

JERSEY / JUDGMENT

Cotillard and Ors -v- O'Connor and Ors [2007] JRC 005 (12 January 2007)

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judgment

deputy bailiff: 1. This case concerns the correct interpretation of a servitude. Factual background 2. The facts are not in dispute; indeed the parties have helpfully prepared an agreed statement of facts from which the following summary is drawn. 3. The first representor ("Mrs Cotillard") is the owner of the remainder of 'Le Clos Fondain' being Field 126 on the Ordnance Survey Map. We shall refer to her land as "the Development Land". On 3rd August 2004 the Environment and Public Services Committee granted permission to develop the Development Land by building nine houses thereon. However, it was a condition of the development permission that a new means of access be created from St Clement's Coast Road ("the coast road") to the Development Land as described below. 4. Immediately to the south of the Development Land and separating it from the coast road lies a strip of land formerly known as 'Petit Clos de Rocquebert' and 'Clos de la Rocque Souphice' ("the Restricted Land"). On this strip of land there have been built thirteen houses in a line along the coast road, all of them on their own plot. 5. The most westerly of these houses is known as 'Roche Banque' and is owned by the second representors ("Mr and Mrs Delauney") who bought it in 1985. Roche Banque is subject to a servitude originally created when it was sold off by contract passed before the Royal Court by James Lorimer Thomson, Wilfred Peter John Thomson and Florence Clariss Thomson ("the Thomson family") on 12th October 1929. The servitude reads thus:- "..... Etant de plus stipulé qu'il ne sera jamais érigé ou construit sur ladite pièce de terre présentement baillée et vendue ou sur le reste dudit clos que des maisons d'habitation bien construites avec des matériaux de bonne qualité, et qu'il ne sera jamais érigé fait valoir ou conduit, soit sur la pièce de terre présentement baillée et vendue soit sur le reste dudit clos ou dans aucun édifice érigé sur iceux, d'usine, auberge, hôtel, ou aucun autre établissement ou commerce quelconque, les seules constructions qui puissent y être érigées étant des maisons d'habitation bourgeoises avec offices et garages convenables." ("the Servitude") 6. It is agreed that the reference in the Servitude to 'dudit clos' is a reference to the remainder of the Restricted Land, which at that stage was retained by the Thomson family. The remainder of the Restricted Land was subsequently sold off as twelve plots upon which have been built twelve houses. Each of those plots has the benefit and burden of the Servitude. 7. At the time of the creation of the Servitude the Thomson family owned other land in the vicinity ("the Remaining Land") and such land also has the benefit of the Servitude. Part of the Remaining Land now

comprises 2 Le Clos Rocquebert which is currently owned by the first respondents Mr and Mrs O'Connor. Their contract of purchase on 3 rd October 1997 recited the Servitude and therefore clearly envisaged that their property should have the benefit of the Servitude. 8. Mr Habin referred to two particular transactions concerning the Restricted Land which have taken place since the creation of the Servitude and which he says are relevant:- (i) On 14 th July 1978 the then owner of Roche Banque sold to the public of the island for incorporation into the coast road a strip of land in triangular shape forming part of Roche Banque and being the southern extremity of that property. Other owners of properties forming part of the Restricted Land entered into similar contracts to assist in the road widening scheme which was taking place at that time. The contract provided that the public would build a replacement wall on the new southern boundary of Roche Banque. Although the contract did not restate the Servitude, it is clear that the strip of land now forming part of the coast road and owned by the public is still subject to the Servitude. (ii) A strip of land some three foot wide at the eastern extremity of the Restricted Land was subsequently incorporated into the private road Clos de Rocquebert, which leads off the coast road to the developments known as Clos Fondain and Le Clos de Rocquebert. The contract of purchase of those properties (an example is that of Mr and Mrs O'Connor) confers a right of way across the three foot strip which is described as now being a tarmac road. That strip of land was also subject to the Servitude. 9. The improved access required for the Development Land by the Environment Committee involves Mrs Cotillard purchasing the northern part of the garden of Roche Banque and a thin strip of land running all the way down the western part of Roche Banque to the coast road ("the Sale Land"). Mr and Mrs Delauney have agreed to sell the Sale Land to Mrs Cotillard. What is proposed appears clearly from the documents described as Schedule 3 and Schedule 4 in the papers before us. Schedule 3 has apparently been approved by the Environment Committee and Schedule 4 represents a slightly amended plan which has not yet been approved. However nothing turns on the difference between the two schemes. They both involve the creation of an access road leading from the Development Land across the north western part of Roche Banque. The proposed road commences in a south westerly direction and then turns south so as to reach the coast road. Most of the south going part of the road will lie on land situated immediately to the west of Roche Banque but the eastern part of the new road will lie on the small strip of land to be acquired from Roche Banque. On that part of the Sale Land forming the northern part of the garden which is not required for the proposed access road (and which lies to the south of the access road between that road and the new northern boundary of Roche Banque) brick pavers will be laid to be used for parking for the purposes of the houses to be built on the Development Land. 10. The proposed works to the Sale Land are therefore:- (i) demolishing the existing boundary walls on the western and northern boundaries of the Sale Land; (ii) demolishing the existing garage of Roche Banque, the western part of which extends on to the western strip of land; (iii) building replacement walls to the east and south of the Sale Land on the new boundary with the remainder of Roche Banque; (iv) placing a kerb edge to the west and northwest of that part of the Sale Land which will be used for parking; (v) laying hoggin and then tarmac on that part of the Sale Land to be used for an access road; (vi) laying brick pavers on the part of the Sale Land to be used for parking. 11. There is opposition to the proposed development of the Development Land by property owners in the vicinity, including Mr and Mrs

O'Connor. Mr O'Connor (who is a conveyancer) has also voiced the opinion that what is proposed would amount to a breach of the Servitude. Mrs Cotillard considers that, before deciding whether to proceed with the purchase of the Sale Land, she needs to establish whether she can lawfully carry out the proposed works on the Sale Land. Accordingly she seeks a declaration that the envisaged works would not amount to a breach of the Servitude. 12. When the matter first came before the Court, it was ordered that the representation be served on Mr and Mrs O'Connor and the Attorney General, representing the public. Subsequently the Court ordered that the representation should also be served on the other twelve property owners on the Restricted Land so that they might have the opportunity of joining the proceedings or making

submissions.

Advocate Michel was appointed under Rule 4/4 Royal Court Rules to represent all persons not specifically served or convened who are owners affected by or who may have an interest in the subject matter of the representation. No other owners have appeared but Mr and Mrs O'Connor have instructed Advocate Michel to represent them on the basis that all those who wish to argue that the Servitude prevents what is proposed have an identical interest. Jurisdiction 13. In Re Curatorship X

[2002] JLR 259 the Court affirmed that it has jurisdiction to make a declaratory judgment on any live issue before it, i.e. any issue with a sufficient degree of reality and immediacy to have a practical bearing upon the resolution of an actual dispute or a dispute likely to arise in the future. We are quite satisfied that there is indeed a live practical issue before us in that the parties need to know whether what is proposed would amount to a breach of Servitude or not and accordingly we agree that we have jurisdiction to grant the declaratory relief sought. Principles of interpretation 14. A helpful summary of the court's general approach when interpreting a document can be found in the judgment of Ereaud, Deputy Bailiff, in *Blackburn v Kempson*

[1971] JJ 1747 at 1756:- "The object of all interpretation of a written instrument is to discover the intention of the author. That intention must be gathered from the instrument itself; the function of the Court, therefore, is to declare the meaning of what is written in the instrument, and not of what was intended to have been written. Prima facie, words must be taken in their ordinary sense, but where words are susceptible to more than one meaning, assistance may be obtained from the context in which they appear and courts will give effect to that interpretation which appears to be most consistent with the intention of the parties to the instrument." 15. In other cases, the Court has referred to the well known observations of Pothier concerning the interpretation of agreements

- see Pothier *Traité des Obligations*

(1821) Tome 1 Art VII. Pothier sets out a number of rules for the interpretation of agreements and the following would appear to be relevant in a case such as this:- "Première Règle On doit, dans les conventions, rechercher quelle a été la commune intention des parties

contractantes, plus que le sens grammatical des termes. Troisième Règle. Lorsque dans un contrat des termes sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat. Sixième Règle On doit interpréter une clause par les autres clauses contenues dans l'acte, soit qu'elles précèdent ou qu'elles suivent. Septième Règle Dans le doute, une clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté l'obligation." 16. However, as the Court of Appeal explained in *Haas v Ducquemin*

[2002] JLR 27 , caution must be exercised in applying these principles to the interpretation of deeds concerning immovable property. As Hodge JA said at para 20 of the judgment in that case:- "While I recognise that Pothier's rules on the construction of contracts may be useful in some circumstances as an assistance in the interpretation of deeds which confer real rights of property (see *Le Pennec v Romeril*), I think that care is required in their application. Pothier, in setting out those rules, was addressing the law of obligations where the intentions of the contracting parties are the prime consideration. In the law of property, however, a deed sets out real rights which affect others than the initial parties to the deed, and there are special rules, such as the presumption for freedom in relation to servitudes, which I will mention shortly." 17. The presumption for freedom referred to by Hodge JA was summarised by Southwell JA in *Colesberg Hotel (1972) Limited v Alton Hotel Limited*

[2003] JLR 176 as follows at para 3 of the judgment - "One main feature of the Jersey law of servitudes is that there is a presumption in favour of the freedom of land from excessive burdens of servitudes. Where servitudes derive their titre from a contract or deed, the effect of this presumption is that in interpreting the words of the contract or deed, in so far as there is any ambiguity, the ambiguous words are to be interpreted in favour of the freedom of the servient tenement." The parties'

submissions

18. Mr Habin, on behalf of the representors, submitted that the clause in question could conveniently be broken down into three parts. In translation, they were as follows - "(a) There may only ever be erected or constructed on the said piece of land presently sold or on the rest of the said Clos, dwelling houses, well constructed with good quality materials; (b) There may never be erected, permitted or conducted, either on the piece of land presently sold or on the rest of the said Clos, or on any building erected thereon, any factory, inn, hotel or any other establishment or business whatsoever; (c) The only constructions which may be erected thereon being middle-class dwelling houses with appropriate outbuildings and garages. 19. He submitted that part (c) was really an elaboration of part (a) and that the underlying intention of the servitude was clearly twofold. First, it was to prevent any commercial activity or building on the restricted land, and secondly it was to ensure that only good quality middle-class dwelling houses should be built on the land. With the exception of commercial activity, the servitude did not restrict the use of any of the plots

comprised in the restricted land, merely the type of constructions that might be erected on them. In this respect, it was of note that there was no specific exemption for things such as boundary walls, driveways, hard standing for parking, patios, swimming pools etc. It could not have been the intention of the servitude to prevent such things; indeed, the original contract for the sale of Roche Banque made it clear that there was a boundary wall in existence on the southern boundary towards the road. He pointed out that, if the respondents were right and the servitude did in fact prevent even the construction of a road or parking place, the extension of the coast road over those parts of the plots which had been sold off for the road widening scheme in 1978, and the construction of Clos de Roquebert on the three foot strip at the eastern end of the Restricted Land, both amounted to breaches of the servitude which must have been overlooked by all those lawyers who had been involved in those two matters. He further pointed out that there was no restriction on the number of houses to be built on each plot on the Restricted Land and that accordingly it would be perfectly lawful for a plot to be sub-divided with one middle-class house being built behind another. In those circumstances, the servitude could surely not be taken as preventing the creation of a drive across the front part of the plot leading to the house on the rear part of the plot. In summary, having regard to the wording of the servitude, parts (a) and

- (c) were to be interpreted as preventing the construction of any building whatsoever, other than middle-class dwelling houses with appropriate outbuildings and garages but did not prevent the construction of things other than buildings, such as walls, driveways etc. In the event of the Court concluding that there was any ambiguity, he relied upon the presumption in favour of the freedom of the servient tenement as referred to above. 20. On behalf of the public, Mr Yates endorsed Mr Habin's submissions. In particular, he submitted:- (i) The effective verbs in the covenant were 'érigé' and 'construit'. Implicit in both terms was the concept of raising up some building or edifice. The laying of hoggin, tarmac or other foundation for a road or parking did not come within any natural interpretation of the words 'érigé ou construit'. (ii) In any event, the proper construction of the Servitude was to be arrived at by looking at the clause as a whole and not at individual words in it. It was clear from the wording of the Servitude as a whole that the intention of the draftsman was to ensure that the affected land was used only for good quality residential accommodation and not for business or commerce. It was not to prevent the use of any part of the affected land as part of a road or for parking, whether that road was public or private. In context, the reference to a 'construction' in part (c) of the Servitude was to a building. 21. Mr Michel submitted that the clause was not ambiguous and that accordingly the presumption in favour of the servient tenement did not arise. He accepted that the clause had to be interpreted sensibly and that it did not prevent the erection or construction of things which were ancillary to the enjoyment and use of the property as a middle-class dwelling house. Thus the Servitude did not prevent the construction of boundary walls, patios, tarmac drives, hard standing for car parking, swimming pools etc. provided that these were constructed for use by the plot in question. He accepted that there was nothing to prevent a

particular plot such as Roche Banque being sub-divided into two separately owned plots with a middle-class dwelling house erected on each and accepted that in those circumstances it would not be a breach of the Servitude for a tarmac drive to be constructed across the front plot in order to gain access to a house on the rear plot. When pressed as to whether this principle could be extended to other parts of the Restricted Land - for example if Roche Banque and the adjoining plot to the east were to fall into common ownership - he was inclined to the view that use of a tarmac road for any part of the Restricted Land would be permissible but he argued that he did not need to go that far. In this particular case, the tarmac road was being constructed for the benefit of the Development Land, which fell outside the Restricted Land, and he was therefore content to argue simply that the construction for such purpose did breach the covenant. 22. In support of his contention, he referred to the English case of *Jarvis Homes Limited v Marshall*

[2004] EWCA Civ 839 . The covenant in that case affected a property referred to in the judgment as No 28 and read as follows - "The purchaser hereby covenants with the vendor for the benefit and protection of [No 30] and so as to bind so far as may be the land hereby conveyed into whosoever's hands may come that he, the purchaser, and the persons deriving title under him will not at any time hereafter:

- (a) permit the land hereby conveyed including the site of the existing dwelling-house thereon to be used for the erection of more than one two-storey private dwelling-house with all necessary outbuildings and garage for use in connection therewith;
- (b) use or permit or suffer to be used the land hereby conveyed or any part thereof or any building or erection now or at any time hereafter erected thereon for any trade, business or manufacture but will use the same as a private residence only." 23. Jarvis Homes Limited wished to purchase No 28 and then construct a roadway running through No 28 to lead to a proposed housing development to be built by Jarvis on adjoining land. That development was to comprise ten houses. The roadway would occupy about one fifth of the area of No 28 and was to be of tarmac and carry two-way vehicular traffic, as it would be the main means of access to and egress from the development site. 24. The owners of No 30, who had the benefit of the covenant, contended that what was proposed would amount to a breach of the covenant in two respects. First, there would be breach of the final ten words of clause 2(b) because No 28 would not be used 'as a private residence only', but as a private residence and a roadway. Thus the development would result in part of No 28 being used as a roadway, rather than as a private residence. Their second argument was that the construction of the roadway would also amount to a breach of clause 2(b). The Court of Appeal decided the case on the first argument. It held that use of part of no 28 as a roadway would mean that that part of the property was not being used as a private residence. It accepted, of course, that use of grounds for ancillary activities such as outbuildings, a garage, a cottage for employees etc. was still to use the property as 'a private residence only' but use of part of the property as a roadway to serve a neighbouring property did not fall within that expression. It emphasised however that the covenant was concerned with the use of the property and it

was the use as a roadway which would amount to a breach. It followed that the Court did not have to deal with the second argument, but, in passing, the Court offered the view that the construction of the roadway would not be a breach of clause 2(b). The Court agreed that the construction of a roadway could not be described as effecting an 'erection' and that a roadway could not be described as being 'erected'. 25. Mr Michel accepted that the decision in *Jarvis* was concerned with the use of the land which was the subject of the covenant but submitted that there were parallels with the present case and that the construction of a road and parking places for the benefit of the Development Land would amount to a breach of the Servitude. Decision 26. In our judgment, none of the envisaged works would amount to a breach of the Servitude. Our reasons can be summarised as follows - (i) Part (b) of the Servitude is concerned with preventing the Restricted Land from being used for commercial purposes. There is no suggestion that the construction of a road and parking place in the circumstances of this case would breach that part of the Servitude. (ii) We must therefore turn to parts (a) and (c) of the Servitude and we agree that they must be read together in order to consider the clause as a whole. Part (a) provides that there shall only ever be erected or constructed on the Restricted Land well constructed dwelling-houses made with good quality material. Part (c) goes on to say that the only constructions which may be erected on the relevant land are middle-class dwelling-houses with appropriate outbuildings and garages. It is noteworthy that the sole verb used in part (c) is 'érigé' (erected). We agree with Mr Habin and Mr Yates that a tarmac road, brick pavers for parking and the creation of kerbing are not things which are 'erected'. Erecting something envisages a raising up. (iii) It is of course true that in part (a) there is a reference to 'érigé ou construit'. It is possible in some contexts to envisage a road or parking place being 'constructed'. However, the expression has to be construed in the context of the Servitude as a whole. We agree that the wording of the clause as a whole makes it clear that the intention of the draftsman was to ensure that the relevant land was used only for good quality residential accommodation and not for business or commerce. It was not designed to prevent the use of any part of the land as part of a road. Part (a) has to be read in conjunction with part (c) which refers to constructions which are erected. (iv) We accept that a boundary wall is something which can properly be described as being 'erected' or 'constructed'. However, we agree with all the parties (including Mr Michel) that it cannot have been the intention of the draftsman to prohibit such items in this case. In our judgment, a clause providing that only dwelling-houses may be constructed will not normally mean that nothing else whatsoever can be put on the land. It is to be expected in the ordinary course of events that a dwelling-house will have certain ancillary items such as a boundary wall, a fence or a patio. It may have additional items such as swimming pools, tennis courts etc. In our judgment, such things will normally fall within the description of a dwelling-house because they are all items which are commonly part and parcel of a dwelling-house and, in the absence of wording pointing in the opposite direction, are not to be taken as prohibited. We acknowledge that in some cases draftsmen will deal specifically with such matters by including wording such as 'avec dépendances' or some similar expression, but we do not consider that the absence of such an expression will normally lead to the view that such ancillary items are prohibited.

The process of interpretation is intended to give effect to the intention of the parties creating the servitude in question and we consider that clear wording would be required to exclude the construction of items which are to be found in most dwelling-houses and can properly be regarded as ancillary to a dwelling-house. We therefore agree with Mr Habin that the clause prohibits the erection of any buildings other than middle-class dwelling-houses and appropriate outbuildings and garages but does not prevent the construction or erection of other items such as walls, a drive, a parking area etc. (v) Indeed Mr Michel accepted that, if the works in question were to be undertaken for the benefit of Roche Banque itself, they would not be in breach of the Servitude. His submission was that the fact that the tarmac road and pavier parking were to be made for the benefit of other land (the Development Land) meant that they were in breach of the Servitude. We cannot accept this argument. There is nothing to that effect in the Servitude itself and we have not been referred to any authority which supports such a distinction. The Servitude is concerned with what is to be erected on the land. Save for preventing commercial use, it is not concerned with the purpose or for whose benefit the work is taking place. Work either falls within the prohibition contained in the Servitude or it does not. We have already held that the creation of a tarmac road and of a parking area made of brick paviers is not the erection of anything and is not restricted by the wording of the Servitude. If it is not restricted, it matters not that part of the land is being sold off and that the person who will benefit from these works is not the owner of the remaining part of Roche Banque. (vi) We have of course considered the case of Jarvis referred to by Mr Michel, but the covenant in that case was concerned entirely with the use to which the property in question could be put. Save for the prohibition of commercial use, the Servitude does not purport to deal with the use of the land in question; it deals entirely with what may be erected or constructed on the land. It follows that we do not find Jarvis to be of any assistance. (vii) If Mr Michel's argument is right, the use of the strip of land on the southern boundary of Roche Banque (and the adjoining plots) which were sold to the States as part of the road widening scheme in 1978 is also a breach of the Servitude, as is the use of the 3 ft strip at the eastern end of the Restricted Land as part of Clos de Roquebert. The fact that none of the lawyers involved in the passing of these contracts thought that there was any difficulty is not of course determinative but, for the reasons we have given, we consider that the incorporation of part of the Restricted Land in these two roads is not a breach of the Servitude. (viii) In our judgment the wording is not ambiguous. Accordingly we have not relied upon the presumption for freedom in relation to servitudes referred to at paras 16 and 17 above. However, had we considered the clause to be ambiguous, we would have applied the presumption to arrive at the interpretation which we have adopted. 27. In summary, we are satisfied that, having regard to the wording of the Servitude as a whole, the proposed works would not amount to a breach of it and we declare accordingly. Authorities Re Curatorship X

[2002] JLR 259 . Blackburn v Kempson

[1971] JJ 1747 at 1756. Pothier Traité des Obligations

(1821) Tome 1 Art VII. Haas v Ducquemin

[2002] JLR 27 . Colesberg Hotel (1972) Limited v Alton Hotel Limited

[2003] JLR 176 . Jarvis Homes Limited v Marshall

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