

**THE HIGH COURT  
DUBLIN**

**RHONA O'SHEA**

**TUDOR HOMES LIMITED**

**[2004 No. 476SP]**

**PLAINTIFF**

**DEFENDANT**

**Judgment delivered by Mr. Justice MacMenamin on Friday, 17th December 2004.**

1. Mr. Justice MacMenamin: The Plaintiff in these these proceedings is a widow and resides at Winfield, Lehaunstown Lane, Cabinteely in Dublin. The Defendants are a limited company engaged in property development, having their registered address as Lonsdale House, Avoca Avenue, Blackrock, County Dublin.

2. The matter comes before the Court by way of a special summons in the matter of the construction of a deed of conveyance dated 23rd October 1963.

3. The circumstances in which this relates to the Plaintiff and the Defendant are set out below.

4. By deed of conveyance dated 23rd October 1963, to which I will herein after refer to as the "Kitching deed", made between Frank John Lionel Rourke, hereinafter called the vendor of the one part and John Metcalfe Kitching, hereinafter called the purchaser of the other part, the vendor covenants as follows at the fifth schedule, Clause 2:

"For a period of 50 years from the date of these presents (*sic.*) to limit buildings on the lands retained by the vendor lying on the eastern side of the lands hereby assured as follows:

A. No house to be erected on a site less than one acre.

B. All sites to have a frontage of at least 150 feet to Lehaunstown Lane.

C. All sites to have access to a said frontage."

5. The lands retained by the vendor in that deed are the lands shown coloured blue on the map annexed to this judgment. The Plaintiff is a successor in title to the purchaser in this deed, i.e. she is successor in title to John Metcalfe Kitching. The Defendant is a successor in title in part with respect to the lands retained by the vendor in the said deed.

6. Plaintiff asserts that the said covenant affects the Defendant's title, which the Defendant denies. The question of construction which arises under the Kitching deed is whether the Defendant's lands being part of the land "retained by the vendor lying on the eastern side of the lands hereby assured" is affected by the said covenant.

7 As is deposed during the affidavit of John Walsh Solicitor, who swore the affidavit on behalf of the Plaintiff, issues were joined on foot of a letter which was written by John Walsh and Co. to Messrs. Matheson Ormsby Prentice solicitors for the Defendant, on 16th September 2004. This letter referred to a brief telephone conversation which had taken place between the two firms and referred to a perceived difficulty with Tudor Homes' title being developed by them at Cabinteely, Lehaunstown.

8. As is explained in the letter, the Plaintiff's title derived partly from fees simple conveyed from Córas Iompair Éireann after the closure of the old Harcourt Street line, delineated in brown on the map, and partly from the Kitching deed made between Frank John Lionel Rourke and John Metcalfe Kitching.

9. Mr. Walsh's letter goes on to state that it would be noted that at the time of the conveyance, the vendor, Mr. Rourke, owned a large tract of land to the east and south of Brennanstown Road down to Lehaunstown Lane and, in conveying the portions coloured green and brown to Metcalfe/Kitching, became subject to the covenants of the 5th schedule to that deed, which inter alia severely restricted the development for an ensuing period of 50 years, i.e. to 23rd October 2013 on the bulk of Mr. Rourke's remaining lands, of which the Defendant's lands form part.

10. The letter goes on to state that as far as the Plaintiff's solicitors were aware, the lands having the benefit of this restrictive covenant, i.e. the lands coloured green on the map attached to the Kitching deed, are at this time in the separate ownership of the Plaintiff and one other owner, who had transpired in the course of the hearing to be Treasury Holdings Limited; who while admittedly enjoying the benefit of the restrictive covenant for their portion of the green lands also owned substantial additional adjoining lands detrimentally affected by the restrictive covenant.

11. I understand that the land held by Treasury Holdings is to the south of the blue lands which are the subject matter of these proceedings.

12. The letter goes on to state that: "while researching the scale and effect of the restrictive covenant on surrounding lands for the purpose of possibly negotiating a sale to this other owner that senior counsel was briefed and his unequivocal opinion obtained to the effect that the portion of the Tudor Homes land lying to the east of Lehaunstown Lane, which are coloured blue in the Kitching deed, are adversely affected by the restrictive covenant."

13. The letter goes on to state that "it has come to the Plaintiff's attention that the Defendants are building or proposing to build on some of the lands affected by the restrictive covenant in breaches of same. Further, in view of the fact that the marketing of these dwellings is imminent it was felt incumbent to contact the defendants immediately "to enquire whether they are aware of the situation and to seek your comments or proposals in relation thereto.

14. The penultimate paragraph of the letter states:

"From our perspective it would seem that in order to clear up the problem you would need to secure from our clients and her neighbour a release from the restrictions imposed on your client's lands by the covenants contained in the 5th schedule of the Kitching deed."

15. A number of points arise from this letter. These are:

A. The letter at that point did not state that Treasury Holdings were the other owner referred to.

B. The covenant did not actually refer to the lands lying to the east of Lehaunstown Lane. In fact, the covenant in question refers to the land retained by the vendor lying on the *eastern side of the lands hereby assured*.

C. Quite clearly the development programme upon which Tudor Homes had embarked was far advanced by September 2004. Indeed the point of marketing the developed properties had almost been reached.

16. This letter of 20th September 2004 was met by a response from Matheson Ormsby Prentice which contended that the covenant in question was stated to relate to the lands retained by the vendor in the Kitching deed lying to the eastern side of the lands assured. It went on to point out that the lands being developed by Tudor Homes are to the north of the lands assured by the Kitching deed. Accordingly, it contended the covenant, even if it were an enforceable restrictive covenant, did not affect the Defendant's land.

17. In response to the grounding affidavit sworn on behalf of the Plaintiff, the contents of which have been rehearsed above, there were two affidavits put in on behalf of the Defendant. The first of these is the affidavit of John Fleming, Architect, of 8/11 Baggot Street, which exhibits a number of maps which are of assistance in more clearly identifying the issues in question. (See in particular Exhibits JF5 and JF6.)

18. The latter of the two maps conveniently sets out the boundaries of the land in question; the area of the current development and also a number of developments which have taken place subsequent to the making of the deed in 1963.

19. The affidavit also states that the lands held by the Defendant are in fact held by Yeoman Investment Holdings Limited. This company was by consent added as a Defendant to the proceedings in the course of the application. I understand that the two companies are in common ownership and Yeoman Investment Holdings has undertaken to transfer its interest in the lands at issue to the Defendant.

20. In order to understand the matters in issue it may now be convenient to revert back to the map appended to the judgment and to the deed. The lands which are stated to have had the benefit of the covenant are those coloured green and brown on the map annexed to the Kitching deed. That portion which is brown was originally the property of CIE and was part of the old railway. Mr. Fleming also exhibits at JF1 a map which illustrates the respective differences between the boundaries of the green land and that owned by Tudor, being 280 metres and also the distance from the Plaintiff's property to the Tudor property, being 380 metres.

21. Mr. Fleming states that the Defendant's lands are separated from the Plaintiff's lands by Lehaunstown Lane and by the Druid Valley and Cabinteely stream. He exhibits a series of photographs which illustrates the position and also describes the Defendant's lands to the north as being back land in character, bounded by residential developments. The Plaintiff's lands were agricultural in character and have few dwellings or other developments adjacent. It is possible that the area will be the subject matter of considerable development in the next few years. Mr. Fleming also describes certain natural boundaries dividing the two lands, including the Druid Valley, containing the Cabinteely stream, and the tall granite walls running out along Lehaunstown Lane as being natural features which divide the two lands.

22. He states that the Defendant's land and that of the Plaintiff have no common boundaries; and, as indicated, at their closest are approximately 380 metres apart.

23. He also makes certain observations regarding orientation of the lands to which I will revert later

24. Mr. Martin Browne is a director of the Defendant and has also sworn an affidavit. Some of the points which Mr. Browne makes in his affidavit are of a legal nature. They are essentially:

1. That by reason of the unduly vague description of the lands, the subject matter of the covenant, that the covenant itself may be void for uncertainty.
2. That the covenant may be unenforceable and does not bind or affect the lands developed by the Defendant.
3. Even if the covenant does extend to the lands in question the same is not binding on the Defendants and the Defendants are bona fide purchasers for value without notice that the covenant extended to the lands in question.
4. That the lands in question were purchased by Tern Houses Brennanstown Limited, a company controlled by the Defendant.

25. Prior to the purchase, when title investigations were carried out, the then purchaser was advised that the covenant did not bind or affect the Defendant's lands. In this regard he refers to a letter of advice of Mr. Henry Barron SC, (as he then was) dated the 27th January 1974, and also related correspondence. Mr. Browne also states that the Defendant is engaged in a large scale development of 222 residential units, which development comprises of detached houses, townhouses, six terraces of duplex apartments or apartment buildings, a crèche and an underground car park, for which the Defendant obtained planning permission on 19th December 2002, confirmed by An Bord Pleanála on 26th June 2003. Thus far it is estimated that €12,970,701 has been expended.

26. The Defendant states that the Plaintiff first informed them of her claim by letter of 16th September 2004, at which date the development had considerably progressed. The Defendant makes other points as follows:

A. That the Plaintiff had not exhibited documents of title under which she asserts to be entitled to be part of the lands alleged to benefit from the covenant. (This has now been dealt with.)

B. That, despite requests, a copy of a conveyance dated 24th January 1986 between Kevin Younge and Michael O'Shea and Rhona O'Shea to the Plaintiff had not been furnished.

C. The Plaintiff had not furnished copies of her title between the Kitching deed and the aforementioned deed; examination of which is necessary to establish the Plaintiff's title and the transfer of the benefit of the covenant insofar as the covenant is capable of transfer.

D. The Plaintiff has not identified the owners of the balance of the lands purportedly benefiting from the covenant.

E. That it was never intended that the purported restrictive covenant should extend to the lands to the east of Lehaunstown Lane, including the Defendant's lands.

F. That in a subsequent lease of 19th August 1964 to James Kennedy relating to lands on the eastern side of Lehaunstown Lane forming a part of the lands retained by the vendor, the lease does not contain any restrictive covenant of the type included in the Kitching deed, rather it envisages the erection of additional houses.

G. That the three houses which have been built on the lands which have been in breach of the restrictive covenant indicate that the restrictive covenant was not intended to and should not extend to the lands east of Lehaunstown Lane. These houses are Glengaragh, said to be built prior to 1st September 1966; Springdale, said to be built on foot of a planning permission granted in 1975 and completed prior to 16th December 1977; and the Pines erected, it was thought, some time in the 1980's. The latter stands on lands assigned by Kevin Younge to Rachel Stanley by assignment of 31st December 1969.

27. The Summary Summons herein was issued on 5th November 2004. The Defendant to this Summary Summons itself issued plenary proceedings wherein Tudor Homes Limited and Yeoman Investment Holdings are named as Plaintiffs and Rhona O'Shea as Defendant on 11th November 2004. These proceedings sought declarations that the restrictive covenant contained in the deed of conveyance dated 23rd October 1963 was unenforceable. Damages were sought for injurious falsehood, slander of title and interference with the Plaintiff's economic and commercial interests. In the alternative, the Defendant in the instant proceedings sought a declaration that if the covenant is enforceable as against the Plaintiff, the Defendant is not entitled to any injunctive relief.

28. The matter came before the Commercial Court, Kelly J., and I understand the position is that an undertaking was given by Mrs. O'Shea's counsel that no injunctive relief would be sought. Upon that undertaking, Kelly J. permitted this matter to be remitted into the Chancery List for the purposes of a determination on foot of these Special Summons proceedings. It may, however, for reference purposes, be useful to advert to the contents of paragraph 12 of the Statement of Claim as being an *aide-mémoire* of the points put forward by the Defendant to these proceedings. The points relied on are:

1. The vagueness of the description of the lands.
2. That the covenant binds Mr. Rourke as vendor and not his assignees, and accordingly therefore not the Plaintiffs.
3. The covenant does not extend to the Plaintiff's lands or any part thereof and only extends up to Lehaunstown Lane. It does not extend to that part of the Plaintiff's lands, the subject matter of the current developments.
4. The covenant does not touch and concern the Defendant's lands.

29. Mr. Hussey, Senior Counsel, appeared on behalf of the Plaintiff to these proceedings.

30. He says that this case rests on the interpretation of the 5th schedule of the 1963 deed. He urges upon the Court that this issue falls to be decided as a matter of pure law and must be interpreted in accordance with the canons of interpretation as defined. If he is correct in that submission, he contends, the covenant in the question must govern the totality of lands to the east of the purchased lands, including that owned by the Defendant to these proceedings.

31. He submits that there is nothing in the deed to suggest curtailment. Nor is there anything in Kennedy lease to suggest that the covenant has any different meaning. In particular, he refers to: "Norton on Deeds", pages 50 to 55, and to the fundamental rules of interpretation for the interpretation of deeds set out therein.

32. He particularly relies on the provisions as set out as follows on page 50:

"The word intention may be understood in two senses as descriptive, either (1) of that which the parties intended to do, or (2) of the meaning of words that they have employed."

33. Here it is used in the latter sense. He relies on the authorities as set out in "Norton":

"In other words, he says the question to be answered always is 'what is the meaning of what the parties have said?' Not, 'what did the parties mean to say?' The latter question is one which the law does not permit to be asked; it being a presumption *juris et de jure*, to rebut on which no evidence was allowed, that the parties intended to say that which they have said."

34. In *Throckmerton v. Tracy* (ISSS) 1 Plowd. 145, referred to in "Norton", the following rule was laid down by Staunford J. where the interpretation of deeds is concerned:

"Thirdly, that the words shall be construed according to the intent of the parties, and not otherwise."

35. Essentially, therefore, he contends that the meaning of words for the purposes of the interpretation of deeds must be interpreted in an objective sense and literally.

36. Further, Counsel relies on the quotation of Lord Wensleydale in *Monypenny v. Monypenny* [1861] 9 HLC 114 and the case of *Ex parte Chick Re: Meredith* [1879] 11 Ch.D. 731. The former states:

"The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions."

37. With regard to the latter authority, I am urged to follow the rule of construction which was laid down by Lord Denman and Baron Parke. They said that:

"in construing instruments you must have regard, not to the presumed intention of the parties but to the meaning of the words which they have used."

38. As a general proposition Counsel states that words capable of more than one construction are to be construed as though as to

carry into effect the expressed general intention of the parties: and if owing to some rule of law the deed fails to take effect in the manner expressed it will, if possible, be construed so as to carry into effect the expressed general intention of the parties.

39. Reference is also made to "Norton" at page 63, wherein it is stated: "when the words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing deed, such literal meaning must be taken to be that in which the parties used the words".

40. I am satisfied that Mr. Hussey's submissions are absolutely correct, if the words in question are unambiguous.

41. He says in particular that there are no words of limitation and that there are natural boundaries upon which reliance could have been placed in order to place limitations upon the area to be affected by the covenant. Counsel also relies on what is referred to as the "golden rule" regarding the interpretation of deeds, i.e. the application of its plain meaning. He also draws my attention to the provisions of *Wolstenholme* at page 129, and also, section 58 of the Conveyancing Act.

42. A close examination of the map appended to the deed indicates that immediately to the east of the green portion there is a hedge and pathway. There is also a legend containing measurements measured from the soil butt of the hedge. I draw attention to this because Clause 1 of the 5th schedule provides that the vendor shall:

"not for a period of five years from the date of these presents cut the hedge at present growing on the eastern side of the lands hereby assured below a height of six feet."

43. The same phrase:

"the eastern side of the land assured," is used in Clause 2 of the 5th schedule.

44. At Clause 3 I find the covenant provides that not:

"for a period of 50 years from the date of these presents to limit building of the lands retained by the vendor lying on the south side of the lands hereby assured as follows..."

45. Mr. Hussey submits that this refers to the lands which lie below the boundary described by the brown portion of the map viz. the former railway line.

46. Mr. Hugh O'Neill, Senior Counsel, on behalf of the Defendant, submits that what is truly meant to be dealt with by the deed is what is referred to as the 11 acre field. That is the area described on the eastern side by the boundary with the green lands and on the western side of Lehaunstown Lane as it extends northwards. He says such an interpretation is inevitable when one looks at the deed and also when one looks to the other portions of the third schedule. He says the only logical interpretation of the covenant in question would relate to houses to be situated in what he refers to as the 11 acre field. He says that this interpretation, and only this interpretation, is consistent with the provision of the sites of one-and-a-half acres and each house having a frontage in accordance with the provisions of the covenant.

47. He submits that if one were to proceed all the way northwards up Lehaunstown Lane, this could include 11 houses on a total of 49 acres. Also, he submits that the purpose of the covenant is clearly to protect the amenity of the green land and not to govern other lands more distant from the green land.

48. He points out that other lands encompassed in transactions, viz. those which are described in the map as red and yellow contained no such covenant running therewith. He submits that the Tudor lands in question are not to the east of the green lands but, in fact, to the northeast. He also states that if one looks to the subsequent deeds, one can see the true meaning to be imputed to the deed of 1963. He submits that the three houses, to which reference has been made above, do not in their description correspond with the covenant; and that it would be entirely inconsistent that the vendor should have permitted developments to take place in other lots which would be inconsistent with the meaning to be imputed to the deed of 1963.

49. In the case of ambiguity and difficulty in interpretation, extrinsic evidence, he contends, may be admitted. He submits that this is an appropriate case for such an approach.

50. I have no difficulty in accepting the general statements of law which have been put with such force by Mr. Hussey. The issue which I must decide is what is the literal interpretation of the words if they are capable of a literal interpretation which makes sense and then apply that interpretation to the position before the Court.

51. Having considered the matter, I have concluded that in fact the deed is ambiguous and loosely drafted. It seems to me there is a genuine vagueness and ambiguity as to the terms of the deed itself. I say this by reference to the provisions of Clauses 1 and 3 of the covenant, as well as the provisions of Clause 2, which is the subject matter of consideration here.

52. The very vagueness and ambiguity is even reflected in the Plaintiff's opening letter, to which I have referred above, insofar as it purported to describe the lands the subject of the covenant.

53. On the basis that I am entitled to rely on extrinsic evidence, it seems to me that when one considers such evidence the case being put forward by Mr. O'Neill is a coercive one.

54. The contents of the subsequent deed are indeed at variance with the restrictive covenant contained in the 1963 deed.

55. The conduct of the parties, in particular the purchasers, is also at variance with that restrictive covenant.

56. The description, area and size of the properties which were transferred on foot of the post 1963 deeds are, in at least two cases, at variance with the contents of the covenant.

57. It seems to me, therefore, that while I must rely on the totality of the deed for its meaning and effect, I must also, because of its vagueness and ambiguity, rely on the subsequent leases and what may be inferred regarding the conduct and intent of the parties.

58. It is not consistent with the covenant, for example, that one property could have a frontage of 42 feet, as described in Map Y. Nor would it accord with the covenant that the full area of another take should be less than that described in Clause 2 of the 2nd

schedule.

59. As one can refer to the three properties east of Lehaunstown Lane, one can see that each one of them, to a greater or lesser extent, is not in accordance with the provisions of the covenant.

60. Mr. O'Neill makes further submissions regarding the geography of the area and what is truly meant by the lands east, northeast, west and south in order to illustrate what he contends are the difficulties in interpretation and looseness of the drafting. I am in agreement with these submissions.

61. I am fortified in my view by the authority cited by Mr. O'Neill of *St. Luke's and St. Anne's Hospital Board v. Mahon*, the High Court, 18th June 1993, Murphy J, unreported, where the Court adopted a similar approach in its interpretation of a negative covenant.

62. I am also persuaded of the validity of this view by the provisions of Clause 1 in the 5th schedule. What precisely was the purpose of the 5th schedule? Plainly, to afford protection and privacy to the area adjoining insofar as applicable. Can it be said that this protection had any effect at all on the far more distant lands now held by the Defendant? In my view, plainly no.

63. This Clause is of very considerable assistance in the interpretation of an admittedly vague and ambiguous covenant. I believe the authority of in *Re: Ballard's Conveyance* [1937] 1 Ch. 473 is also persuasive and helpful.

64. It has been further submitted:

1. That the purchasers were on notice of the alleged covenant by virtue of the documents and title furnished to them.
2. That there had been a lack of candour and absence of bona fides in the provision and furnishing of title documents relating to the intended sales having regard to the absence of reference to the Kitching deed.

65. I do not consider there is any evidence for these propositions. As regards No. 1 there is a pithy but clear expression of viewpoint by Mr. Barron S.C. as to the effect of the covenant in his Opinion.

66. As regards, No. 2, I consider that the Defendant was fully justified in furnishing the documents of title as it has done and, in my view, these allegations are unwarranted and without foundation. The Kitching deed does not affect the Tudor lands at all.

67. Further submissions have been made regarding whether or not the deed, as a matter of fact in law, is binding on the Defendant, the successor in title. In view of my findings, it is unnecessary for the Court to consider this issue.

68. The issue which I am asked to decide is set out at paragraph 5 of the General Endorsement of Claim. It is whether:

"The Defendant's lands being part of the lands retained by the vendor, lying at the eastern side of the lands hereby assured, is affected by the covenant."

69. In my view the answer is no. I will hear submissions from counsel on the form of the order and in relation to costs.