Neutral Citation Number: [2018] EWHC 347 (Ch)

Case No: B00TQ111

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
APPEALS (ChD)
ON APPEAL FROM HHJ CARR sitting in the COUNTY COURT AT TORQUAY & NEWTON ABBOT

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 23/02/2018

Before :

THE HON. MR JUSTICE BIRSS

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Between :

	CHURSTON GOLF CLUB	**Appellant**
	- and -	
	RICHARD HADDOCK	**Respondent**

- -
- -

Malcolm Warner (instructed by **Kitsons**) for the **Appellant**
John Sharples (instructed by **Stephens Scown**) for the **Respondent**

Hearing dates: 15th Feb 2018

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Judgment Approved

Mr Justice Birss :

1. This is an appeal from the judgment of HHJ Carr given in the County Court at Torquay and Newton Abbott on Thursday 8th December 2017. The claimant Mr Haddock is the tenant under a lease of Churston Court Farm. The freehold of the farm is registered in the names of the Trustees of the Churston Barony Settlement (the Trustees). The defendant is a golf club which is the leasehold proprietor of neighbouring land. The freehold of the Golf Club's land is held by Torbay Borough Council.

2. The dispute is about an obligation to fence the boundary between the two parcels of land. The judge held that Golf Club owed an obligation as the owner of adjoining land to fence the boundary by putting a fence on their land. He identified the obligation as a fencing easement which arose in the following way.

3. In 1972 the former owners of the club (which was a company with a similar name to the defendant but no relationship with the defendant) sold the golf club land to the Aldermen

and Burgesses of the County Borough of Torbay. The conveyance was by a deed dated 20th Dec 1972. The Trustees, who were owners of adjoining land, were also parties to the deed. Another party to the deed was a company but nothing turns on that.

4. The conveyance contains a clause, clause 2, which the judge held created a fencing easement. The clause is as follows:

> "The Purchaser hereby covenants with the Trustees that the Purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stock proof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto"

5. Mr Haddock is a successor in title to the Trustees named in the clause. Shortly before trial Mr Haddock took an assignment of that benefit from the Trustees and the judge allowed a consequential amendment to the Statement of Case. As a result there is no issue about the benefit of clause 2 passing to Mr Haddock on any view.

6. Torbay Borough Council replaced the County Borough as a result of local government reorganisation in the 1970s and today the defendant Golf Club is a tenant of the Borough Council.

7. The judge held that the burden of that easement passed on to the defendant. The judge therefore found for Mr Haddock.

8. The proceedings involved the Borough Council at one stage but they settled with Mr Haddock and so the Borough Council no longer play any part. There were also other issues the judge had to deal with as between Mr Haddock and the Golf Club but no appeal is brought in relation to those.

9. The Golf Club appeals. The judge refused permission but it was granted by Dingemans J. The appeal was heard in Exeter. This judgment was handed down in Bristol.

10. There are two issues (i) whether it is legally possible for a clause in a conveyance to create a fencing easement at all, and (ii) whether on its true construction the clause has that effect.

11. The appellant contends that the answers to these points are (i) no, it is not legally possible and (ii) in any case even if it is possible, this clause– which is on its face a covenant not a grant - has not done so. The respondent disagrees, supporting the judge.

12. On one view the issues are some legal complexity and involve questions which have vexed real property lawyers for a long time.

The first point

13. Easements are obligations which apply to one piece of land for the benefit of another piece of land. They are attached to the land rather than to the person who happens to be the owner or occupier of the land at a given moment. So one example of an easement could be a right of way over one piece of land (called the servient tenement) which can be exercised by the owner of another piece of land (called the dominant tenement).

14. The problem simply stated is that easements in general do not or cannot give the owner of the dominant tenement a right to impose a positive obligation on the owner of the servient tenement to do something (such as to spend money). See e.g. Gale on Easements 12th Ed para 1-80 " a right to have something done is not an easement". But an obligation to build and maintain a fence is such an obligation. So one might think there can be no such thing as a fencing easement. But a fencing obligation which ran with the land in this way was long recognised in the law. In some cases it was called a spurious easement or quasi-easement to recognise its anomalous character (Gale 1-80 footnote 316). But in the 1960s and 1970s as a result of three cases decided by the Court of Appeal which considered this sort of fencing obligation, it has now been clearly established that a fencing obligation between neighbours in the nature of an easement can exist as a matter of English law and will run with the land. In fact it was of very ancient origin. For today I will call it a fencing easement. The three cases are ***Jones v Price*** [1965] 2 QB 618, ***Crow v Wood*** [1971] 1 QB 77 and ***Egerton v Harding*** [1975] 1 QB 62. The judges in these three cases did not agree on all points, for example there is an issue about whether a fencing easement can be created by custom, but that debate does not matter for the question I have to decide.

15. What also emerges from these cases is that at least some of the legal bases on which this fencing easement was found to arise meant that it must be something which could be created by grant. There was a division about that in the first of these cases ***Jones v Price***. There Diplock LJ at p640 at A finds that the origin of it "can lie only in grant" and Willmer LJ finds it could arise under the doctrine of lost grant (p636 at E) but Winn LJ (p646-B to 647-G, esp. 647-E) was not prepared to accept that lost grant was possible for reasons I will address below. However in ***Crow v Wood*** both Lord Denning MR (at p85 at A) and Edmund Davies LJ (at p86-G) held it can be created by grant and Megaw LJ agreed with both, while in ***Egerton v Harding*** Scarman LJ, giving the judgment of the court, made the same finding at p72 at A.

16. Part of the reason why that must be so is that one of the ways in which has now been accepted a fencing easement could be established in law (pax Winn LJ) was by the doctrine of lost modern grant, in effect a legal fiction based on proving that some user had been going on for a long time and therefore pretending that there must have been a grant of a right to do it which has now been lost. The word "modern" means sometime after the year 1189 because the doctrine was invented to get around a problem with an older similar doctrine which required proof of user back to time immemorial (which was deemed to be 1189). Note that (as was not in dispute before me) lost modern grant can be defeated if the grant was impossible (see Megarry 28-065). So lost modern grant only works because grant is possible. The fact a grant was improbable was not a bar

(Megarry 28-064).

17. However Mr Warner for the appellant submitted that although the grant of a fencing easement was possible in theory, it was not possible in practice due to the rule in ***Austerberry v Corporation of Oldham*** (1885) 29 Ch D 750 (Court of Appeal).

18. That case is authority for the proposition that a covenant in a conveyance which imposes a positive obligation on the land owner such as to spend money does not run with the land. In other words it is a purely personal contractual obligation between the parties to the document.

19. Mr Warner submitted that this practical problem did not undermine the lost modern grant doctrine because a grant which was possible in theory but not in practice only put the fencing easement into the "improbable" category rather than the "impossible" category. In other words although a grant of a fencing easement was possible in theory, it was not possible in practice because the only way to do it was by a covenant and that method did not work because of ***Austerberry*** but that was alright because ***Austerberry*** only made it practically impossible rather than legally impossible. I am not convinced. I appreciate that lost modern grant is a legal fiction. Nevertheless if it truly is not possible in practice to grant a fencing easement then it seems to me that the lost modern grant theory cannot allow fencing easements to be established. Moreover I am in good company since ***Austerberry*** is the reason why Winn LJ in ***Jones v Price*** was not prepared to accept that a fencing easement's origin could be in grant. However, as I have explained above, Winn LJ was in the minority in that case and taken with the subsequent cases, the issue has been decided. Fencing easements can be created by grant.

20. When Diplock LJ examined the issue in ***Jones v Price*** he had noted that the origin of the fencing easement could either be in covenant or grant but then noted that the idea it could be created by covenant could not survive ***Austerberry***. Therefore, he reasoned, it must lie in grant. The judge noted there was no precedent in the books for such a grant and said he found it difficult to envisage its form. The text book Megarry (at 30-022) also deals with this, noting that the nature of the right of fencing lies in grant but, in footnote 141 stating "However it is impossible to draft an express grant of such a right. It could only be created expressly by means of a covenant". What the authors are getting at is the idea that it is impossible to draft an express grant because that would be a covenant and covenants cannot achieve the desired result because of ***Austerberry***.

21. So Mr Warner submits all one can do in the relevant deed is put in a fencing covenant and rely on attempts to impose chains of covenants on successors in title, so that if the holder of the dominant tenement believes the covenant to fence has been breached they can sue the original covenantor, even though he or she no longer owns the land. Assuming the breach is proved, that covenantor pays damages to the holder of the dominant tenement and then seeks an indemnity from the successor in title and so on down the chain to the current owner (assuming the chain has not broken). Mr Warner recognises this is cumbersome and impractical but contends it is not legally possible to do anything else.

22. On the other hand a textbook by Scammell in 1996 proposes a form of express clause for a conveyance which, the author suggests, could create a fencing easement. Since his easement clause is untested, Scammell also advises putting in a covenant just in case.

23. So Mr Warner's case is essentially that while fencing easements are possible, they can only be established by prescription and other approaches based on long user. They cannot be created by express grant.

24. In my judgment that is wrong. The trio of Court of Appeal decisions makes it clear that the origin of the fencing easement lies in grant (or at least that is one origin). That is a necessary part of the reasoning which leads to the courts accepting that these obligations exist at all. Given that, then it seems to me that it must be possible for two parties to actually create such a right by grant in a conveyance, in other words in a clause in a conveyance of the relevant land. That does not mean such an easement has in fact been created in any given case but if, on its true construction, a clause purports to create an easement of fencing, in other words the objective view of the intention of the parties is that that is what they intended to achieve, I cannot see any good reason in law or principle why that should be declared legally impossible. Since clauses in conveyances can grant other sorts of easement, there is no reason why they cannot create this sort of easement. To hold that this is the law does not mean any attempt to create an easement which imposes any other sort of positive obligation is now possible. Far from it. That wider sort of positive obligation easement has not been recognised by the courts. But since a fencing easement is a thing which can exist, can run with the land and whose origin can lie in grant, I cannot imagine why two parties who wish one to be granted cannot do so.

25. This is not the same as the situation in ***Rhone v Stephens*** [1994] 2 AC 310. In that case the House of Lords held that s79 of the Law of Property Act 1979, which is essentially a word saving provision making it unnecessary to refer to successors in title, had not reversed ***Austerberry*** and did not convert a positive covenant to maintain a roof into an easement which ran with the land. However crucially in my judgment, the House of Lords were not concerned in that case with a fencing easement – that is to say with a positive obligation which the law had by then already recognised could run with the land. The issue in ***Rhone v Stephens*** was whether s79 could in effect turn any positive covenant into a new kind of positive easement. The answer was no. ***Jones v Price*** is referred to and so their Lordships will have been well aware that that the case stood for the proposition that a fencing obligation could run with land. They did not contradict it. The reference picks up part of the judgment of Willmer LJ in which he noted that ***Austerberry*** prevents a positive covenant running with land.

26. It is clear law (and counsel for the appellant did not dispute) that clauses in a deed which conveys property can be construed as a grant of an easement even though they are framed expressly in terms as a covenant and even though the word "covenant" is used (see e.g. ***Rowbotham v Wilson*** [1843-60] All ER Rep 601, 603, and ***Russell v Watts*** (1885) 10 App Cas 590). Therefore the fact that a clause uses the word "covenant" does not mean it only takes effect as a covenant and cannot do so as a grant. Moreover, as explained by Diplock LJ in ***Jones v Price***, the decision in ***Austerberry*** is concerned with the inability of provisions which are covenants as distinct from grants, to run with the

land. Diplock LJ specifically drew the distinction between a grant and a covenant when he distinguished ***Austerberry***. His judgment was that something which is a grant does not fall foul of ***Austerberry***. It seems to me therefore that it follows that in a case in which the provision is construed as a grant, ***Austerberry*** is irrelevant.

27. Putting it another way, I respectfully disagree with the footnote in Megarry. It seems to me that once the step has been taken, as it was by Dipock LJ, to distinguish grants and covenants for the purposes of the application of ***Austerberry***, then it necessarily follows that a clause which is construed as a grant does not engage ***Austerberry*** at all and there is no conceptual difficulty about drafting a clause which makes clear the parties intend the effect to be to grant an easement. No doubt it is simplistic but one might suggest putting the intention beyond doubt by using the word "easement" (as Mr Scammell did, and in saying this I recognise the actual clause in this case does not do that).

28. I find that the judge was entitled to examine whether the clause did create an easement of fencing because, as a matter of law, it is possible for a clause in a conveyance to do that. I reject the first point.

The second point

29. The second question is whether clause 2 in fact creates a fencing easement.

30. The judge dealt with this in paragraph 46-49. He said:

> "46. The covenant in this case creates a fencing easement, and indeed a fencing easement can only be created by such a covenant. This is again supported by Megarry & Wade in the passage already cited, and in *Russell v Watts* [1883] 25 ChD 559. *Sugarman v Porter* [2006] EWHC 331 (Ch) does no more than seek to construe the wording of a particular covenant, and is not a proposition for the idea that a covenant cannot create an easement.
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> 47. As was made clear in *Scamell: Land Covenants* and *Rowbotham v Wilson* [1860] EngR 892, one has to look at the wording of the 1972 covenant. The wording could not be clearer, nor could the intentions to bind successors in title be more apparent. The burden therefore passes, if in no other way, under section 79 of the Law of Property Act 1925.
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> 48. Were the defendant's arguments right – namely that the claimant's only course of action is against the Council – this would fly in the face of the wording and the intention of the 1972 conveyance, which could be circumvented by the land being sold or by the Council ceasing to exist, for example as a result of local authority changes. The wording of the 1972 conveyance, 'forever hereafter' would be without meaning. Whilst I accept the position would be different with an informal oral agreement,

that is not the case here.

> 49. The next question is whether the benefit of the fencing obligation passed to the claimant under the lease granted to him by the Council. In short, was the benefit intended to be personal to the trustees or was it attached to the land. Again it is necessary to look at the wording of the 1972 conveyance. The wording, as already indicated, speaks of an obligation 'forever hereafter' and would have little or no meaning if the benefit could not pass to the claimant. As soon as the trustees sold the land and had no interest in it, or they ceased to exist, it could not be required by the claimant to enforce the covenant; it would have no practical value or purpose. In all the circumstances, I am quite clear the benefit attached to the land passed to the claimant under the lease. This would be true even where the lease is silent on the issue, as one is entitled to look at the surrounding circumstances to assess the intention of the party. Again from the wording of the 1972 agreement, and all the surrounding circumstances, it is apparent that this was a benefit that was always intended to pass to the land. It does so both at common law and pursuant to section 78(1) of the Law of Property Act 1925."

31. The appellant submitted the judge misconstrued the clause and reached the wrong conclusion on it.

32. The appellant submitted that clause 1 of the 1972 deed (which is the conveyance of the land) contains two clear easements and so would have been simple for draughtsman to put a fencing easement there too if that is what was intended, but he or she did not. Therefore that is an indication that clause 2 is not an easement. That is not a good point. Clause 1 is the conveyance between the vendor and purchaser of the land. Clause 2 is different. Irrespective of the issues of covenant vs easement, the clause takes effect between vendor and the trustees, who are the owners of the neighbouring land. There is nothing to assist the appellant in the fact that clause 2 is separate from clause 1.

33. A point was made about professional draftsmen (citing ***IDC Group v Clark*** [1992] 2 EGLR 184) but I was not persuaded that factor helps either way in this case. In ***IDC Group v Clark*** the clause in a professionally drafted deed contained the word "licence" which the court held no professional draughtsman would have used to create an easement. That makes sense but there is nothing like that in this case. The respondent submitted that since the deed here was drafted in 1972, which is after ***Jones v Price***, it might be said a professional would at least know that it might be possible to create a fencing easement since the Court of Appeal had found that such an obligation could run with land. I am not persuaded the professional draughtsman point helps either way.

34. Turning to the words of cause 2 itself, it was common ground that, as Megarry (8th Ed) explains at 27-004 there are four requirements for an easement. There must be a dominant and servient tenement, the easement must confer a benefit on or "accommodate" the dominant tenement, the dominant and servient tenements must not

be owned or occupied by the same person, and the easement must be capable of forming the subject-matter of a grant. In clause 2 and given my finding on the first point in this appeal, all four requirements are satisfied.

35. The key thing in clause 2 which persuaded the judge that this was a grant of an easement was the fact that the clause included the words "forever hereafter". That showed that the parties intended that the obligation was supposed to last into the future even if the purchaser ceased to exist. I agree. That seems to me to be a strong point in the respondent's favour.

36. The appellant relied on the judgment of Peter Smith J in ***Sugarman v Porter*** [2006] 2 P&CR 14 (p274). ***Sugarman*** is the only case cited by the appellant in which a court has considered a fencing covenant after the three Court of Appeal cases referred to above. The issue in ***Sugarman*** was whether the benefit of a series of covenants ran with the land. The defendants there argued that they did. Peter Smith J held that they did not. The main reason why not was that in the conveyance, they were only expressed to be for the benefit of the vendor's land for the period in which that land was unsold. They were intended to allow the vendor herself to exercise control as long as she was the owner of the unsold land. They were not intended to run with the land when it was sold. A further argument advanced in favour of the benefit running with the land was that there was a fencing covenant which referred to the purchaser maintaining the fence "forever after". Peter Smith J held that that covenant did not assist the defendants. He held it was not an easement but was a covenant. It is true that the words of the covenant itself, when taken out of their context, are close to the words of the clause 2 in this case but the context is materially different since they are part of a conveyance in which there are clear indications that the covenants were not meant to be annexed to the land (the unsold land point). In my judgment HHJ Carr was right that ***Sugarman*** did not compel him to decide that clause 2 was not a grant of an easement.

37. Clause 3 of the 1972 conveyance also involves fencing. Here the vendor and the trustees covenant with the purchaser that they will maintain a fence on other parts of the boundary. The respondent submitted that the absence of a reference in this clause to those deriving title under the covenantor supported the respondent's submission that the inclusion of those words in clause 2 supported the respondent's case. That is not a strong point.

38. The respondent also submitted that if clause 2 had been intended as only a personal covenant, one would have expected to see provisions to bind the Council's successors. Various examples were given such as a term obliging the Council to ensure that a purchaser covenanted with the Council to perform the obligation. While it is not determinative, in my judgment this point does support the respondent's case on construction.

39. Clause 4 is a restrictive covenant and is expressly drafted to show it is intended to run with the land. The appellant draws a contrast between that and the drafting of clause 2. The respondent characterised this as a fair point but not a strong one. I agree. Restrictive covenants are different from easements in that the former do not inherently

benefit the covenantee's land while the latter do.

40. Of course clause 2 of the 1972 deed expressly states that the purchaser "hereby covenants". Nevertheless in my judgment an objective approach to determining the intention of the draughtsman of clause 2 is that it was intended that a stock proof boundary fence, wall or hedge would be maintained "forever hereafter" on the purchaser's side of the boundary of the two parcels of land by the owners or occupiers of the purchaser's land for the benefit of the trustees' land. In other words it was intended to create a fencing easement and HHJ Carr was right so to hold.

41. The one aspect of the judgment which I do not entirely accept is in paragraph 47 where the judge reasoned that the burden "therefore passes if in no other way under s79 of the Law of Property Act". In my judgment the burden passes because an easement has been granted, not because of s79. A finding that the burden passes under s79 seems to me to run counter to ***Rhone v Stephens***. The section is a word saving provision which applies unless the contrary intention appears. The contrary intention does not appear and therefore I agree that the section takes effect. But if s79 is needed in order to turn clause 2 into the grant of an easement, which I do not believe it is, then that would be contrary to ***Rhone v Stephens***.

Conclusion

42. In my judgment it is legally possible to create a fencing easement by express grant in a conveyance of the relevant land. The conveyance in this case does that. The judge was right to find that a fencing easement existed. I will dismiss the appeal.