Neutral Citation Number: [2022] EWHC 1694 (Ch)

Case No: PT-2021-000776

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (CH.D)

Royal Courts of Justice
Rolls Building, London EC4A 1NL

Date: 06/07/2022

Before :

Deputy Master Bowles

- -

Between :

Neil John Mackenzie	**Claimant**
- and -	
(1) Sharon Shac-Yin Cheung	
(2) Infinity Homes & Developments Limited	**Defendants**

- -
- -

Mark Warwick QC (instructed by **Wellers Law Group LLP**) for the **Claimant**
Carl Fain (instructed by **Davitt Jones Bould**) for the **Defendants**

Hearing date: 13th April 2022

- -

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.

.....

Deputy Master Bowles :

1. The Claimant, Mr Neil Mackenzie (Mr Mackenzie) is the freehold owner of residential premises at 432 Selsdon Road, South Croydon (432). The property is a detached dwelling house, formerly forming a part of land then owned by the Whitgift Educational Foundation (the Foundation) and known as the Governors Fox Farm Estate (the Estate).

2. The First Defendant, Sharon Shac-Yin Cheung (Ms Cheung), is the freehold owner of 444 Selsdon Road, South Croydon (444). That property is, also, currently a single detached dwelling house. It, too, formerly formed part of the Estate and was formerly owned by the Foundation.

3. 432 was sold out of the Governors Fox Farm Estate by a conveyance dated 7 November 1947. 444 was sold out of the Governors Fox Farm Estate by a conveyance dated 3rd October 1947. Accordingly, at the date that 444 was transferred out of the Estate, 432 remained a part of the Estate.

4. By clause 2 of the October 1947 conveyance, the purchaser of 444, 'for himself his sequels in title and assigns to the intent that the covenant hereafter contained (should) run with the land and bind the same unto whosoever hands the same (should) come' covenanted with the Governors for the time being of the Foundation (the Governors) their successors and assigns 'for the benefit of the adjoining or adjacent land now the property of the Foundation and being that part of (the Estate) remaining undisposed of at the date of' the conveyance 'and every part thereof that the Purchaser his sequels in title and assigns (would) at all times (thereafter) observe and perform the stipulations' contained in the Second Schedule to the conveyance.

5. It is common ground that the reference to the Second Schedule was a slip and that the intention of the parties was to refer to the Third Schedule.

6. The stipulations contained in the Third Schedule included, at paragraph 7, a covenant or stipulation that 'No building (should) be erected on the (land conveyed) except one detached dwelling house and the stables or garage offices and outbuildings thereto which said property (should) not be used other than as a private residence'.

7. The Third Schedule also contained a provision, at paragraph 11, which, as appears later in this judgment, is at the heart of the current application and which provided that 'The Governors reserve the right to deal with any of the plots situated upon this estate or any of their adjoining or neighbouring land without reference to and independently of these stipulations and also reserve the right to allow a departure from them in any one or more cases'.

8. It is, further, common ground that, pursuant to the Whitgift Charities Act 1969, which, by section 3 of that Act, created, in place of the then existing structure of the Foundation, a corporate body, the Whitgift Foundation, that all powers previously held, or retained, by the Governors under any existing deeds, including, therefore, the powers provided for in paragraph 11 of the Third Schedule, vested

in the Whitgift Foundation and were and are now exercisable by the Whitgift Foundation.

9. It is also common ground that, subject to any power retained in that regard, by the Whitgift Foundation, pursuant to paragraph 11 of the Third Schedule, and to the exercise of that power by the Whitgift Foundation, the stipulation as to building rights, contained at paragraph 7 of the Third Schedule, is enforceable as a restrictive covenant by Mr Mackenzie, as owner of 432, against Ms Cheung, as owner of 444, and, correspondingly, against any purchaser of 444 from Ms Cheung.

10. The Second Defendant, Infinity Homes & Developments Limited (Infinity), holds an option to purchase 444 and, as such, upon the exercise of that option, it would become bound by the stipulation contained in paragraph 7 of the Third Schedule, save and unless the Whitgift Foundation was entitled to and did release, or modify, that stipulation, pursuant to the paragraph 11 of the Third Schedule.

11. The basis upon which, subject to any power of release, or modification, retained by the Whitgift Foundation and to the exercise of such power, the restriction contained in paragraph 7 of the Third Schedule, binds the owner of 444, as against the owner of 432, is to be found in the application of principles of annexation. The effect of clause 2 of the October 1947 conveyance, read with section 78 of the Law of Property Act 1925, is to annex the benefit of the restriction upon building contained in paragraph 7 of the Third Schedule to that conveyance to every part of the Estate which was undisposed of at the date of the October 1947 conveyance. As already set out, 432 was conveyed out of the Estate in November 1947 and, in consequence, has the benefit of the annexation.

12. Materially, to the issues arising for determination, in respect of the ambit and effect of paragraph 11 of the Third Schedule, it is not in dispute but that the provisions, giving rise to annexation (including the stipulations contained in the Third Schedule) and which are contained in both the October and the November 1947 conveyances and, as I understand it, other conveyances of land out of the Estate, did not give rise to an enforceable building scheme, or 'local law'.

13. Such a scheme requires the existence of a clearly defined fixed area in which the scheme will operate, together with an intention that all the properties within that fixed area will be mutually benefitted and burdened. In this case, it is clear that there is no defined area in which a scheme could operate and, likewise, paragraph 11 of the Third Schedule, whatever the precise limits of its ambit, makes it plain that the Governors, in selling off land from the Estate, were not intending to create mutually binding obligations in respect of all the plots sold, but, rather, expressly intended to reserve their right not to create a scheme of mutually binding benefits and obligations.

14. In this litigation, Mr Mackenzie seeks a declaration that 444 is subject to a restrictive covenant in the terms of paragraph 7 of the Third Schedule and that that covenant is enforceable by him, as against Ms Cheung, as owner of 444, and as against Infinity, should Infinity become the owner of 444 pursuant to its option. As has already been made clear, in paragraphs 9 and 10 of this judgment, Mr Mackenzie is entitled to that declaration, subject only to the rights and powers

reserved by paragraph 11 of the Third Schedule to the Whitgift Foundation and to the election of the Whitgift Foundation to exercise such powers of release from the burden of the paragraph 7 restrictive covenant as it may have.

15. The catalyst for this litigation has been the application by Infinity for and grant by Croydon Borough Council, on 24th March 2020, of planning permission for the demolition of the existing house on 444 and the construction and erection, in its place, of a block of nine residential apartments.

16. The Defendants' response to the Claim, which was issued upon 3rd September 2021, has been to assert the right of the Whitgift Foundation, pursuant to paragraph 11 of the Third Schedule, to modify, or vary, the restrictive covenant affecting 444 and to contend that, in the event that a draft deed of modification negotiated between, on its face, Ms Cheung and the Whitgift Foundation, is executed by the Whitgift Foundation, then the restrictive covenant, in its original form, will not be enforceable by Mr Mackenzie. By way of Counterclaim, the Defendants seek a declaration to that effect.

17. The draft deed of modification agreed between Ms Cheung and the Whitgift Foundation is before the court. In consideration of a payment, the amount of which has been, understandably, redacted, the Whitgift Foundation has agreed 'in so far as it is able to release' (Ms Cheung) and her 'successors in title … from the obligations under the covenants and stipulations contained in the (October 1947) Conveyance to the extent necessary' to implement the planning permission granted to Infinity.

18. By application notice, dated 10th December 2021, the Defendants now seek summary judgment in their favour on Mr Mackenzie's Claim and their Counterclaim and, in particular, in respect of their Counterclaim, a declaration that following the execution of the deed of modification the development of 444 would not be a breach of paragraph 7 of the October 1947 conveyance. This judgment relates to that application.

19. The substantive question raised by the application is a question as to the construction of paragraph 11 of the Third Schedule.

20. Is, as the Defendants contend, the language and intent of that paragraph apt to entitle the Whitgift Foundation to release 444 from an extant and binding restrictive covenant, which has been enforceable by the owners from time to time of 432 since 1947?

21. Alternatively, as contended upon behalf of Mr Mackenzie, was paragraph 11, on its true construction, intended only to clarify the fact that the Whitgift Foundation and its predecessors had no obligation, in dealing with other plots on the Estate, or on any of its adjoining or neighbouring land, to have regard to the restrictions contained in the Third Schedule and to clarify, also, that, in dealing with such plots it could, if it so chose, elect, if imposing restrictions, to depart, in any one, or more, case(s) from those imposed by the Third Schedule?

22. On this latter analysis, or construction, it would not be open to the Whitgift Foundation to unilaterally remove the restrictions contained in the Third Schedule

and, thereby, deprive the owners of land benefitted by those restrictions from the protection afforded by those restrictions.

23. There is no doubt that an issue of construction of this type is apt to be resolved under Part 24 in an appropriate case and it was not contended that the Part 24 procedure was, in this case, inappropriate. Specifically, it was not contended that there was any issue as to the factual matrix, against which the construction of paragraph 11 fell to be construed, such as to warrant the question of construction being taken to a trial. Nor was there any suggestion that, in dealing with the question of construction, on this application, the court was being deprived of any materials that might assist it to a decision.

24. The issue which has been raised, however, arising in the event that the construction of paragraph 11 is that favoured by the Defendants, is whether the grant of the declaration sought by the Defendants, being a declaration in respect of an event which has not yet occurred (the execution and completion of the deed of modification), would be a proper exercise of the court's jurisdiction to grant declaratory relief.

25. It is well understood, indeed, trite law, that declaratory relief is not available as of right, simply upon the proof of the facts which give rise to the right in law in respect of which declaratory relief is sought. It is equally well established that the court will not grant declaratory relief if the application is premature, or if the question in respect of which relief is sought is hypothetical, or (and perhaps most particularly) if the declaration sought will serve no useful purpose.

26. A declaration which merely clarifies the parties' legal rights does not, in itself, serve a useful purpose and can, properly, be regarded as academic, or hypothetical. Where, however, the clarification of the parties' rights serves a useful purpose, then, as it seems to me, the grant of relief will not, in principle, be either academic, or premature, or hypothetical.

27. In this regard, I agree, with respect, with Master Clark, in **San Juan v Allen [2016] EWHC 1502 (Ch)**, at paragraph 20, that it is over simplistic to treat a question as hypothetical and, accordingly, ineligible for declaratory relief in any case where the facts relevant to the grant of that relief have not yet occurred. The better view is that set out, in paragraph 20 of **San Juan**, namely that facts should not be treated as hypothetical as long as they are likely to occur within a reasonable time scale and, further, that, if sensible and practical reasons exist for the grant of a declaration that relief will be available even although the events the subject of the declaration have not happened and, even, may not happen.

28. In this case, Mr Warwick QC, for the Claimant, submits that the declaration sought by the Defendants, as outlined in paragraph 16 of this judgment, constitutes an attempt by the Defendants to utilise the grant of declaratory relief as a means of securing legal advice as to the effect, in law, of their proposed actions and submits, further, that such a use of the court's jurisdiction to grant declaratory relief is a misuse of that jurisdiction.

29. I, respectfully, disagree. I do not consider it wrong, in principle, in circumstances where a clear dispute exists between the parties as to the effect, in law, of an event

which, subject to the court's conclusion, is highly likely to occur and which, if it occurs, will have significant consequences for the parties, for the court to resolve the dispute in question at an early stage rather than wait upon the happening of the event and to, then, rule, ex post facto, upon the effect, or consequences, of the event in question.

30. This case falls within that parameter.

31. The dispute as to the meaning and effect of paragraph 11 of the Third Schedule is fully pleaded out between the parties. There is no lack of clarity as to the issue in debate and no question but that the issue is 'live' between the parties.

32. The deed of modification, which has only been barely outlined in this judgment, is a comprehensive and fully negotiated document and there is nothing at all to indicate that it would not be completed, or executed, if the court ruled that it was effective to its intended purpose and operated, therefore, to release 444 from the burden of the restrictive covenant contained in paragraph 7 of the Third Schedule. In this regard it is not insignificant, although entirely irrelevant in respect of the question of construction, that the evidence before me shows that the Whitgift Foundation has entered into similar deeds of modification and release in respect of other properties previously forming part of its land holdings in South Croydon and has, as I am told, exacted substantial premiums in consideration for such deeds.

33. The consequences to the parties flowing from the determination of the construction of paragraph 11 of the Third Schedule, are significant. A determination in favour of Mr Mackenzie will leave Mr Mackenzie with an enforceable covenant and will preclude Ms Cheung, or, more particularly, Infinity, from implementing its planning permission. Conversely, a determination in favour of the Defendants will open up 444 for development in accordance with the planning permission and will preclude Mr Mackenzie from preventing that development.

34. In these circumstances, I am satisfied that the grant of the declaration sought by the Defendants, in the event that the question of construction is concluded in their favour, would not be premature, nor hypothetical and, further, that the grant of the declaration, in confirming the Defendants' entitlement to proceed with the implementation of Infinity's planning permission, would serve a clear practical purpose.

35. It remains to consider, however, whether the Defendants' construction of paragraph 11 of the Third Schedule is the correct construction and whether, therefore, on the substantive merits, the Defendants are entitled to the declaration they seek.

36. There is no doubt and there is no dispute between the parties but that the opening words of paragraph 11 reserved to the Whitgift Foundation and its predecessors the right, in its dealings with the Estate and its adjoining and neighbouring land, to deal with those lands without reference to and independently of the restrictions imposed in respect of 444 and, therefore, without having any obligation to impose the like restrictions over any other of its lands when disposing of those lands. I do

not think, either, that the Defendants would dissent from the proposition that the width of those words was and is sufficient, also, to enable, or allow, the Whitgift Foundation, or its predecessors, when disposing of other of its lands, to impose restrictions upon those lands which are different to those imposed upon 444.

37. It is in that context that the Defendants, by their counsel, Mr Fain, contend that the latter words of paragraph 11, whereby the Governors (now the Whitgift Foundation) 'also reserve the right to allow a departure from (the stipulations in the Third Schedule) in any one or more cases', rather than merely clarifying the earlier part of the paragraph, enable the Whitgift Foundation, in cases where the stipulations contained in the Third Schedule have previously been imposed, to retrospectively depart, in any one or more cases, from those restrictions and, thereby, if it so chooses, release an otherwise burdened property, such as 444, from the restrictions which previously applied.

38. Their argument, in its simplest form, is that, given the width of the opening words of paragraph 11, any construction of the latter words of the paragraph which gave rise, merely, to an entitlement in the Whitgift Foundation to depart, in transactions other than those in which stipulations had previously been imposed, from the stipulations that, in previous transactions, had been imposed, would render those latter words entirely surplus and, consequentially, unlikely to reflect the intentions of the parties.

39. Mr Fain submitted that the Defendants' construction would not derogate from the rights acquired by the original purchaser of 432, or of the rights of Mr Mackenzie, as his successor in title. The benefit of the restrictions contained in the Third Schedule was always, on the Defendants' construction, subject to the right of the Governors and, latterly, the Whitgift Foundation to release those restrictions.

40. Mr Fain further submitted that the Defendants' construction accorded with commercial common sense, in that, in circumstances where an owner sought to develop, it enabled the Governors (and now the Whitgift Foundation), in return for a premium, to modify, or release, the restrictions to which a property was subject without the potential developer having to seek recourse to those otherwise entitled to the benefit of the restrictions.

41. In further support of his submissions, Mr Fain placed reliance upon the decision of Neville J, in **Mayner v Payne [1914] 2 Ch 555**. In that case, land forming part of an estate (the Egerton estate) had been sold off subject to a scheme of mutually enforceable covenants, giving rise to a building scheme, or 'local law', in respect of the estate.

42. The covenants imposed various restrictions, or stipulations, but were subject to a reservation in favour of the original owner of the estate (a Mr Webb) in identical terms to that contained in the latter part of paragraph 11 of the Third Schedule; namely a reservation of 'the right of allowing a departure from these stipulations in any one or more cases'.

43. The owner of a number of plots subject to the stipulations agreed to sell one of those plots for purposes which would have offended against the stipulations with which the plot was burdened and to meet that difficulty procured the agreement of

Mr Webb to release the plot from the relevant stipulation, which related to business use, in reliance upon the reservation contained in the original and subsequent conveyances of the lot in question.

44. In that case and in that context, Neville J determined that the reservation formed part of the 'local law' and that pursuant to the 'local law' Mr Webb was entitled to allow a departure, by way of release, from the stipulations otherwise restricting the user of the property in question

45. Given the similarity of language, as between the reservation in **Mayner v Payne** and the latter part of paragraph 11 of the Third Schedule, in the instant case, Mr Fain submits, perhaps somewhat speculatively, that the draftsmen of the October and November 1947 conveyances (which, in so far as material, are in identical terms) may have had **Mayner v Payne** and the construction placed upon reservation, in that case, in mind when drafting the two conveyances and that, in consequence, the construction of the reservation, in that case, might well provide useful guidance in construing the latter part of paragraph 11 of the Third Schedule in the instant case. Irrespective of any direct linkage between **Mayner v Payne** and the instant case, he further submits that the construction of the reservation, by Neville J, in **Mayner v Payne, is**, in any event, indicative of the construction which should find favour in this case.

46. I have not found myself persuaded by Mr Fain's skilfully advanced arguments. I am not satisfied that the latter part of paragraph 11 of the Third Schedule properly bears the meaning and has the effects for which he contends.

47. The starting point, in determining the proper construction of the latter part of paragraph 11, is the well understood textual and contextual approach explained by the Supreme Court in such cases as **Wood v Capita Insurance Services [2017] AC 24**, cited by Mr Warwick QC. The court's task, in determining the objective meaning of the provision in question is to consider the language of the provision in its context, giving such weight as is appropriate to all relevant circumstances. In so doing, the court can test rival constructions against the touchstone of commercial common sense. However, as explained in **Arnold v Britton [2011] UKSC50**, cited by the Upper Tribunal (Lands Chamber) in **Derreb Ltd v White and Harpin [2015] UKUT 0667 (LC)**, a case upon which Mr Warwick QC placed some reliance, the court must be careful not to invoke commercial common sense in such a way as to undervalue the language of the provision under examination.

48. Relevant, also, to the issue of construction, particularly in a case such as this, where reliance is placed upon the identical language of a provision used in a different case and a different context, is the trite but fundamental proposition that the task of the court is to construe the instrument before it on, as it was put by Sir Stephen Sedley, in **Rees v Peters [2011] EWCA Civ. 836,** 'its own terms and in its own context' and to appreciate, therefore, that similar phrases used in other contexts may well bear different meanings.

49. Relevant, or potentially relevant, also, to construction upon the particular facts and arguments in this case are two further matters; firstly the weight to be given to arguments based upon surplusage in a case of this nature; secondly the approach to be adopted to the construction of a reservation.

50. As to the former, there is a powerful body of long standing judicial wisdom and experience to the effect that, particularly in respect of conveyancing documents, where traditionally draftsmen have adopted a 'torrential' style of drafting, arguments based upon surplusage, or redundancy of language, carry little weight.

51. As to the latter, there is, as it has been put (**Savill Brothers Ltd v Bethell [1902] 2 Ch 523 at page 537**), 'a settled rule of construction' to the effect that, when construing a reservation, or exception, to a grant, the court will construe that reservation contra proferentem the grantor and in favour of the grantee.

52. I do not regard either of the foregoing propositions as constituting exceptions to, or variations of, the usual rules of construction. In both cases, they reflect the context in which particular language is used. In relation to surplusage, the court's approach recognises the style of drafting conventionally adopted in certain classes of case and brings that style into account when construing the document in question. In relation to the construction of reservations, it reflects that, in the context of the grant of a right, the objective likelihood is that the intention of the parties, a right having been granted, will not be that the right granted will be radically dissipate, or reduced, by the impact of the reservation.

53. In this case, I am satisfied that the application of the principles of construction discussed above favours the construction for which Mr Warwick QC contends and that that construction is consistent both with the text of Paragraph 11 of the Third Schedule and the context in which those provisions were put in place.

54. In my view, the very clear context in which paragraph 11 of the Third Schedule falls to be construed is the evident intent of the Governors not to create a building scheme, or a system of mutually enforceable covenants, or 'local law' over, or in respect of the Estate. That intent is manifest from the terms of clause 2 of the October 1947, replicated in the November 1947 conveyance of 432 and, no doubt, other conveyances out of the Estate. The striking feature of that provision is that it explicitly annexes the covenants contained in the Third Schedule to the Governors' retained land and makes no attempt to introduce a system of mutually enforceable covenants across the Estate.

55. Paragraph 11 of the Third Schedule is completely consistent with that approach. The opening part of the paragraph signals, again explicitly, that the Governors have not bound themselves in their dealings with other parts of the Estate, even those which, by dint of annexation, may have the benefit of the Third Schedule restrictions, to impose equivalent, or any, restrictions, in respect of any of their future dealings with the Estate. The latter part of the paragraph, as construed by Mr Warwick QC, is, likewise, completely consistent with the Governors' plain intentions, in that it serves to make clear that the Governors' freedom of action in respect of unsold parts of its Estate included their right, if they so chose, to impose limited, or different, restrictions to those contained in the Third Schedule.

56. The opening part of the paragraph sets out the general position. The latter part, so construed, makes specific the Governors' right to depart in its dealings with other of its land from restrictions previously imposed. It may well be that, as a matter of strict logic, this construction of the latter part of the paragraph already falls within the ambit of the opening, or general, part of the paragraph. That, however,

is, in my view, no more than a typical example of a legal draftsman's desire for clarity and completeness.

57. Looking, further, at the language of paragraph 11, in my view, the natural meaning of the words used corresponds precisely with the Governors' intent, as set out above. The opening words of the paragraph are plainly directed to the Governors' future dealings with the Estate. The latter words, following on, take, as I see it, their tenor from the earlier words and are also, therefore, directed to the Governors' future dealings with the Estate.

58. It seems to me to be very unlikely that a paragraph which, so obviously, deals in its opening part with the Estate's future dealings with its unsold land should, then, in its second part, be intended to give a right of departure, or release, from restrictions already imposed in respect of lands already sold out of the Estate.

59. It is, also, I think, striking that, if the latter part of paragraph 11 was intended to give a right of release from the burden of restrictions already imposed, it did not say so in terms. The word 'departure' is, in my view, not obviously apt to describe a right of release. It is a much more appropriate term to use in describing, as I think it was, the Governors' entitlement to depart in new transactions from restrictions it had imposed in previous transactions.

60. In so saying, I do not overlook that, in **Mayner v Payne,** the word departure was treated by Neville J as embracing, or including, a release. That, however, in my view, exemplifies the point well made in **Peters v Rees**, namely that the same words, or phrases, may have different meanings in different contexts. The context of **Mayner v Payne** was one where a 'local law' had come into being, pursuant to which the properties sold out of the estate, in that case, were all subject to mutually enforceable covenants. In that context, the right to allow a departure could only have any meaning as a right of release. That, however, is not this case, or this context.

61. In regard to context, Mr Warwick QC made particular reference to the broader context in which the October and November 1947 conveyances had come into being and submitted that that context lent weight to his submissions on construction. The context in question was the existence in 1947, prior to the coming into force of the Town and Country Planning Act 1947, of a local planning scheme, the Borough of Croydon Town Planning Scheme 1929. Under that scheme, development was limited to eight houses per acre.

62. Mr Warwick submitted that, in the context of that scheme, purchasers of land out of the Estate required the security provided by the restrictions in the Third Schedule in order to protect themselves from the risk that other purchasers from the Estate might build at a density which precluded a plot owner from building on his, or her, plot and that, in that context it cannot, objectively, have been the intention of the parties that the Governors, having imposed protective covenants, could unilaterally and for profit remove them.

63. I am less than wholly persuaded by this argument.

64. The flaw in the argument, as I see it, is precisely in the freedom of action undoubtedly enjoyed by the Governors in respect of future dealings with the Estate and in the fact that the Governors were not precluded in respect of their future dealing from making sales out of the land without the imposition of any restrictions upon development. While it might have been the case that a purchaser of land, in an area of the Estate where other land had previously been sold off and where restrictive covenants had been taken, could take comfort in those covenants, as a protection against overbuilding, that would not be the case in respect of a purchaser of land in a previously unsold area of the Estate. In that situation, although subsequent purchasers would have the benefit of the restrictions imposed by the Governors upon the particular parcel, or plot, in question, there would be no guarantee at all that the Governors would take like covenants from subsequent purchasers. Nor, even if they did, in the absence of a building scheme, would any covenants taken be enforceable, on the facts of this case, by a previous, or prior, purchaser.

65. It should not be overlooked, further, that purchasers of land out of the Estate, while taking the benefit of covenants entered into by prior purchasers, were themselves, where Third Schedule restrictions were imposed, buying a burdened property. In that context, it is not, intrinsically, unrealistic that such purchasers might have wanted and might have agreed to provisions which retained the prospect of releasing their property from the imposed restrictions and to be enabled to do so without having to seek the agreement from all of those who might have, by annexation, the benefit of the restrictions.

66. The fact, however, that such purchasers might have agreed such a term, does not mean that they did and, for the reasons set out above, I am satisfied that they did not.

67. Specifically, I am satisfied that this is not a case where commercial common sense requires that the latter part of paragraph 11 is given the meaning for which Mr Fain contends. There is nothing at all unreasonable or unlikely in the construction that I have placed on the paragraph and nothing at all to warrant moving away from what I regard as the natural meaning of the paragraph, set in its context. The reservation of a power of release, in respect of a restriction, to be exercised by a settlor, or grantor, without recourse to, or agreement by, those entitled to the benefit of the restriction, is, or would be, a very unusual thing and not one that the court should be constrained to impose, by way of construction, on the grounds of commercial common sense.

68. In the result and for all the reasons set out in this judgment, I am satisfied that the proper construction of the latter part of paragraph 11 of the Third Schedule is that contended for by Mr Warwick QC.

69. It follows that, although, as I have held, this would be an appropriate case to grant the declaration sought by Mr Fain, should the facts justify it, no such declaration will be granted and the Defendants' application for summary judgment will be dismissed.

70. That conclusion averts the curious position, which was discussed in argument, and which would have arisen had I found in favour of the Defendants on the issue of

construction; namely one whereby both parties would potentially have been entitled to the declarations sought; Mr Warwick QC, as reflecting the current position, in respect of the enforceability of the Third Schedule restrictions; Mr Fain, as reflecting the contingent position should the deed of modification be completed.

71. That anomalous position does not now arise. It does, however, remain to consider how, if at all, this Claim should proceed, given that there is not now any answer to Mr Mackenzie's claim for declaratory relief. I could, for example, treat the hearing of this application as the trial of the Claim and grant Mr Mackenzie final relief upon that basis.