BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 17 of 2017
Between

KINSALE HOLDINGS LIMITED **Appellant**

-AND-

COOL BLUE RESIDENCES LTD **Respondent**

Between the Hon. Sir Marston C.D. Gibson, K.A., Chief Justice; The Hon. Mr. Justice Andrew D. Burgess, Justice of Appeal and The Hon. Mr. Justice William J. Chandler, Justice of Appeal (Ag.)

2018: 25 July
2020: 26 June

Mr. Bryan L. Weekes of Messrs Bryan L. Weekes & Associates for the Appellant
Mr. Kevin Boyce and Ms. Sheena Ann Ince of Messrs Clarke Gittens Farmer for the Defendant

DECISION

GIBSON CJ:

Introduction

[1] At its core, this matter is about the interpretation of the language of a restrictive covenant set out in the title deeds in a building scheme. The High Court held that, on a proper contextual construction of the covenant, there had been no violation by the respondent of the covenant. For the reasons which

follow, we agree with and affirm the judgment of the High Court judge even if we deviate somewhat in our reasoning process.

FACTUAL AND PROCEDURAL BACKGROUND

[2] The facts are largely undisputed. The parties in this matter, Kinsale Holdings Limited ("Kinsale" or "the appellant") and Cool Blue Residences Ltd ("Cool Blue" or "the respondent") are the owners of Lots 27 and 24 respectively, located in a building scheme at Coral Cliff, Maynards in the parish of St. Peter (the building scheme). The parties, both registered companies under the **Companies Act, Cap 308 of the Laws of Barbados**, have the benefit and burden of restrictive covenants affecting their use and occupation of the lots in question.

[3] By deed of conveyance dated the 30th December 1993 and made between Atlantic Mfg Ltd (Atlantic) as vendor, and Larry Warren Architect Ltd as purchaser ("LWAL"), LWAL purchased Lot No. 27 situated in the building scheme. Larry Warren of LWAL is also the sole shareholder and one of the two directors of the appellant Kinsale. The conveyance from Atlantic to LWAL noted that it was "subject to the . . .restrictive covenants . . . contained . . .in a Conveyance dated the 15th day of June 1970 between [EBT], Edward Ive O'Hara and St. Lucy Mfg Co."

[4] By conveyance dated 17th January 2011, made between EBT, as vendor, and

Cool Blue as purchaser (the EBT-Cool Blue deed), Lot 24 was transferred to Cool Blue with EBT reserving unto itself and its successors in title the benefits and burdens of a restrictive covenant which was intended to cover the entire building scheme in that part of Maynards. The covenant covered Lots 11 through 29 of the scheme.

[5] A key fact is that both Lots 24 and 27 sit on a ridge or bluff overlooking the ocean. They are not contiguous as the developer EBT has retained Lot 26, which is between Lots 24 and 27. We will return to this fact when we examine the issue of whether the value of the claimant's lot was affected by any violation of the amenities which attached to the lot.

[6] A central clause of the covenant required the approval of EBT by each purchaser *prior to* any construction taking place. That language was contained in the original deed and while it was only incorporated by reference in the deed to LWAL, it was reproduced in the January 2011 EBT-Cool Blue deed. It will be convenient to set it out here:

> 2. The Purchaser doth hereby for itself and its successors in title (owners for the time being of the said lot or parcel of land hereby assured and every part thereof), covenant with the Vendor and its successors in title (owners for the time being of the other lands of the said building estate and every part as follows:
>
> (a) . . .
>
> (b) not at any time to erect or cause to be erected on the said lot or parcel of land or any part thereof any buildings or erections other than those comprising one single private dwellinghouse together with the boundary walls or fences garages servants rooms or other usual outbuildings for use in connection

therewith which dwellinghouse garages servants rooms and other usual outbuildings shall be subject to the following restrictions, namely:

(i) no such building and erections shall be constructed otherwise than of stone or masonry construction or be roofed with any material other than shingles or tiles or asphalt or asbestos;

(ii) no such buildings and erections on any of the lots marked 11 to 29 inclusive on the Key Plan shall be of more than one storey or in excess of twenty feet above ground level at the highest point of the lot on which they are built;

(iii) all such buildings or erections shall be designed by an architect and *the relevant plans and all specifications in respect thereof shall be submitted to the Vendor for its approval in writing before commencement of construction*; Provided However that this restriction shall only apply to buildings and erections the construction of which shall be commenced while the Vendor shall retain its ownership of any lot or lots of the said building estate and thereafter shall become null and void and be of no power and effect."

(Emphasis added).

[7] Sometime in July 2010, prior to the purchase of Lot 24 by Cool Blue, Mr. Robbie Bell, a principal of Cool Blue, as required by clause 2(b)(iii) of the conveyance, submitted his plans for the construction of the house to the principals of the vendor EBT, including Mr. Anthony S. May. Appended to the six pages of architectural plans was the statement:

> "The attached construction designs by Harper Downie dated July 2010 *have been preapproved by the vendor* on the basis the final design will be materially based on these shown with particular reference to the overall height of the building *not being more than 20 ft above the ground level* of the highest point on Lot 24 and the method of construction for the wall will be either stone or masonry and be roofed with shingles or tiles or asphalt or asbestos, in accordance with the covenants contained within the sale and purchase agreement."

[Emphasis added]

It was signed by four persons (presumably principals of EBT) including Anthony S. May who, by letter dated 1st August 2010 and written to Mr. Bell, stated:

> Dear Robbie,
>
> Enclosed are your planes (sic) which have been approved by us for the house you want to build on Lot 24 at Coral Cliff, Maynards. I trust that these are in order.
>
> Yours sincerely
>
> Sgd. Anthony S. May.

[8] After the commencement of the construction, Mr. Peter Evelyn QC, an attorney for Kinsale, wrote on December 17, 2013, to Mr. Bell asserting that the type of house being constructed, namely a two-storey house which combined wood with the stone and masonry, was in violation of the restrictive covenants and calling on him to cease construction. In response, Mr. Bell wrote to Mr. Evelyn QC by email on December 24, 2013, stating that he disputed Mr. Evelyn's interpretation of the covenant; that the application to the Department of Town and Country Planning had been made since May 2012 and that any objections should have been raised at an earlier stage.

[9] Crucially, moreover, Mr. Bell informed Mr. Evelyn that the design of the property had been approved by EBT Ltd who had created the Coral Cliff Building Estates and its associated covenants. He indicated that he would be willing to meet with Mr. Evelyn's clients to discuss any concerns which they

may have had. Attached to Mr. Bell's emails were the approvals mentioned above in para [6].

The Underlying Proceedings

[10] By Claim Form dated 21st February 2014 together with a Certificate of Urgency, Kinsale commenced this action against Cool Blue seeking the following relief:

> "1. An injunction restraining the Defendant by itself or by its servants agents or otherwise from constructing on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter in this island a dwelling house of more than one storey and constructed of any material other than stone or masonry.
> 2. An injunction mandating that the Defendant remove the structure existent on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter which is in excess of one storey;
> 3. An injunction mandating that the Defendant remove any structure or any part of a structure on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter which is not constructed of masonry or stone;
> 4. Further or in the alternative, damages to be assessed;
> 5. Interest;
> 6. Costs."

[11] The Claim Form recited the terms of the covenant. In its Defence filed 28th March 2014, Kinsale recited the Evelyn letter and Kinsale's response, as well as the approvals before the purchase and after the commencement of construction. As to the claim by Kinsale that there was wood being used in the construction, Cool Blue responded that the wood was there to provide framing for the roof of the house and to provide a rendered finish of the masonry construction.

[12] Curiously, neither the Claim Form, Statement of Claim, nor Mr. Warren's Affidavit in Support of the Urgent Application ever mentioned the EBT approval of the plans or that the approval made no reference to the number of storeys. They also never mentioned Bell's response to the Evelyn letter. (see para [6] above).

[13] In its Reply filed April 8th 2014, Kinsale noted that the purpose of the covenant was to ensure (a) the privacy of the owners of any lot which benefits from the said covenant; and (b) the view enjoyed by any such lot. Mr. Bell and Cool Blue filed, as part of its defence, an Affidavit in Response on April 8th 2014. Appended to the affidavit was a letter dated 25th March 2014 from G&W Associates to Mr. Bell, per David Gill, a land surveyor, who wrote:

> Dear Mr. Bell,
> **Re: As built height differences as measured on site at "Elysium", Lot 24, Coral Cliff, Maynards, St. Peter.**
>
> Please be advised that I have checked the height differences between the highest roof apex, the ground floor slab and the road curb level at the north east corner of the property which was pointed out to me as the reference point. My findings as taken on March 24, 2014 are stated below and shown on the attached sketch drawing. . .
>
> 1) The roof apex is 5.79m (18' 11 ¾") above the reference point.
> 2) The ground floor slab is 1.29m (4' 2 ¾) below the reference point.
>
> Please let me know if you require any further information.
>
> Sincerely,
> Sgd.
>
> David N.D. Gill."

[14] It is clear, then, that construction had begun and, *as built*, the land surveyor found that the building on the property was just under 19 feet in height and did not find violate the height requirements in the covenant. It also bears noting at this juncture, that the only approval requirements by EBT were that the property should not exceed 20 feet in height and that it should be constructed of "either stone or masonry and be roofed with shingles or tiles or asphalt or asbestos, in accordance with the covenants contained within the sale and purchase agreement."

[15] As a result of commendable case management by the trial judge, the issues were narrowed to three, namely:

(1) The meaning of the restrictive covenant: does the covenant mean that buildings within the development can be either a maximum of one storey or a maximum height of 20 feet or whether such buildings must comply with both restrictions?

(2) Whether the Claimant has breached that covenant? and

(3) If so, whether the Claimant should be granted the injunctive relief sought and/or damages and/or interest.

The Evidence at the Trial

[16] Three persons provided Witness Statements, namely Mr. Warrren, his wife,

Ann Warren, both directors of Kinsale, and Mr. Belle for the respondent. Only Messrs Warren and Belle testified at trial. Their witness statements were accepted as their evidence in chief and they were both tendered for cross-examination.

[17] The cross-examination of Mr. Warren began with his admission that he had omitted from his affidavit any reference to the responses from Mr. Belle to Mr. Evelyn's letters, which had included the approvals from EBT as well as the plans submitted by Mr. Belle to EBT. Mr. Warren explained his interpretation of the covenant as permitting only a one-storey building. However, when asked whether a deck built at 18 feet would be restricted by the covenant, he responded that it would not be in breach of the covenant if it was not being used as a living space. "It would have to have no access," he stated. Mr. Warren agreed that the respondent had not broken the regulation relating to 20 feet. He also agreed that Lot 24 and 27 lay on the same ridge line. Moreover, while Mr. Warren stated that "every single home over the last 50 years has abided by the regulation of one storey 'above grade' respecting the next neighbour's privacy and respecting the light and views," he conceded that the covenant made no reference to grade. He was then asked to read the covenant and noted that it did not say 20 feet above the grade level but 20 feet above ground level.

[18] Regarding the impact of Lot 24, as constructed, on the lots, the following exchange occurred:

> Mr. Boyce: So when we look at the Lots 24 and 27 they lie on the same ridge line isn't it?
> Mr. Warren: That is correct.
> Mr. Boyce: And 27 is north of 24.
> Mr. Warren: Yes, that is correct.
> Mr. Boyce: So 24 does not have any impact of (sic) the light of Lot 27 does it?
> Mr. Warren: We are a collective group of people who are under one covenant, so it does have an effect on all of us one way or the other.
> Mr. Boyce: Does 24 impact 27 in terms of light, Mr. Warren, you are under oath.
> Mr. Warren: No, it doesn't.
> Mr. Boyce: Does 24 impact 27 in terms of air, Mr. Warren
> Mr. Warren: No, it doesn't.
> Mr. Boyce: Does 24 impact 27 in terms of views, Mr. Warren.
> Mr. Warren: No, it doesn't.
> [Hearing Transcript 21-22]

[19] Mr. Warren also accepted that two properties in the development which were subject to the covenant, namely Lots 12 and 13, had more than one storey but he explained this on the basis that they were on a slope. However, the covenant, as quoted above in para [6], made no exceptions for sloping properties. Mr. Warren stated, in re-examination, that the two-storey constructions on Lots 12 and 13 existed before he purchased Lot 27.

[20] Mr. Belle testified in chief in amplification of his witness statement, and outlined the correspondence between Mr. Evelyn and himself. Under cross-examination, he

stated that he had submitted his plans for EBT's approval because "as part of the purchase, when we bought the land we sign (sic) a purchase agreement contain (sic) a requirement that they approve our plans at the time that we construct." After receiving the Evelyn correspondence, he spoke with his attorneys and continued construction "because we did not consider that we were in breach" and had continued construction even after the commencement of the action. He insisted that "our full understanding throughout could (sic) that the covenant was to protect the height on ridge line and the properties behind in terms of view"

[21] It can be noted here that the trial judge made a visit to the site.

The Judgment Appealed From

[22] The trial judge, in her judgment, preferred Cool Blue's interpretation to that of Kinsale. Much of the judgment was concerned with what is now called the "contextual interpretation" of contract language. The judge referred to several decisions, particularly two decisions of this court in ***System Sales Ltd v Arletta Brown-Oxley*** **Civil Appeal No. 10 of 2006** and ***E. Phil & Sons A/S (Denmark) v Brondum A/S (Denmark)*** **Civil Appeal No 24 of 2012 decided 23rd October 2013**, and two decisions of the Caribbean Court of Justice (CCJ), ***Sea Haven Inc. v Dyrud*** **(2011) 79 WIR 132** and **Canadian Imperial Bank of Commerce v. Gypsy International and Royston Beepat [2015] CCJ 16 [AJ].** The trial judge noted that in ***E.Pihl*** and ***System Sales***, **Burgess JA** (as he then was) outlined the principles

that should guide inquiry into the meaning of contractual language and, citing the seminal language of Lord Hoffman in ***Investors Compensation Scheme v West Bromwich Building Society*** **[1998] WLR 896**, held that the contextual approach to interpretation was the correct and modern approach. As she observed, **Burgess JA** had noted the shift away from literalism to the contextual approach in the interpretative process as a result of ***Investors Compensation Scheme***.

[23] The learned trial judge therefore concluded that, properly construed using the contextual analysis propounded by Lord Hoffman in ***Investors Compensation Scheme*** and cited with approval by **Burgess JA** in this Court, a reasonable person would read the disjunctive "or" in the restrictive covenant as requiring the construction of a building of no higher than 20 feet but without being confined to one storey. She therefore held that there had been no breach of the covenant and dismissed the action by Kinsale. This appeal ensued.

The Appeal

[24] The appellant took issue with the decision of the trial Judge and has asked this court to review the interpretation of the restrictive covenant affecting the properties of both parties. It is the appellant's case that the type of dwellinghouse being built was a two storey structure which was not permitted by the covenants. This construction amounted to a breach of the covenants and accordingly, the appellant sought relief in the court below.

[25] The respondent submitted that the trial judge was correct in her interpretation of the covenant and that there was, accordingly, no breach by the respondent. The appeal, it further submitted, ought to be dismissed with costs.

DISCUSSION

[26] As we noted in our introduction, we differ slightly from the learned trial judge, although we affirm her decision. We commence our analysis of the law by going back to first principles relating to restrictive covenants. While we agree with the trial judge that there is no real difference between the construction of ordinary contract language and the language of a restrictive covenant, restrictive covenants require a little more care insofar as their purpose, particularly where a building scheme is concerned, is to preserve the character and amenities of the land subject to the building scheme.

[27] In the text *Commonwealth Caribbean Land Law* (Routledge Cavendish 2007, Sampson Owusu (Owusu), writes, at p. 498:

> "A building scheme or scheme of development usually arises when property is laid out in lots for sale to individual purchasers. To preserve the character or the value of the individual lots or amenities of the area as a residential property or for any such purpose each lot is sold subject to restrictions, e.g., prohibiting the use of the property for business purpose, or the keeping of animals on the property, alteration of the lot so as to increase the number of houses on it, hanging of washing in front of the house."

[28] Owusu adds, at p. 471, a caveat when discussing the willingness of equity to enforce the covenant under the doctrine enunciated by Lord Cottenham LC in the celebrated decision of *Tulk v Moxhay* (1848) 2 Ph. 774:

> "The Courts soon realised that this principle should be kept within narrow limits; for it soon became evident that it could have the adverse effect of imposing upon many pieces of land enforceable restrictions where there was no conceivable advantage to be protected."

[29] The second point to be made concerns the presence in clause 2(b)(iii) of the covenant-contract of language requiring approval of the plans by the developer, and the fact that approval had been given by the developer of the building scheme to the plans submitted by Cool Blue prior to its construction of the home as required by covenant. In *Preston & Newsom on Restrictive Covenants Affecting Freehold Land* (Sweet & Maxwell, 8th Edn, (G.L. Newsom), at para 6-13, p. 128, it is written:

> "A covenant to submit plans of any proposed building before starting to erect it is to be treated as a covenant not to start to build until plans have been submitted to and approved by the vendor. If plans were not submitted but there would have been no other breach, damages would be nominal; however, an injunction will be granted if the buildings are such that the surveyor would not have approved them either as to their design or their position."

[30] The authority cited for that proposition is *Powell v Helmsley* [1909] 1 Ch 680, 687-688, where Eve J observed that:

> Further, I think that the covenant by the purchaser that he will before the commencement of any building submit the plans thereof for the approval of the vendor involves a negative contract that no building shall be commenced until plans have been submitted to and approved by the vendor. As I have already stated, no plans were ever submitted and no approval obtained and in this respect also the erection was a breach of the covenant. The building, therefore, has been erected in

> breach of the covenant, and I am satisfied on the evidence that its existence materially affects the value of the plaintiff's property."

[31] In our view, it follows from the fact that EBT approved the plans which had been submitted that EBT perceived that no violation of the covenant had occurred. Owusu describes such restrictions as operating as a "local law binding and enforceable on all the individual purchasers." Moreover, it is noteworthy that the covenant states that "this restriction shall only apply to buildings and erections the construction of which shall be commenced while the Vendor shall retain its ownership of any lot or lots of the said building estate." That language is consistent with settled law that, if the common vendor in a building scheme disposes of all the lots and retains no adjacent or other land to be benefitted or protected by the covenant, the vendor will lose the capacity to sue for breach of the covenant (see, Owusu, at p. 498).

[32] Owusu states, at p. 502, citing the Privy Council decision of *Jamaica Mutual Assurance Society v Hillsborough Ltd et al*, [1989] 1 W.L.R. 1101, 1106, that a claim founded on a building scheme will succeed only if there are two prerequisites, namely:

> (i) the identification of the land to which the scheme relates; and
>
> (ii) (ii) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will *enure to the vendor* and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land. Reciprocity of obligations between purchasers of different plots is essential. [Emphasis added]

[33] We conclude that, in light of the fact that the developer both approved the plans *and* retained Lot 26 which is between the lots owned by Kinsale and Cool Blue, the developer would likely not have approved plans which it perceived as violative of the covenant. It follows that there was no breach of the covenant and therefore the contention of the appellant Kinsale fails. This should suffice to dispose of the claim.

[34] But we agree with and affirm the construction of the covenant by the trial judge. The analysis of the trial judge was comprehensive and exhaustive and we find no need to repeat or reproduce it here. We will mention only briefly our basis for supporting the judgment.

[35] As mentioned above, both in this Court as well as in decisions of the CCJ (see, ***System Sales Ltd v Arletta Brown-Oxley et al, Civil Appeal No. 10 of 2006*** delivered on May 15th 2014; ***E. Phil & Sons A/S (Denmark) v Brondum A/S (Denmark) Civil Appeal No. 24 of 2012*** (unreported); ***Sea Haven Inc v Dyrud,*** *supra* and ***CIBC v Beepat,*** supra. In ***E. Phil & Sons A/S (Denmark),*** *supra*, **Burgess JA** described the contextual approach to construction of contractual language when he adopted the principles enunciated in the ***Investors Compensation Scheme Case*** as follows:

> "First, that case heralds an unmistakable shift in approach to contractual interpretation, namely, a shift to ascertaining the contextual meaning of the relevant contractual language and away from literalism in the interpretative process: see per Lord Steyn in *Sirius* at p. 200. Second, ambiguity is not a pre-requisite of an

investigation of the background or factual matrix in which a contract had been concluded. Third, such an investigation is an indispensable part of the process of understanding what a contract means in all cases. The background, which may include the legal, regulatory and factual matrix constituting the background, enables the interpreter to determine the intended meaning of the contractual language. Finally, the actual words used do not necessarily govern the meaning to be given to the contract; the background can let the judge decide that the parties used the wrong words, or mis-ordered their words, and to ascribe to the parties' words the meanings they must have intended, in the light of the background. The last point was made by Lord Hoffman in Chartbrook where he said at p 1113-1114:

> When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did.

[36] The question then is: what is the context or factual matrix which informs the proper construction of the language in the restrictive covenant? That matrix begins with our first central point above, namely, that the developer of the scheme approved the plans submitted by Cool Blue and, in its approval, referred only to the 20-foot height restriction and made no mention of the one-storey condition in the covenant. Significantly, the vendor retained a lot, Lot 26, which is between Lot 24, owned by respondent Cool Blue, and Lot 27 owned by appellant Kinsale. It follows that it could hardly have approved the plans for Lot 24 and, *ex hypothesi*, those of Lots 12 and 13, while the possibility existed of loss of the amenities attendant on the covenants.

[37] In addition, during the construction by Cool Blue, approval was given to the building "as constructed." Moreover, the principal for Kinsale actually testified that

none of the amenities of privacy, light, or air was affected by the construction. Finally, there were already two properties, Lots 12 and 13, the buildings on which had more than one storey, and, presumably, the developer had given approval for their construction as well.

[38] Having examined the contextual matrix in which the covenant was framed, we now turn to the proper construction of the restrictive covenant which is now reproduced:

> "no such buildings and erections on any of the lots marked 11 to 29 inclusive on the Key Plan shall be of more than one storey **or in excess of twenty feet above ground level at the highest point of the lot on which they are built;" (emphasis added)**

We are of the opinion that the word "or" used in the covenant is disjunctive and not cumulative in terms of the restriction imposed upon purchasers. It appears to us that the purpose of the restrictive covenant is to preserve the amenity of the scheme by maintaining the view of the ocean of other lots irrespective of the number of stories built within the requirements of the Town and Country Planning Office.

[39] In this factual matrix, the letter of Mr. David Gill, Land Surveyor cannot be overlooked. The covenant requires that buildings or erections should be no more than 20 feet above ground level at the highest point of the lot on which they are built. There has been no challenge to his opinion that the height requirement was not breached.

[40] We are therefore in entire agreement with the trial judge who concluded that the word "or" separating the height restriction from the requirement of one storey, when read contextually, could only mean that the lot owners were offered the alternative of a building of either 20 feet or one storey, and that, given the factual scenario at the scheme of development, primacy was given to the height restriction in the covenant as opposed to the number of storeys.

[41] For these reasons, we affirm the judgment of the Court below in its entirety and we dismiss the appeal with costs.

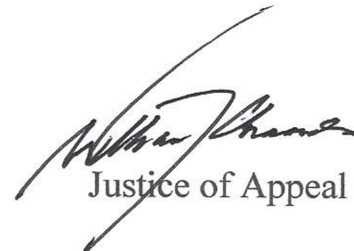
DISPOSAL

(i) The appeal is dismissed.

(ii) Costs to the respondent to be agreed or assessed.

Chief Justice

Justice of Appeal



Justice of Appeal