Neutral Citation Number: [2016] EWHC 2435 (Ch)

Case No: HC-2015-000384

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2016

Before :

MR JUSTICE NORRIS

- -

Between :

(1) BRYANT HOMES SOUTHERN LIMITED **(2) JACK MOODY LANDSCAPING AND CIVIL ENGINEERING LIMITED** **(3) CRANBROOK CONSTRUCTION LIMITED**	**Claimants**
- and -	
(1) STEIN MANAGEMENT LIMITED **(2) VIVIAN KELLY (Executor of the Estate of Henry Bryan Evans)** **(3) NEIL EVANS (Executor of the Estate of Henry Bryan Evans)**	**Defendants**

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Joanne Wicks QC (instructed by **Eversheds LLP**) for the Claimants

John Randall QC and Anthony Verduyn (instructed by **The Wilkes Partnership**) for the First Defendant

John Dagnall (instructed by **Coles Miller LLP**) for the Second and Third Defendants

Hearing dates: 9 and 10 February 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NORRIS

Mr Justice Norris :

1. Peter Boggis ("the Vendor") was the owner of Middlefield Farm on the outskirts of Witney, Oxfordshire. In 1985 he sold 10 acres of it as a site for a school, and by a Deed of Easement granted a right of way over a farm track on his adjoining retained land ("the Track"), but making provision to vary the arrangements in case any of his adjacent land came to have development potential. In 1993 he conveyed two parcels of agricultural land ("the Property") amounting to some 127 acres forming part of the farm to the Claimants ("the Buyers"), who are a consortium of property developers, subject to but with the benefit of the Deed of Easement so far as it related to the Property. In doing so he took some covenants from them: and the action in which this preliminary issue arises concerns the present enforceability of those obligations.

2. Amongst the land retained by the Vendor in 1993 were the farmhouse and its curtilage, and the farm buildings and yards, including at least part of the bed of the Track.

3. Clause 3 of the Conveyance dated 15 December 1993 ("the 1993 Conveyance") between the Vendor and the Buyers was in these terms:-

> "The Buyers hereby further jointly and severally covenant with the [Vendor] and his successors in title the owners or occupiers for the time being of the adjoining land edged red and blue on the Plan that they will not use the Property for any purpose other than agricultural."

The land edged blue on the plan was the farmhouse, farm buildings and yards. The land edged red on the plan was the curtilage. The red and blue colouring included at least part of the bed of the Track. (This description is not exact but is sufficient).

4. Contemporaneously with the 1993 Conveyance the Vendor and the Buyers entered into another agreement ("the 1993 Agreement") by reference to a plan on which (i) some further agricultural land (which remained in the ownership of Peter Boggis) was tinted pink ("the Pink Land") and (ii) the Property conveyed by the 1993 Conveyance was edged green and tinted green ("the Green Land").

5. In the 1993 Agreement

   a) the Buyers promised at their own expense and as soon as possible to promote the Pink Land and the Green Land with a view to obtaining planning permission for residential or commercial development of all or part of that land on conditions reasonably acceptable to them (so that they promised to seek development permission for the Green Land which they were contemporaneously promising in the 1993 Conveyance should only be put to agricultural use);

   b) the Buyers promised that in the event that a qualifying planning approval was received then at any time after receipt of planning approval but before the expiration of that approval they would give to the Vendor a "valuation notice" specifying the land for which the qualifying planning approval had been received;

c) the giving of a valuation notice triggered (i) an option which the Buyers had to acquire so much of the Pink Land as was affected by the qualifying planning approval and (ii) a process leading to the calculation of an "overage" payment in respect of so much of the Green Land (which the Buyers had acquired by the 1993 Conveyance) as was the subject of the qualifying planning approval;

d) By clause 14.3 the Vendor promised to release the covenant imposed by clause 3 of the 1993 Conveyance in relation to any of the Green Land with qualifying planning approval once any overage payment due had been paid;

e) By clause 9 the Vendor promised "not [to] use the [Pink Land and the Green Land] except for its existing use or (if different) for normal agricultural or similar operations which would not materially reduce the chance of obtaining Qualifying Planning Approval or materially increase the expense of any subsequent development."

(The 1993 Agreement is in some respects obscure, and the foregoing summary is not entirely accurate: but it suffices for this case).

6. The title acquired by the Buyers under the 1993 Conveyance was duly registered. Entry No.5 in the Charges Register set out the terms of the covenant in clause 3 of the 1993 Conveyance. The register of title does not mention the 1993 Agreement.

7. In the period 1998–2000 the Vendor converted some of the agricultural buildings on the Red Land and the Blue Land and developed others and sold them off as individual residential properties. Sometime later it occurred to those advising him that by those sales of parts of the Red Land and the Blue Land he may have compromised his ability (under the 1993 Agreement) to release the covenant contained in clause 3 of the 1993 Conveyance and thereby to obtain for himself the overage payment under clause 14 of the 1993 Agreement. So he obtained assignments back from his purchasers of the benefit of the Clause 3 covenant.

8. By 2005 the Vendor continued to own only the Pink Land and part of the bed of the Track. This he sold in September 2005 to NAB Land Ltd for £1.5 million. It is not in dispute that as part and parcel of that transaction the Vendor also assigned the benefit of the covenant contained in clause 3 of the 1993 Conveyance. NAB Land Ltd funded the purchase price by means of a loan from Henry Evans, which was secured by a registered first charge over "the whole of the land comprised in the title… including any buildings on the land". An issue has arisen over whether the charge extended to the assigned covenant.

9. On 31 July 2008 the Buyers and NAB Land Ltd entered into an agreement expressed to be supplemental to the 1993 Agreement. It proceeded on the footing that NAB Land Ltd was the successor to the Vendor, Peter Boggis, in respect of the benefits and the burdens created by that Agreement. It clarified some of the obscurities in the 1993 Agreement and varied some of its terms.

10. NAB Land Limited defaulted on its mortgage, and the personal representatives of Henry Evans took possession as mortgagees. NAB Land Limited entered liquidation.

On 18 June 2013 the personal representatives of Henry Evans contracted to sell the Pink Land (and the part of the bed of the Track of which Peter Boggis had retained ownership) to Stein Management Limited ("Stein"): and Stein has now become the registered proprietor.

11. On the footing that the benefit of the covenant in clause 3 of the 1993 Conveyance had not been included in the charge, and so remained vested in NAB Land Ltd (in liquidation), on the 22 September 2014 the Buyers entered into an agreement ("the 2014 Agreement") with the liquidator whereby they obtained a release of the covenant contained in clause 3 of the 1993 Conveyance and of the obligation to make any overage payments under the 1993 Agreement as varied by the Agreement of 31 July 2008.

12. The position of the Buyers is that following the 2014 Agreement there is now no person able to enforce the covenant contained in clause 3 of the 1993 Conveyance. But Stein argues that as the owner of part of the bed of the Track (which used to form part of the Red land and the Blue Land for the benefit of which the clause 3 covenant was expressed to be taken) and so a successor in title of the Vendor, it is entitled to enforce the covenant: and in this it is supported by the personal representatives of Henry Evans.

13. Part 8 proceedings were therefore commenced in February 2015 by the Buyers seeking a declaration that neither Stein nor the personal representatives nor any other person has the benefit of the covenant contained in clause 3 of the 1993 Conveyance (and a consequential order directing its removal from the charges register of the Buyers' title). In his management of that case Chief Master Marsh identified two groups of issues for decision. By his order dated 10 June 2015 he identified as Issue 1

> "(a) an issue of law as to the nature of the rights that were created by clause 3 of [the 1993 Conveyance] and how those rights were transmissible hence;
>
> (b) whether the rights created pursuant to clause 3 of the [1993 Conveyance] had been transmitted to [Stein] and/or [the personal representatives of Henry Evans]".

He directed the trial of Issue 1 as a preliminary issue: and it has taken place before me. Issue 2 (which is for another day) raised questions about whether the covenants in clause 3 of 1993 Conveyance ever were capable of benefitting the bed of the Track or are now capable of so doing.

14. The claimants in the action are the original covenantors: so no issue arises as to the transmissibility of the burden of the covenant. In broad terms the debate about the transmissibility of the benefit is about whether clause 3 of the 1993 Conveyance creates only contractual rights transmissible by assignment, or whether it creates proprietary rights which are capable of passing with Peter Boggis's property interest: and if the latter, whether that property interest is the entirety, or whether some fragment (such as title to part of the bed of the Track) would suffice. I will examine each in turn.

15. The Buyers made their promise to "the [Vendor] and his successors in title the owners or occupiers for the time being of [the Red Land and the Blue Land]". By whom might it be enforced?

16. It is useful to begin by reminding oneself of when the benefit of the covenant may run with the land (or with the covenantee's estate in the land) at law or in equity. The position at law is explained by Lord Oliver in P & A Swift Investments v Combined English Stores Group [1989] AC 632 at 639ff. At law the benefit of the covenant will run with the land if, but only if, the assignee has a legal estate in the land and the covenant is one which "touches and concerns" the land: and by that expression is meant (1) that the covenant benefits only the estate owner for the time being, and if separated from the estate ceases to be of benefit to the covenantee; (2) that it affects the nature, quality, mode of user or value of the land of the estate owner; (3) that it is not expressed to be given only to a specific estate owner. Condition (3) is perhaps a particular expression of a general requirement that the parties should have intended that the benefit of the obligation should attach to the land into whosoever hands the lands should come i.e. that it should be an incident of the estate.

17. In equity likewise a restrictive covenant enforceable by those who are not parties to the original agreement must be one which "touches and concerns" the land of the covenantee (or "benefits" or "accommodates" it). As it is put in Gray and Gray "Land Law" (Fifth edition) paragraph 3.4.29

> "… There is an underlying sense in which the claimed benefit must be *real* rather than *personal*. A restrictive covenant capable of enforcement against third parties must, in some way, enhance the dominant land rather than connote some purely personal advantage or benefit for the covenantee".

18. To what extent are these requirements met by the terms of the 1993 Conveyance, properly construed?

19. Counsel for the Buyers submits that in order properly to construe clause 3 of the 1993 Conveyance due weight must be given to the Deed of Easement (with its recognition of the possibility of developing the Green Land) and that account must also be taken of the 1993 Agreement, executed as it was between the same parties and on the same day and relating in part to the same land. The 1993 Conveyance imposed the covenant about the mode of user of the land: and the 1993 Agreement contained a mechanism (clearly personal to the Buyers and to the Vendor) for the release of that restriction upon the payment of a sum of money (thereby enabling the development that had been seen as a possibility in the Deed of Easement). Read together, it is submitted, the covenant as to user is no more than a means of securing the due payment of the "overage". The entire arrangement is about the payment of money.

20. Reliance is placed upon paragraph 7.55 of "Restrictive Covenants and Freehold Land" by Andrew Francis (4th ed), which is in these terms:-

> "… "Money payment covenants must be distinguished from restrictive covenants properly so-called. Modern authority stresses the distinction between covenants imposed to protect, or preserve amenity and those imposed to protect, or allow

> recovery of an increase in value. This latter purpose, often described as "overage" or "clawback" may be regarded as one lying outside the scope of the benefit of a restrictive covenant. But note that the right to a payment of money, whether on account of an increase in the value of the covenantee's land, or otherwise, is not related to the preservation of the value, or the amenity of the covenantee's land. Such a right is more in the nature of a privilege which is designed to enhance the value of the covenantee's pocket rather than his land. However, the fact that the covenant requires the payment of a sum of money will not prevent it from "touching and concerning" the land as long as it is connected with something to be done on or in relation to the land… But a covenant which is imposed purely to lead to a payment of money (e.g. as a ransom payment) is not one which should be regarded as being capable of benefiting other land and should not be enforceable as a restrictive covenant."

21. Counsel for the Buyers submits that these principles are seen in operation in the decision of Sir William Blackburne in Cosmichome v Southampton City Council [2013] EWHC 1378. When acquiring a site the BBC gave to Southampton a covenant (expressed to be for the benefit and protection of so much of the adjoining or adjacent land of the Council as was capable of being benefited thereby) confining the use of the site to a broadcasting centre, restricting its use to the BBC, and granting a right of pre-emption to Southampton in the event that the BBC no longer require the site for its permitted use. The BBC sold the site and its purchaser sought a declaration that this covenant was not enforceable against it. So this was a case about whether the burden of the covenant had passed. Sir William Blackburne accepted a submission that the fact that the covenant purported by its terms to be for the benefit and protection of Southampton's land should not blind the court to its substance, and decided that the covenant could not be said to have benefited Southampton's adjoining land when imposed, and that the purchaser had demonstrated that the reason for its imposition had been to seek to maintain the BBC at the site and to serve as a lever for extracting a payment if and when the BBC decided to go elsewhere and that

> "[36] … as such it is in the nature of a money payment obligation rather than a restrictive covenant properly so-called. It is not intended to protect or preserve the amenity or value of the Council's adjacent land. It does not bind successors in title to the BBC. "

22. Counsel for the Buyers submits that they are applicable here because

    a) The clause 3 covenant is not expressed to be taken *for the benefit of* the Red Land and the Blue Land but is merely expressed to be given to the Vendor and his successors in title the owners or occupiers for the time being of the Red Land and the Blue Land;

    b) The language in which the parties have expressed themselves in taking and giving the covenant will not in any event blind the Court to the realities of the arrangement;

c) To read the 1993 Conveyance and to ignore the 1993 Agreement would be to allow form to triumph over substance;

d) It is obvious that the Buyers acquired the Green Land for development (not for agriculture);

e) It is obvious from the 1985 Deed of Easement that the Vendor understood the development potential of the Green Land;

f) The 1993 Agreement imposed positive personal obligations on the Buyers to seek commercial or residential planning permission as soon as possible;

g) The 1993 Agreement envisaged that the Vendor might remain in possession notwithstanding the sale and he was required (by a clearly personal covenant) in the course of such use not materially to reduce the chances of obtaining planning permission;

h) The clause 3 covenant must be released if the increase in value by reason of the grant of permission is shared between the Buyers and the Vendor (the obligation to do so being personal to the Vendor);

i) Because of that the clause 3 covenant does not on analysis "touch and concern" the land but is in truth a "money payment covenant";

j) The scheme does not work if the benefit of the covenant in clause 3 is treated as running with the Vendor's estate in the Red Land and the Blue Land, because the Vendor must retain control over the covenant (otherwise he will find himself obliged to the Buyers to release the clause 3 covenants but held to ransom by his successor in title, and the Buyers will find themselves likewise held to ransom because the benefit of the clause 3 covenant is vested in people who are not bound to release it).

23. The argument in a nutshell is that whilst the promise made to the Vendor and his successors in title not to use the Property otherwise than for agricultural purposes could be enforced by the Vendor, it cannot be enforced by his successors in title to whom he has not assigned its benefit because the promise about the use of the Property does not relate to (or "touch and concern") the Red Land or the Blue Land. I do not think that that argument could have been better put or developed.

24. Counsel for Stein disagree with the departure points of that argument. First they submit that the covenant is expressed in entirely conventional terms to be with the Vendor (Peter Boggis) and his successors in title, the owners or occupiers for the time being of the Red Land and the Blue Land. On their face these words show that the covenant was not with a specified person, but that its benefit was intended to run with the Vendor's estate in the land. The words are, for example, in marked contrast to the promise the Vendor made in clause 9 of the 1993 Agreement about how he would use the Pink Land. I agree with this submission. In my judgment one has to start with the words of the covenant itself, rather than regarding all of the words used in the course of the transaction as a sort of jigsaw out of which a picture has to be assembled.

Taking those words as a starting point, by themselves they indicate an intention that the benefit of the covenant is to be enjoyed by the Vendor's successors in title.

25. That does not, of course, mean that the subject of the covenant *must* therefore "touch and concern" the land. Thus in Re Ballard's Conveyance [1937] Ch 473 the covenant was with "Emily Harriet Ballard her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate". Clauson J was satisfied that such a covenant was for the benefit of the vendor as owner of a particular property, and could therefore be sued upon (i) by the covenantee whilst owner of the property; and (ii) by a person who became the owner of the property by a title derived from the original covenantee *provided* that the covenant was of the sort that could be made to run with the land at law: see p.479. But he held that since the Childwickbury Estate extended to some 1700 acres he was bound by the evidence to hold that the covenant "fail[ed] to concern or touch far the largest part of the land" (at p.481). In a similar way in Cosmichome (*supra*) the parties had stated that the covenant was taken for the benefit of Southampton's adjoining land: but the judge found on the evidence that in reality there was no such benefit. There is, of course, no such evidence in the instant case: and I am left with the words themselves. In general it would be odd that the parties should objectively intend that there should run with the land the benefit of an obligation which they also objectively intended would be of such a nature that it was incapable of so running (because the obligation did not "touch and concern" or "relate" to the land). So the expression of the intention that the covenant is with the Vendor's successors in title is without more a pointer to the sort of obligation that the parties had in mind.

26. Second, Counsel for Stein submit that as well as being expressed in entirely conventional terms the content of the covenant is entirely unexceptional. As Wilberforce J pointed out in Marten v Flight Refuelling Limited [1962] 115 at 136:-

> " If an owner of land, on selling part of it, thinks fit to impose a restriction upon the user, and the restriction was imposed for the purpose of benefiting the land retained, the court would normally assume that it is capable of doing so. There might, of course, be exceptional cases where the covenant was on the face of it taken capriciously or not bona fide, but a covenant taken by an owner of an agricultural estate not to use a sold-off portion for other than agricultural purposes could hardly fall within either of those categories…. Why, indeed, should the court seek to substitute its own standard for those of the parties – and on what basis can it do so?"

The burden is thus on the Buyers to establish that the position is otherwise: and on this preliminary issue the Buyers cannot establish that the restriction to agricultural user was incapable of benefiting the Red Land and the Blue Land.

27. Third, Counsel for Stein submit that one cannot simply introduce the 1993 Agreement to undo this entirely conventional covenant, and that the court should be slow to defeat a registered interest by reference to an unregistered and comparatively invisible provision in another agreement. Counsel for the personal representatives of Henry Evans supported this argument, relying on Cherrytree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736. I agree that caution is required.

28. According to the conventional rules for the interpretation of documents the meaning of the contract or conveyance is that which would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of entering the document. So in understanding clause 3 of the 1993 Conveyance one is entitled to have some regard to the 1993 Agreement. The question is whether in that process of interpretation one treats in exactly the same way a document which appears on a public register (the extracted details of the 1993 Conveyance, including clause 3) and a document to which the parties to it alone have access (the 1993 Agreement). I put the point that way because a document cannot have one meaning as between the parties to it, but a different meaning as between their respective successors in title: nor can it have one meaning when executed, but a different meaning when registered.

29. In Cherry Tree Investments on the same day the parties entered into (i) a facility agreement which varied the statutory power of sale (by providing that the advance should be due immediately upon signature of the facility agreement) and (ii) a legal charge on the standard Land Registry form which made no reference to the facility agreement or any variation of the statutory power of sale. The judge held (in effect) that the two documents should be read as one because they had been executed as part of a single transaction. The Court of Appeal disagreed. Lewison LJ explained (at paragraph [128] following):-

> "…the question is: what weight would the reasonable person with all the background knowledge of the parties attribute to background material which did not appear on the face of [the registered charge] itself?….The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. This knowledge would include the knowledge that insofar as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for the originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of the transfer of or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not) ....."

30. Legal charges and restrictive covenants are significantly different. But I would apply that statement of principle to this case in this way. The covenant in clause 3 of the 1993 Conveyance was a promise made not only to the Vendor but also to his successors in title, the owners and occupiers from time to time of the Red Land and the Blue Land. The terms of that covenant would be recorded at the Land Registry

against the title to the Property. Future owners or occupiers of the Red Land or the Blue Land who wanted to find out what restrictions bound their neighbour's land would see the terms of the covenant, but would have no means of knowing what the 1993 Agreement said. They would have no access to any of the material on the basis of which it is said that clause 3 is not (as the words in which it is expressed would suggest) an ordinary covenant restrictive of the user of land, but is in truth (as is suggested to be the case) only a money payment obligation. At the date that the 1993 Conveyance and the 1993 Agreement were entered the reasonable reader's background knowledge (i) would include an understanding of that position; (ii) would also include a recognition that the Vendor and the Buyers had deliberately chosen to put the covenant in the registrable document open to public inspection and the release mechanism for the covenant in a private document; (iii) would include an understanding that a release of the covenant in relation to the entirety of the Property was far from certain, so that the promise might endure forever. In the light of those considerations the reasonable reader would understand that the true nature of the covenant was more likely to be set out in the registered document of title and would not treat the 1993 Agreement as containing material of sufficient weight entirely to recast the nature of the obligation as so disclosed.

31. Fourth, Counsel for Stein submit that even if the 1993 Agreement does contain a mechanism for the release of the clause 3 covenant which happens to be a personal arrangement between the Buyers and the Vendors, that does not mean that the obligation to be released must also itself be personal in nature. I agree with this submission. It is perfectly possible that clause 3 of the 1993 Conveyance created an obligation which related to or touched and concerned the Red Land and the Blue Land (and so was enforceable both by the Vendor and by his successors in title) but in relation to which one party entitled to enforce the benefit of the covenant (the Vendor) entered into a personal obligation to release it in certain circumstances. Indeed, on my analysis, that is exactly what happened in the instant case. (Derreb Ltd v White [2015] UKUT 0667 (LC) affords another example). It is right that, as Counsel for the Buyers pointed out, such an arrangement places both the Buyers and the Vendor in some difficulty if the Vendor sells off part of the Red Land or the Blue Land and his lawyers do not take the appropriate protective steps to exclude from the subject matter of the sale the benefit of the covenant in clause 3. But the fact that the adopted scheme is not foolproof is not a reason for treating the nature of clause 3 as fundamentally different from what it appears to be.

32. Fifth, Counsel for Stein submit that even if one of the purposes of clause 3 was to secure an obligation to make overage payments it cannot at this hearing be demonstrated that the clause 3 covenant conferred no other benefit on the Red Land and the Blue Land, and it is therefore not possible to treat the clause 3 covenant as a "pure" money payment obligation. I agree with this submission also.

33. In the result I reject the Buyer's argument that clause 3 did not relate to or touch and concern land so as to be incapable of passing with the Vendor's estate in the Red Land and the Blue Land to purchasers of parcels of that land, and instead requiring assignment of the benefit of the covenant. Clause 3 discloses an intention to create a right enforceable by the Vendor and by his successors in title. The obligation it imposed was an obligation relating to the user of the Property acquired by the Buyers. That is an entirely conventional obligation, and in this preliminary issue is to be taken

(in the absence of the contrary being established) as capable of benefiting the Red Land and the Blue Land. It is not permissible to treat the 1993 Conveyance and the 1993 Agreement as if they were a single document (although they relate to a single transaction) and to treat the contents of the latter as subverting the apparent meaning of the former. The mere fact that the 1993 Agreement contained a mechanism whereby the clause 3 covenant could be released neither means that the clause 3 covenant itself must be read as a purely personal obligation nor that the clause 3 covenant is pure security for the payment of overage.

34. I can turn to the second limb of Issue 1. It is accepted by the Buyers that if the clause 3 covenant "touched and concerned" or "related to" the Red Land and the Blue Land then the effect of section 78 of the Law of Property Act 1925 was to annexe it, rendering it capable of transmission without assignment. But the issue raised is: to what was the benefit annexed? Is clause 3 enforceable only by someone who has the entirety of the Red Land and the Blue Land (and so is not enforceable by Stein, which owns only a bit of the bed of the Track)?

35. I agree with the submission of Counsel for the Buyers that it is necessary to construe the covenant to ascertain what land is intended to be benefitted, and that if the benefit of the covenant is annexed to a parcel of land then there is a strong presumption that it is annexed to the whole of the land and to each and every part of it (see Federated Homes v Mill Lodge Properties [1981] 1 WLR 594 at 606G). Counsel for the Buyers goes on to argue that once regard is had to the terms of the 1993 Agreement that strong presumption is displaced, and this is one of those rare cases in which the benefit is annexed only to the whole of the Red Land and the Blue Land.

36. The argument is that the 1993 Agreement only works if there is a single person able to release the clause 3 covenant under clause 14.3 of the 1993 Agreement, being the person to whom the overage payment is made, there being no mechanism for the apportionment of the overage payment between multiple owners or of compelling them to concur in a release.

37. One can, I think, put on one side those cases in which it has been held that the benefit of the covenant is not annexed to each and every part of the benefited land because the covenant itself either (i) contains an express term that it shall not be (Roake v Chadha [1984] 1 WLR 40) or (ii) describes the benefitted land in a way that suggests that it is an entire estate (or its diminishing core) that is to be benefited, and not fragmentary sales-off. They do not assist in the instant case. The question here is whether the strong presumption that the benefit of the covenant is annexed to the whole and each and every part of the benefited land is displaced not by the language of the covenant but by the nature of arrangements for the release of the covenant contained in a separate document.

38. In my judgment the annexation to each and every part is not so displaced. First, as I have explained above this is not a case in which one can treat the 1993 Conveyance and the 1993 Agreement as constituting a single document: greater weight has to be given to the terms of the 1993 Conveyance. Second, the facts (i) that the mechanism for the release of the covenant may not be perfect and (ii) that if appropriate steps are not taken on the occasion of any sale off then Vendor might be placed in a position of some difficulty, do not of themselves warrant altering the nature of the covenant contained in clause 3 of the 1993 Conveyance so as to make the defective scheme

more workable. Third, the mechanism for the release of the covenant must not dominate the analysis. The covenant in clause 3 of the 1993 Conveyance endures in perpetuity. By contrast, the 1993 Agreement has a limited life and the release mechanism it contains may never be engaged at all, let alone applied to the whole of the Property. Fourth, the very language of clause 3 of the 1993 Conveyance contemplates enforcement of the covenant by successors in title and occupiers for the time being. There is no ground for saying that the use of the plural is confined to joint owners of the entirety of the Red Land and the Blue Land and does not extend to multiple owners. Fifth, reading clause 3 of the 1993 Conveyance as annexing the benefit of the covenant only to the entirety of the Red Land and the Blue Land attributes to the Vendor the very odd intention to lose the benefit of the covenant if he sold off any single part of the Red Land or the Blue Land (which, as I have indicated, consisted of a collection of buildings, a farmhouse, and some accommodation land).

39. In my judgment this was an entirely conventional restrictive covenant annexed to each and every part of the Red Land and the Blue Land. The purchasers of the residential units cannot (because of the events which I have recounted) themselves enforce the covenant. But Stein (as the owner of part of the bed of the Track) *might* be able to, provided that the hurdles raised in Issue 2 can be overcome.

40. I will therefore determine Issue 1 in the sense that clause 3 of the 1993 Conveyance creates a restrictive covenant annexed to each and every part of the Red Land and the Blue: and I invite Counsel to prepare an order reflecting that outcome.