Browne Jacobson

Churston Golf Club v Haddock [2019] EWCA Civ 544

The Court of Appeal has reinstated conventional wisdom by ruling that a standard fencing covenant should not be treated as a fencing easement.

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Facts

A conveyance in 1972 contained a 'covenant' by the buyer in favour of the owners of adjoining land as follows:

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

The current tenant of the adjoining land looked to enforce this obligation against the current tenant of the land conveyed in 1972 (i.e. not the original covenantor) on the basis that the obligation was a fencing easement (and so ran with the land). To the surprise of most people, this argument was successful in the High Court.

Issues

1. Could the obligation in the 1972 conveyance be construed as a fencing easement (and therefore binding on successors in title to the servient land)?
2. If so, was it possible to create such an easement by express grant?

Decision

1. To construe the obligation in the 1972 conveyance as an easement (rather than as a covenant) would be at odds with the language and the composition of the conveyance (after all, the relevant clause expressly used the word "covenants"). The conveyance was drafted by a lawyer and the form and terminology adopted demonstrated that the draftsman understood the basic rules governing the creation of easements and the imposition of covenants.
2. As a result of point 1 above, it was unnecessary to consider whether it is legally possible to create a fencing easement by express grant.

Points to note/consider

1. The High Court decision was based on a trio of Court of Appeal decisions from the 1960s and 1970s which had held that the right to have a wall or fence kept in repair can constitute an easement, even though it offends the rule that an easement cannot impose a positive obligation on the owner of the servient land. In those cases, the alleged easements arose by prescription and there are no reported cases where such an easement has been upheld when expressly granted. As the Court of Appeal declined to express an opinion on the point, we still do not know if such an express grant is possible in appropriate circumstances.
2. Given the language of the 1972 conveyance, it is unsurprising that the High Court decision has been overturned on appeal. All

property lawyers would read the relevant obligation as a positive covenant and conclude that the burden is not capable of directly binding successors in title to the original covenantor.

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