in breach if they built more than one private house or built the permitted house closer than allowed to the main road. He ended by saying that subject only to the above they can build as many swimming pools, tennis courts, greenhouses, garden sheds, walls, fences, driveways and carry out any other kind of activity they consider fit over their land.

The effect of that letter was that on the 2nd February, 1984, Dr. Sayers actioned the Duchemins, seeking first an injunction restraining them from continuing to build driveways, retaining walls, fences and other things which were then under construction; secondly, a mandatory order that they demolish and remove those constructions which were already there and thirdly, an injunction quia timet which would restrain them from building any fences, walls, sheds, greenhouses, garages, swimming pools or any other thing of any nature of kind whatever in the future. The allegation as to the future contained in the Order of Justice was that the defendants had indicated to the plaintiffs their intention to build construct or erect or cause to be built, constructed or erected further items on their property within 216 feet of Bon Air Lane namely, a swimming pool, greenhouses and garden shed. The answer to the Order of Justice set out the defendants' construction of the covenant which is contained at some length in paragraph 4 of the answer and, if I may endeavour to summarise it, says that the defendants are entitled to construct within the 216 foot line, such works which may be regarded as ancillary to the ordinary use of the dwelling house but which do not constitute the dwelling house itself or "offices en dependant".

For the purpose of seeking the guidance of the Court as to the construction of the covenant, the defendants also set out in lettered paragraphs (a) to (t) a variety of structures which it was envisaged that they might wish to place upon their land and asked the Court for a declaration that those structures or some of them would not infringe the terms of the covenant.

As an alternative and on the assumption that their primary contention as to the construction of the covenant was wrong and that Dr. Sayers was right, the defendants also counterclaimed for an injunction to require Dr. Sayers to remove certain works which it was said, upon his own construction, had been in breach of the covenant. There was an additional subsidiary point raised by the answer namely that there had been at some stage in the past a widening of the road and that the effect of that was in fact, to reduce by 6 feet the distance of 216 feet within which the covenant was to operate.

When the case came to trial the only oral evidence called by either party concerned the widening of Bon Air Lane. No evidence was called about the future intentions of the Duchemins as to works upon their property. Photographs were produced which showed the present state of the properties and the Court held a view to see what had actually been built. It was upon this material and this material alone that the Court was asked to pronounce on the construction of the covenant.

The learned Deputy Bailiff rejected Dr. Sayers' construction and found substantially in favour of that advanced by Mr. Clyde-Smith. That is to say, he held that the Duchemins were entitled within the 216 feet to carry out such works as were reasonably ancillary to their enjoyment of their property but he went on to say (and it does not appear that any argument to the contrary was advanced by Mr. Clyde-Smith) this did not mean that the Duchemins had carte blanche. It was, he said, a question of size, scale, permanency and even in some cases, possibly, habitation. All these matters had been taken into account, deciding whether the particular structure was or was not an infringement of the covenant.

Having construed the covenant in that fashion, the learned Deputy Bailiff came to the conclusion that none of the works that he had seen actually erected could be considered to be infringements. He also felt unable to say from what he had been told about the future intentions of the Duchemins that anything which they were proposing to do would sufficiently appear to be a breach of the covenant to justify an injunction quia timet. Accordingly, he refused the prohibitory and mandatory injunctions which were sought in the Order of Justice.

Having done so, however, the learned Deputy Bailiff added what he called a 'rider' to his judgment. He said: "We are going to say that before any plans in respect of a swimming pool or anything of that nature [I think one must interpolate the words "are carried out"] 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 the clause" [again I think we must add the words, "the plaintiff will have the opportunity to take such action as he may be advised to take".] In drawing up the Act of the Court, the Greffier gave effect to that 'rider' by saying that the Deputy Bailiff dismissed both the Order of Justice and the Counterclaim but with regard to paragraph (b) of the said Order of Justice - the paragraph seeking an injunction quia timet - directed that the defendants should submit in advance to the plaintiff's legal advisers any plans in respect of the swimming pool, substantial fences, walls, sheds, greenhouses, garages or anything eiusdem generis which they might wish to build.

We have had some discussion about what is the effect in law of a 'direction' of this kind. Mr. Clyde-Smith took the view that this was tantamount to an injunction, that is, an order of the Court, which his client was bound to obey. I confess that upon reading the Act of Court I think this prudent advice to have given. Upon the footing that the Court did so order, the Defendants appealed to this Court saying that the learned Deputy Bailiff had no jurisdiction to make such an order. The only basis of the plaintiff's rights is the restrictive covenant. That covenant prohibits the building of certain kinds of structures but imposes no requirement that the owner of the land should give advance notice of his intentions. To make such an order requiring such notice is to impose as a matter of law an obligation which the defendants never undertook.

Of course Mr. Clyde-Smith acknowledges that as a matter of common sense it may be wise for landowners to give advance notice and submit plans to their neighbours. If he does not do so and builds an offending structure, the Court will have less inhibition about granting a mandatory injunction. Nevertheless these are matters of neighbourly conduct and not in themselves enforceable by law. We agree that if the learned Deputy Bailiff intended to impose a legal obligation he had no jurisdiction to do so and that part of the order must be deleted.

Accordingly the Appeal, as far as the rider which was added, is allowed. I turn now to the question of costs. Having dealt with the claim the learned Deputy Bailiff turned to the Counterclaim. The Counterclaim sought, firstly, a declaration that the matters specified in the Answer would not infringe the covenant, secondly, on the hypothesis that the Defendants were wrong in their construction of the covenant, an injunction against the plaintiff ordering him to demolish and remove all those works on his land that infringed the covenant and thirdly, a declaration relating to the widening of Bon Air Lane. Dealing with the third request, the learned Deputy Bailiff found that on a balance of probabilities there had been a widening of Bon Air Lane but he

was unable to say by how much. Having found that the defendants were in principle right in saying that the distance should be reduced, he left it to the parties to agree by how much it had been reduced and failing an agreement he gave them liberty to come back to court. As to the rest of the Counterclaim he said "it follows 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, his cider crusher and various things really can be said to infringe the restriction". That finding was in accordance with his and the defendants' construction of the covenant, he then said "under the circumstances and having regard to our findings, we are not prepared to make any order for costs". It is not altogether easy to deduce from that sentence the precise basis on which no order for costs was made. The sentence is, in the typewritten judgment, attached to the paragraph in which the Counterclaim is dismissed and that might suggest that he regarded the honours as being equal. On the other hand this being an oral judgment it might have a wider meaning.

Costs are a matter for the discretion of the court and provided that discretion is exercised judicially this court will not interfere. The question is whether this discretion was exercised judicially or whether the learned Deputy Bailiff misdirected himself as to the basis on which he was to exercise his discretion. One starts with the ordinary assumption that the successful party will obtain his costs. In this case the claim made by Dr. Sayers was a claim for injunctions. That claim was entirely dismissed and therefore unless some reason for depriving the defendants of their costs is apparent they would be entitled to those costs. One therefore has to ask whether there are any grounds upon which the Deputy Bailiff could have exercised his judicial discretion to deprive the defendants of their costs. The grounds suggested to us are firstly the letter of 15th December, 1983, which it is alleged constituted an exorbitant claim on the part of the defendants to build any structures which they liked on the 216 foot area. For my part, although the letter was written with what can be described as rhetorical exaggeration, I do not think it could have been read as constituting such a claim nor do I think that it was so read by Dr. Sayers' advisers, because there is no allegation in the Order of Justice that the issue was whether or not the defendants were to have carte blanche to construct whatever they wished on the 216 foot area. On the contrary, the allegations as to the future intentions were that the defendants intended to build a swimming pool, green-house and garden shed. Furthermore if there could have been a misconstruction of that letter the plaintiff's advisers must have been disabused of that view in June 1984 when the Answer was filed.

That makes clear that the construction is much narrower. The other basis upon which it was said that the learned Deputy Bailiff was entitled to exercise his discretion was that in his judgment there were suggestions of the arguments for the defendants being put in wider terms. For example it was said on page 2 of the judgment that Mr. Clyde-Smith had argued that the 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 the court should find for the plaintiff. Mr. Clyde-Smith told us that was not precisely the effect of his argument before the court and in any event we do not think that it matters. In the course of argument counsel often argue different points, some good and some bad. What seems to us to matter is that the construction adopted by the learned Deputy Bailiff was successful in enabling the whole of the relief that the plaintiff was seeking to be dismissed. That being so it seems to me that the defendants were entirely successful in their claim and no grounds upon which any discretion could be exercised were apparent. They should have had their costs.

I turn now to the Counterclaim. The learned Deputy Bailiff said that he dismissed the Counterclaim but if one analyses his judgment, the only aspect dismissed was the alternative claim for an injunction against Dr. Sayers. That alternative claim would only arise if the defendants were found wrong on their construction of the covenant. The dismissal of that aspect of the Counterclaim therefore was only a side effect of the defendants' victory. They could not be said to have lost. The other aspect was the claim for a declaration as to the widening of the road and that was accepted in principle by the court. The learned Deputy Bailiff said nothing expressly about the claim for a declaration. It is clear from his judgment on the claim that the items constructed did not infringe the covenant but he was of the opinion that the defendants were right in their construction of the covenant for which they sought the declaration. The learned Deputy Bailiff felt that there was insufficient material before him for the declaration and considered that he had given sufficient guidance to the parties in his judgment. The making of a declaration is entirely a matter for the discretion of the court and there are many cases where no purpose would be served in making a declaration which in effect would be translating the words of the covenant into different words of the court. We make no criticism of the learned Deputy Bailiff for not making a declaration. This does not detract from the fact that the defendants had won on their construction of the covenant. We do not think in so far as the defendants had not obtained all the relief for which they asked that they were unsuccessful. The correct order should have been that Dr. Sayers should pay the defendants costs of the claim and

the Counterclaim.

We accordingly hold that the Appeal succeeds both as to the rider and as to the question of costs and therefore Dr. Sayers will pay the costs of the hearing.

PRESIDENT: As far as the costs of this Appeal are concerned.....

ADVOCATE BINNINGTON: I fear that I am unable to resist an order for costs Sir.

PRESIDENT: That must be right. Dr. Sayers will therefore pay the costs of this Appeal.