

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge Behrens (sitting as a Judge of the High Court)
Claim No: HC07C02128**

Royal Courts of Justice
Strand, London, WC2A 2LL

22/10/2009

B e f o r e :

**LORD JUSTICE WARD
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER**

Between:

ANTHONY STEPHEN DAVIES

Appellant

- and -

**(1) RICHARD AND MARGARET DENNIS
AND OTHERS**

Respondents

**Mr Tom Weekes (instructed by Pitmans) for the Appellant
Mr Martin Hutchings (instructed by IBB Solicitors) for the Respondents
Hearing date: 3 June 2009**

Lord Justice Rimer :

Introduction

1. This is a defendant's appeal against an order of 21 November 2008 made by His Honour Judge Behrens sitting as a High Court Judge in the Chancery Division. The judge (i) declared that certain building works that the defendant, Anthony Davies, wished to carry out would, if carried out, breach restrictive covenants whose benefit is enjoyed by each of the claimants/respondents (Richard and Margaret Dennis, Daniel and Irene Cameron, Richard Giles, Derek and Ruth Tilsley and Hannah Yentis); (ii) granted an injunction restraining Mr Davies from carrying out the works; (iii) ordered him to pay the claimants' costs; and (iv) gave permission to appeal.
2. The judge had to decide three issues. First, whether on its true construction the covenant in paragraph 2 of the relevant schedule applied to Mr Davies' proposed building works at all. Second, if it did, whether the works would be or become a 'nuisance or annoyance' to the claimants within the meaning of that covenant: only if they did would there be a breach. Third, whether Mr Davies had a written approval to carry out the works for the purposes of the covenant in paragraph 1 of the schedule.

3. The judge decided all three points against Mr Davies. All three were again put in issue by his appellant's notice, although in the event the argument focused only on the first and third points. As for the second point, which required a value judgment by the judge based on the evidence, Mr Weekes (who appeared, as below, for Mr Davies) recognised that to persuade this court to substitute a different judgment required the scaling of too high a mountain and he did not press the point. We are thus concerned only to decide the first and third points: construction and approval.

The background facts

4. I take these gratefully from the judge's judgment. The parties live on Heron Island in the River Thames, at Caversham, near Reading. In the mid-1980s the island was developed by Heron Homes Limited ('Heron') as a residential estate comprising 47 three-storey houses. The judge said this of the development:

 '16. ... A particular feature of the development was its closeness to the river and the views that each house was afforded of the Thames. The island was described in the advertising brochures at the time as a unique development "lapped by the waters of the Thames on three sides" and, as providing purchasers with a "waterside lifestyle". The open river views were a feature of the development and many houses were also given mooring rights. Nearly every house has a waterside frontage. Views of the River are gained by deliberately designed gaps between the houses and the houses have been carefully orientated in order to take advantage of the river view.'
5. Heron sold the houses by materially identical transfers entered into by itself, its management company, OM Peverel Limited ('Peverel'), and the purchasers. It later transferred the communal areas and mooring facilities to Peverel, which covenanted to manage and maintain them, the purchasers covenanting to reimburse Peverel for the cost (the transfers in fact named the management company as OM Limited, but nothing turns on that).
6. Each transfer included a series of restrictive and positive covenants by the purchaser, some with just Heron and Peverel, others both with them and with the owners for the time being of other plots on the estate. I will go straight to the relevant provisions of the transfer of No 23 Heron Island, which Mr Davies has owned since 1993. The transfer is dated 26 June 1987 and the original transferee was Mr Strange, from whom Mr Davies derived title.
7. By clause 4(a) Mr Strange covenanted:

 'The Purchaser for himself and his successors in title and with the intent to bind the Plot into whosoever hands the same may come hereby covenants with the Vendor and the Management Company and also as a separate covenant with every other person who is now the owner of any part of the Estate for the benefit of the remainder of the Estate including any part thereof for the time being unsold to observe and perform the restrictive and other covenants and stipulations set out in the Third Schedule hereto PROVIDED THAT nothing herein contained shall prevent the Vendor or its successors in title from selling or otherwise disposing of any part or parts of the Estate free from any restriction or stipulation or from waiving compliance with or agreeing to vary any restriction or stipulation now or hereafter affecting any part of the Estate nor be deemed to create a building scheme.'
8. The key covenants in the Third Schedule are in paragraphs 1 and 2 but I will also set out paragraph 4:

 '1. Not to erect on the Plot or any part thereof any building whether of a permanent or temporary nature except such as shall be in accordance with plans and elevations which shall have been approved in writing by the Management Company and whose proper and reasonable fees shall be paid by the persons submitting such plans and elevations for approval

2. Not to use the Dwellinghouse for any purpose other than that of a private residence or ancillary thereto and not to carry on from the Plot or any part or parts thereof any trade business or manufacture whatsoever nor to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate or the neighbourhood ...

4. (a) Not to allow the wall fence or boundary posts along those boundaries of the Plot indicated by a "T" within the boundary on Plan 1 nor the rear wall or fence to fall into disrepair but to maintain the same in good condition

(b) Not at any time to erect or permit to be erected along any of the boundaries of the Plot any boundary structure of whatsoever nature other than as may exist at the date hereof (and where only boundary marker posts exist along such boundary not to erect any boundary structure of whatsoever nature) without the written consent of the Management Company which shall be entitled to grant or withhold its consent entirely at its discretion

(c) Not to erect construct or plant in front of the front or side building line any wall fence gate or other means of enclosure without the written permission of the Management Company and the Local Planning Authority'

It is not disputed that each claimant is entitled to the benefit of, and to enforce against Mr Davies, the restrictive covenants contained in those paragraphs. Paragraph 4(a), although expressed in negative terms, in fact looks more like a positive covenant; if so, it may not be so enforceable, although I express no final view on that.

9. The particular problem that has arisen is that on 19 October 2005 Mr Davies obtained planning permission to build a three-storey side extension to his house. Work started on it in May 2007 but was later halted following complaints from the claimants' solicitors and pending their resolution by these proceedings. Its continuance is now enjoined by the judge's order. Each claimant is a neighbour of Mr Davies and asserts that the proposed extension does not have a paragraph 1 approval; and (even if it did) that it will anyway cause them a 'nuisance or annoyance' in breach of paragraph 2. Mr Davies' house at No 23 borders the river on the southern side of Heron Island. Mr and Mrs Dennis live at No 16, behind No 23 to the north-west. Mr and Mrs Cameron live at No 17, next door to No 16. Mr Giles lives at No 46, in the central part of the island and approximately to the west of No. 23. Mr and Mrs Tilsley live at No 22, on the eastern extremity of the island, roughly north-east of No 23. Mrs Yentis lives next door to them at No 21.
10. Mr Davies' proposed extension is intended to comprise a study and utility room on the ground floor, an extension to the sitting room and a balcony on the first floor and an additional bedroom on the second floor. It is 3.2 metres wide, 6.3 metres deep, 7.5 metres high to the eaves and 9.5 metres to the ridge. The judge summarised the objections of each of the claimants to the extension, which included complaints that it would reduce their river views from parts of their respective houses. During a four-day trial, he had the benefit of the claimants' written and oral evidence, plans, a three-dimensional model, photomontages, expert evidence from two witnesses on planning matters, evidence from a valuation surveyor and a site view. As regards the evidence directed at proving that the extension would occasion 'nuisance or annoyance' to the claimants in breach of paragraph 2 by interfering with their river views, Mr and Mrs Dennis obviously had the strongest case; and Mr and Mrs Tilsley and Mrs Yentis the weakest.
11. Central to the argument before the judge was whether the covenant in paragraph 2 has any application at all to the erection or extension of a building: Mr Davies' argument was that the regulation of works of that nature was exclusively within the province of paragraph 1. The judge held, however, that, as a matter of construction, the reach of paragraph 2 *did* extend to restraining the erection of buildings 'which may be or become a nuisance or annoyance' to covenantees. Having so held, he had to decide whether Mr Davies' proposed extension would in fact be or

become a 'nuisance or annoyance' to the claimants. In directing himself as to that, he referred to this court's decision in *Tod-Heatly v. Benham* (1888) 40 Ch. D. 80. He said:

'98. In my view therefore the question is whether applying the guidance afforded by the case of *Tod-Heatly v. Benham* this extension would be or become a nuisance or annoyance to the claimants. Would reasonable people, having regard to the ordinary use of the Claimants' houses for pleasurable enjoyment, be annoyed and aggrieved by the extension? To adopt the words of Lord Justice Lindley, would the extension raise an objection in the minds of reasonable men, and be an annoyance within the meaning of the covenant? Lastly, would the extension reasonably trouble the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of the Claimants' houses?

99. As I have noted the test is an objective one and must be judged by robust and common sense standards.

100. At the end of the day the issue is a relatively narrow one. As I indicated in the course of argument I think that some of the objections of the Claimants contained in their witness statements would fail that objective test. Thus I agree with Mr Weekes that the objections with regard to the size of the gap, the view on the approach to Number 22, and the visiting of the water front would not reasonably trouble the minds of an ordinary sensible inhabitant of the Claimants' houses.

101. However I have had the benefit of a view from each of the Claimants' houses. I have seen the view of the river – admittedly in November. I have seen photomontages of the effect of the extension. I agree with Mr Derbyshire that the loss of view is significant from Numbers 17, 46 and especially from Number 16. In my view the three storey red brick extension would trouble the minds of the ordinary sensible English inhabitant of any of those three houses and in those circumstances it does constitute an annoyance within the meaning of the covenant.'

12. As I have said, if the judge was right to hold that paragraph 2 is capable of extending to the erection of an allegedly annoying building, we are not asked to review the correctness of the factual conclusion at which he arrived in those paragraphs. I add that, for myself, I would have required much persuading that this court could properly arrive at a view on that matter differing from his. As regards paragraph 2, the only issue argued before us is thus whether it is capable of applying to the erection of a building at all. I turn to that.

What is the reach of the covenant in paragraph 2?

13. As Mr Weekes emphasised, paragraph 1 is expressly directed at restraining a covenantor from erecting any building on his plot save in accordance with plans previously approved in writing by Peverel, whose reasonable fees must be paid by the covenantor. He submitted that the requirement for the submission of plans for prior approval, linked with the need for business efficacy, had the consequence that two terms had to be implied into paragraph 1: (i) that Peverel could not withhold its consent unreasonably; and (ii) that when considering a building application, it must have regard to the interests of the other occupiers of the estate. In support of the first of those assertions, Mr Weekes invoked the decision of Hart J in *Mahon and another v. Sims and another* [2005] 3 EGLR 67. In support of the second, he referred to *Land Covenants*, Scammell, 1996, page 239, where the author suggested that 'an example of a case of an implied term giving rise to an obligation to act correctly towards the plot owners as a whole (including the owner seeking approval) would be the case of a building scheme'. In the present case, clause 4(a) of the standard transfers (quoted above) expressly negated the creation of a building scheme. We were not referred to any authority supporting the second suggested implied term.
14. As for paragraph 2, Mr Weekes submitted that it must be construed in the context of a schedule that includes the immediately preceding paragraph 1. He said that, upon its true construction in that context, paragraph 2 did not also extend to the regulation of the erection of buildings on a

covenantor's plot. To interpret paragraph 2 as doing so would effectively be to emasculate paragraph 1. It would mean that even if the plans for a proposed building were approved by Peverel under paragraph 1, the building would remain at risk of challenge by one or more covenantees under paragraph 2 on the basis that it may be or become a nuisance or annoyance. If paragraph 2 is construed in a context that includes paragraph 1, he said that it can sensibly only be regarded as concerned with the covenantor's *activities* on his plot, not including activities in the nature of the erection of annoying buildings. He said it would anyway be unsatisfactory if paragraph 2 were interpreted as applying not just to activities on the plot but also to the erection of buildings on it. A covenantor proposing to erect a building will need to obtain both planning permission and an approval under paragraph 1. If paragraph 2 is also capable of applying to his proposal, he will also need to consider whether the building might prove to be a 'nuisance or annoyance' to others. That would or might involve a difficult exercise of judgment. Such matters ought to be exclusively within the province of the planning authority (when considering whether to give planning permission) and of Peverel (when considering whether to give paragraph 1 approval). Mr Weekes supported this submission by pointing out that, quite apart from the colour that paragraph 1 lends to the interpretation of paragraph 2, sub-paragraphs 4(b) and (c) impose express restraints on the erection of structures on plot boundaries and so assist in the conclusion that paragraph 2 cannot naturally be interpreted as also applying to the erection of buildings or other structures.

15. Mr Weekes submitted further that even if paragraph 2 is interpreted in isolation from paragraphs 1 and 4, it still cannot and should not be interpreted as applying to the erection of buildings. It is concerned with the prevention of activities that may be or become a 'nuisance or annoyance'. That phrase is, he said, borrowed from the law of nuisance at common law, whereas the erection of a building that (without interfering with any easement, such as a right to light or air) interferes with a neighbour's enjoyment of his own property will not amount to a common law nuisance. For that proposition, which was not in dispute, Mr Weekes referred us to the observations of Lord Goff of Chieveley in *Hunter and Others v. Canary Wharf Ltd* [1997] AC 655, at 685D to G.
16. Mr Weekes did not, however, press that submission too far, since he recognised that the relevant part of paragraph 2 ('nor to do etc') is plainly not directed merely at restraining activities that would be or become a 'nuisance' at common law. He accepted that the effect of restraining activities that may be or become a 'nuisance or annoyance' carries a wider import: if it did not, it would add nothing to the covenantees' common law rights. Mr Weekes' moderation in that respect was well judged. Covenants of the nature imposed by paragraph 2 have long been used in conveyances, transfers and leases and it is clear that the expanded phrase 'nuisance or annoyance' in such covenants is directed at conferring a wider protection than the remedies available for the tort of nuisance at common law.
17. The point is perhaps best illustrated by the decision to which the judge referred, *Tod-Heatly v. Benham* (1888) 40 Ch. D. 80, and it is worth digressing to that authority and citing from its judgments. The case raised the question whether the establishment of a hospital for the treatment of various diseases constituted a breach of a covenant in a lease restraining the carrying on of particular trades, including a covenant by the lessee that he would:

'... nor do or wittingly or willingly cause or suffer to be done any act, matter, or thing in or upon or about the said premises, which shall or may be or grow to the annoyance, nuisance, grievance or damage of the lessor, her heirs and assigns, or the inhabitants of the neighbouring or adjoining houses'.
18. In this court Cotton LJ said that the relevant question was not whether a case of nuisance had been made out, but whether the covenant had been breached. He rejected the submission that the word 'nuisance' gave colour to the whole covenant and required it to be interpreted as if 'the thing to be prohibited must be a nuisance or anything that is a legal nuisance' (page 92). The relevant phrase included the words 'annoyance ... grievance or damage'. A matter could cause

'annoyance' or 'grievance' without also causing any pecuniary loss. As to the meaning of those words, he said, at 93:

'Now "annoyance or grievance" are words which have no definite legal meaning. It has been pressed upon us that we cannot say that it was that which was an annoyance or grievance to reasonable people, because the Judges, in speaking of what would be an annoyance to reasonable people, are only speaking of what they themselves really think would be an annoyance or grievance. That is the difficulty that Judges very often have to deal with; they must not take that to be an annoyance or grievance which would only be so to some sensitive persons. They must decide not upon what their own individual thoughts are, but on what, in their opinions and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V-C Knight-Bruce in *Walter v. Selfe* 4 De G. & Sm. 322. It is not sufficient in order to bring the case within the words of the covenant, for the Plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done.'

Lindley LJ made like points. He said, at 95/96:

'The question which arises is, what is the meaning of the expression "shall or may be or grow to the annoyance, nuisance, or damage" [sic: he omitted 'grievance'] of the persons named. Certainly that string of words is introduced in order to give the covenantee a greater protection than he would have had without any such words at all, or if only one of those words were used. ... I cannot at all agree with the contention that these words "annoyance or grievance to the inhabitants" mean that which would be according to law a nuisance, or that the covenant is only against such acts as would produce pecuniary damage. ... Now what is the meaning of annoyance? The meaning is that which annoys, that which raises objections and unpleasant feelings. Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant.'

Bowen LJ said, at 97/98:

'What is the meaning of the term "annoyance"? It implies more, as it seems to me, than "nuisance." The language of the covenant is, that nothing is to be done, "which shall or may be or grow to the annoyance, nuisance, grievance or damage of the lessor or the inhabitants of the neighbouring or adjoining houses." Now, if "annoyance" meant the same thing as "nuisance" it would not have been put in. It means something different from nuisance. ... "Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort.'

19. The judge applied that guidance and recognised, as does Mr Weekes, that the paragraph 2 injunction against 'nuisance or annoyance' goes wider than would a mere injunction against 'nuisance'; and I have quoted the judge's reasons for concluding that a case of 'annoyance' was established. But the prior question before him, and now before us, is whether paragraph 2 applies to the erection of buildings at all.
20. Given that the language of paragraph 2 deliberately extends beyond the restraint of that which may be or become merely a 'nuisance', I am not convinced that the fact that the erection of a house that interferes with a view will not, without more, amount to a nuisance at common law should encourage us to interpret the reach of paragraph 2 as falling short of restraining the erection of potentially annoying buildings. Mr Weekes' submission is, however, that this is nevertheless its correct construction. He said that it cannot be the case that the plot owners must

maintain unobscured views across their plots. Is it, he asked, to be said that Mr Davies cannot suffer the growth of trees in the position of the extension that would similarly obscure the views of the river? I understood him to submit that for Mr Davies to suffer his trees so to grow could not give rise to an actionable annoyance under paragraph 2 any more than could his erection of the extension.

21. Mr Weekes referred us to this court's decision in *C & G Homes Ltd v. Secretary of State for Health* [1991] Ch 365. It raised an issue as to whether a health authority's housing of former mental in-patients in two houses on a residential estate resulted in a breach of one or both of two covenants burdening the houses. One covenant, paragraph 20, was in these terms:

'Not to cause or permit or suffer to be done in or upon the property any act or thing which may be or become a nuisance, annoyance, danger or detriment to the transferor or owners or occupiers for the time being of other parts of the estate'

22. This court, reversing the judge, held there had been no breach of that covenant. The facts of the case were very different from those of this one, so that the decision lends us no direct assistance. But paragraph 20 has obvious similarities to the relevant part of our paragraph 2 and Mr Weekes drew our attention to two passages in the judgments which he said supported his submission that paragraph 2 is concerned not with the erection of buildings or other structures on the plots, but only with other activities carried on there. First, Nourse LJ said, at 386C:

'Mr Macdonald's [leading counsel for the appellant] primary submission was that the covenant does not impose any restriction on the persons who may occupy the property. It only restricts the acts or things which the occupants, whoever they be, may do there. Although Ferris J thought that that was too narrow a view, I suspect that it accords with the construction which most conveyancers would put on a covenant in this form, again a very familiar one'.

Secondly, Lord Donaldson of Lynton MR said, at 390C:

'The position in relation to covenant 20 is quite different. Once again I have to look to the object and to the words. It is not directed to the use being made of the property, that being the subject matter of covenant 24(2). It is directed instead at conduct in or upon the premises which causes or may cause nuisance, annoyance, danger or detriment to other owners ... or occupiers of other parts of the estate or to the plaintiff. No complaint whatsoever is being made in relation to the conduct of the occupants in or upon the premises. The evidence relied upon as constituting a detriment to the plaintiff relates solely to the use of the premises made by the Secretary of State and amounts to no more than that in a buyers' market a particular purchaser was astute enough to use the general nature of that use as a lever to obtain a small reduction in the purchase price. There has been no breach of covenant 20'.

23. I am not myself convinced that either passage in fact supports the case that paragraph 20 could not have been enlisted in aid of a complaint that the covenantors had erected a building on the burdened land that had caused annoyance to other estate owners. The erection of such a building would, it seems to me, at least be capable of being described as an 'act' or 'thing' that the occupiers would have done on the land (see Nourse LJ), although I admit to less confidence as to whether Lord Donaldson would have regarded it as embracing whatever he had in mind in referring to 'conduct'.
24. Another relevant passage in Nourse LJ's judgment is, however, his observation at 380G, where in referring to a particular matter to be taken into account in construing the covenants in issue, he said:

'No less to be taken into account is that parties to a conveyancing transaction, having entered into a covenant in a long established and familiar form, must have intended that it should have the effect which earlier authorities have said that it has.'

That observation is a pertinent one in the present case because (i) paragraph 2 is undoubtedly drafted 'in a long established and familiar form' (covenants in essentially similar form can be found in the Encyclopaedia of Forms and Precedents, 2nd edition, 1925, Volume XV, page 874; and 5th edition, 2007 reissue, page 226); and (ii) it can also be said to have received a judicial consideration adverse to Mr Weekes' argument. The authority is Romer J's decision in *Wood v. Cooper* [1894] 3 Ch 671.

25. The facts of that case were that, by a lease of November 1878, Mr Wood demised a house to Mr Bailey for 99 years. Mr Bailey's covenants included covenants with Mr Wood and his successors ('the lessor parties') (a) not, without the licence and consent in writing of the lessor parties being first obtained:

'To erect or build, or cause or permit to be erected or built upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof, any other building whatsoever save and except a stable and coach-house'

and (b):

'not to do or suffer to be done on the said premises or any part thereof any act, matter, or thing which may be or become an annoyance, nuisance, or disturbance to the neighbourhood or to the tenant of the lessor parties'

26. I shall refer to these covenants as covenants (a) and (b) respectively. They are essentially equivalent to the covenants in paragraphs 1 and 2 in our case. Mr Wood also granted to Mr Grice a 99-year building lease of adjoining land, upon which Mr Grice was to build a house. The house was in fact built by Mr Grice's assignee, Mr Neale, who moved in on 26 February 1894. Mr Bailey had in the meantime assigned his lease to Mr Cooper, the defendant. The inference is that Mr Cooper was visually offended by the proximity of Mr Neale's house and on 27 February 1894 he commenced the erection of a substantial trellis-work screen on his land, fronting Mr Neale's land. Mr Wood objected that this breached the covenants in Mr Cooper's lease but Mr Cooper completed the work. Mr Wood sued him for an injunction, alleging (i) that the screen was a 'building' erected in breach of covenant (a); and (ii) that its erection infringed covenant (b) as being an annoyance, nuisance and disturbance to Mr Neale.
27. The arguments of counsel, as recorded at [1894] 3 Ch 671, 675, show that Mr Neville QC for Mr Wood submitted that there was a breach of both covenants. Mr Bigham QC, for Mr Cooper, submitted that the screen was neither a 'building' within the covenant (a) nor an 'annoyance' within covenant (b). Romer J held Mr Cooper to be in breach of both covenants. Whilst he regarded the case as on the border line, he held the screen to be a 'building' within covenant (a). He went on to find that its erection also constituted a breach of covenant (b), saying at 676:

'In the second place, I have no doubt whatever in my own mind, that it is a breach of the covenant that the lessee "will not do or suffer to be done on the premises, any act, matter, or thing which might be or become an annoyance to any tenant of the lessor." To my mind, undoubtedly, what the Defendant has done is an annoyance to Mr Neale, the tenant of the lessor. I think, in the first place, that it does substantially interfere with the access of light to the windows on the ground floor of this building, and that, notwithstanding some parts of the expert evidence; and I feel satisfied beyond that, and irrespective of that, that it causes an annoyance to Mr Neale, the tenant, within the meaning of the words used in the covenant. It falls within the definition of the word "annoyance," in a covenant like this, which was given by the three Lords Justices in the case of *Tod-Heatly v. Benham* 40 Ch. D. 80. In the first place, to adopt the language of Lord Justice Cotton, I am satisfied by the evidence before me that reasonable people, having regard to the ordinary use of Mr Neale's house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the Defendant. It would be an annoyance or grievance to reasonable, sensible people. It is an act which is an interference with the pleasurable enjoyment of the house. Then, to adopt the words of Lord Justice Lindley, I think it does raise an objection

in the minds of reasonable men, and is an annoyance within the meaning of the covenant. Lastly, as pointed out by Lord Justice Bowen, “ ‘Annoyance’ is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort.”

I have come to the conclusion, therefore, that this is a clear breach of the last-mentioned covenant as well as of the first, and on both grounds I think the Plaintiff is entitled to succeed.’

28. That decision is unhelpful to Mr Weekes; and in coming to his conclusion that the paragraph 2 covenant in the present case was as applicable to catch the erection of annoying buildings as other annoying activities, the judge was influenced by it. The relevance of *Wood v. Cooper* is (i) that it concerned alleged breaches of two covenants being the equivalent of those in paragraphs 1 and 2; (ii) that the relevant part of the paragraph 2 covenant is in its essentials identical to covenant (b); and (iii) that, having held that the erection of the trellis infringed covenant (a), Romer J held that its erection also infringed covenant (b).
29. Mr Weekes sought to meet these difficulties in two ways. First, he submitted that, in approaching the construction of a covenant contained in a transfer dating from 1987, the court should not regard itself as bound to apply and follow a decision in 1894 on a covenant dating from 1878. Secondly, he submitted that Mr Bigham QC anyway did not argue the point that he argued before us. Mr Bigham argued merely that (i) the screen was not a ‘building’ for the purposes of covenant (a), and (ii) if it was, it was not an ‘annoyance’ for the purposes of covenant (b). What he did not argue was that (i) it was not a ‘building’, but (ii) if it was, its erection anyway could not constitute a breach of covenant (b), which was directed only at the restraint of annoying activities of a different type upon the burdened land. He invited us to hold that, in assuming covenant (b) to be potentially in point, Romer J accepted a tacit concession that ought not to have been made.
30. Mr Hutchings, appearing, as below, for the claimants, submitted that the judge’s interpretation of paragraph 2 was correct. He pointed out that all the houses on the island were sold by Heron by transfers imposing on the owners a tight scheme of covenants (those in the Third Schedule), being covenants intended to be directly enforceable by all other house owners and as reflecting a clear desire by the parties to preserve the original integrity of the scheme of development. He referred in particular to the covenants in paragraph 4, to other covenants of a positive nature requiring the owners to keep their houses and gardens in good order and to a restraint on the cutting down of trees planted by Heron (I have commented on the extent of the enforceability of the positive covenants).
31. As for paragraph 2, Mr Hutchings submitted that it was in an entirely familiar form. It falls into three distinct parts respectively restricting (i) any use of the house other than as a private dwellinghouse; (ii) the carrying on from the plot any trade or business; and (iii) the doing or suffering to be done on the plot of ‘anything of whatsoever nature which may be or become a nuisance or annoyance’ to owners or occupiers of the estate or the neighbourhood. He submitted that the quoted words are expressed in terms of the maximum width and that their natural and ordinary meaning obviously embraces the erection of a building which may, by materially interfering with river views, be an ‘annoyance’ to neighbours. In *Wood v. Cooper* Romer J apparently had no doubt that covenant (b) restrained the erection of the ‘annoying’ trellis that he had already held to be a ‘building’ for the purposes of covenant (a).
32. Mr Hutchings submitted further that the natural interpretation of paragraph 2 is not impliedly cut down by the provisions relating to the erection of buildings in paragraph 1. The ordinary sense of the language of paragraph 2 extends to a restraint on the erection of ‘annoying’ structures of one sort or another and the parties are unlikely to have intended to have confined its reach merely to structures that are not a ‘building’ within the meaning of paragraph 1. Whilst Mr Hutchings agreed with Mr Weekes that Peverel was under an implied obligation not to withhold its

paragraph 1 consent unreasonably, he disagreed that it was under a further implied obligation to have regard to the interests of all others on the estate potentially affected by the building proposal; and he submitted that the demands of business efficacy would not require the implication of such a term. He suggested that a fair interpretation of Peverel's responsibilities when considering whether to approve plans for a proposed building was that it would be primarily concerned merely to consider its own interests as the managing agent of the communal areas and facilities; and that it would be under no obligation to consider the particular objections of plot owners. The essence of his submission was that there was no sufficient warrant to interpret a paragraph 1 approval as impliedly eliminating a plot owner's right to complain under paragraph 2 that the proposed building would constitute an 'annoyance'.

Discussion of the reach of paragraph 2

33. We had the benefit of able arguments on both sides of this point, for which I express my gratitude. Ultimately the point is a relatively short one. Paragraph 2 contains covenants in a form whose essence has long been familiar to conveyancers and I unhesitatingly accept Mr Hutchings' submission that the ordinary and natural construction of the purchaser's covenant in it 'nor to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance' etc is sufficiently wide to be capable of extending to activities of all natures, including building an extension to an existing house which, when built, will be such an 'annoyance'. Romer J plainly assumed (although did not apparently have a contrary argument) that covenant (b) in *Wood v. Cooper* extended to restraining the erection of 'annoying' buildings and he held Mr Cooper to be in breach of it.
34. That is not the end of the point, because paragraph 2 must of course be interpreted in the context of the Third Schedule as a whole; and there remains Mr Weekes' argument that the undoubted width of the language of paragraph 2 must be regarded as implicitly cut down by paragraph 1. The point is that paragraph 1 deals expressly with the giving of approval to erect buildings, without which approval no building may lawfully be erected. It is said that the scheme of the Third Schedule is therefore that paragraph 1 deals exhaustively with whether a proposed building may or may not be built; and if a paragraph 1 approval for its erection is given, there can be no scope for a separate challenge under paragraph 2 to its erection by another plot owner.
35. The argument can be said to have its attractions; and, it seems to me, a like argument could have been advanced in *Wood v. Cooper* but was not. Quite apart, however, from the fact that Romer J did not expressly address the point, the factual differences between *Wood v. Cooper* and the present case are such that I would not regard *Wood v. Cooper* as providing conclusive assistance on the resolution of the point that has been argued before us.
36. There was a difference between counsel as to whether, on receiving plans and an application for a paragraph 1 approval, Peverel is impliedly required to have regard to the interests of the other plot owners and occupiers on the island. We were referred to no authority dealing with this; and, in the absence of any representation or arguments by Peverel, which is not a party, I would be reluctant to purport to decide the extent of its obligations under paragraph 1. I should, however, say that I found unconvincing Mr Hutchings' submission that Peverel is primarily concerned to consider only its own interests as managing agent of the communal areas and facilities, although assuming (without deciding) that it should direct its considerations more widely, I regard as uncertain precisely what the scope of those considerations might be.
37. Whatever their potential reach, I am not however persuaded that, upon the true construction of paragraphs 1 and 2, the allegedly implied obligations of Peverel in considering a paragraph 1 approval application can have the implied consequence of cutting down the apparently unambiguous scope of paragraph 2. There is, in my judgment, no doubt that the natural sense of the language of the relevant part of paragraph 2 can extend to a restraint upon the erection of potentially 'annoying' buildings; and I agree with the judge that, had it been the parties' intention to cut this down, they would have done so expressly. There is, in my judgment, no good reason

why paragraphs 1 and 2 cannot operate alongside each other, as the judge held they could and did. I can see no sound reason why the giving by Peverel of a paragraph 1 approval should be regarded as impliedly preventing a plot owner or occupier from asserting, and proving if he can, that despite such approval the proposed building will in fact constitute an actionable 'annoyance' in breach of paragraph 2.

38. If the reasonable man were to be consulted as to his view of the relationship between paragraphs 1 and 2, I consider that he would be unlikely to be impressed by the proposition that the ordinary sense of the relevant language of paragraph 2 is impliedly cut down by the existence of paragraph 1. He would recognise that paragraph 1 makes it clear that the obtaining of a Peverel approval is the pre-condition of carrying out any building work at all. But I consider that he would be unlikely to be convinced that the giving of a Peverel approval automatically forecloses the opportunity for a covenantee to object that the approved building will nevertheless constitute an 'annoyance' contrary to paragraph 2. As there is nothing in the language of paragraph 2 to support such a proposition, why, he would ask, should it be thought that it does so?
39. I would dismiss Mr Davies' appeal on the paragraph 2 ground.

Does Mr Davies have a written approval under paragraph 1?

40. In light of my decision on the paragraph 2 issue, this ground of appeal is only of subsidiary interest. That is because, whether or not Mr Davies does have such an approval, the judge's conclusion on the paragraph 2 issue trumps it. As, however, we had argument on the point, I will express my views on it.
41. The story relating to this issue is that Mr Davies submitted an application for approval to Peverel on 10 January 2007. His application form described the building as a 'three storey side extension' and included the 'plans and planning permission' and Peverel's fee. The individual at Peverel responsible for making the decision was Mr Sheehan, the estate manager. He replied in the third week of January 2007 saying that the proposal had been forwarded to the Heron Island Residents Association, which had rejected it, complaining that it would involve a departure from the island's original 'open plan' character. Mr Sheehan said he was not qualified to comment on this and that 'in normal circumstances [Peverel] would have no objections to granting consent to alterations providing the relevant local authority planning has been authorised'. He said he was referring the application to Peverel's solicitor for comment and advice.
42. Mr Davies emailed Mr Sheehan on 8 February, saying that the Residents Association had met the previous day and had told him that their only concern was whether the extension encroached on communal land and that the 'open plan' objection had not come from them. He explained that he would be engaging a surveyor to ensure that the extension did not so encroach. Mr Sheehan replied on 9 February, saying that he would not personally stand in the way of the extension 'and will be glad to grant consent if [the Residents Association] has no objection'.
43. On 20 March Mr Davies sent Mr Sheehan his surveyor's report showing the extension to be within his plot boundary. Mr Sheehan replied on 2 April saying that there was 'stiff opposition' to the proposal and that a committee meeting to discuss it was being held on 4 April. Since the residents' meeting of 7 February, a number of residents had written letters of objection to Peverel. He said he was sorry he did not have a definitive answer on Mr Davies' application at that stage. On 18 April Mr Davies told Mr Sheehan that he needed a decision by 4 May as his building work was scheduled to start on 7 May; and he also asked him to confirm he had received his surveyor's report. Mr Sheehan gave his confirmation on the same day, saying he had passed the file to Richard Sandler (Peverel's solicitor) 'to make a final decision on the consent'. On 14 May Mr Davies emailed Mr Sheehan to express his disappointment at the delay and the lack of communication from him. Mr Sheehan replied within 10 minutes to say that Mr Sandler would be advising on the application and to confirm that 'no formal decision has been taken in relation to your planning consent from Peverel'. He said he appreciated that the matter had taken some time

but 'your proposal has raised numerous complaints which we as managers have to consider. There are service charge implications/re-calculations which also need to be considered'.

44. There was a telephone conversation on the same day between Mr Davies and Mr Sheehan. On the following day, 15 May, Mr Davies emailed Mr Sheehan to remind him that he had said in that conversation that a decision 'would be made today' (ie 15 May) and asking whether that was correct. Mr Sheehan replied:

'I have now been advised by my Regional Manager and company solicitor that consent for the application can be given on provision of the following

1. Professional drawings confirming that the extension is *in line* with the existing properties. If you have addition [sic] plans in this regard, please can you forward them to me at your earliest convenience to avoid any further delays. Working drawings of the plans/elevations in colour would be helpful.

2. Confirmation by an independent RICS surveyor appointed by Peverel OM that your boundary lines are not being altered in relation to the work. I note that you have submitted a surveyor's report but they are unfortunately not RICS. (Please note that the cost of this will be rechargeable to the applicant as per the terms of your transfer – Schedule 3.1)

I will be confirming the above by way of hard copy for your records.' (Emphasis supplied)

45. This email is central to the argument under this head of the appeal: Mr Davies' case is that it is this which gave him the paragraph 1 approval. As to the phrase 'in line', Mr Weekes submitted that it meant 'in keeping', although I understand that there was no agreement on that in the court below. Despite the last line of the email, no hard copy was sent.
46. Following that email, Mr Davies wrote on 18 May to Peverel asking it to arrange for an independent surveyor to review the boundary issue. On 23 May Mr Sheehan emailed Mr Davies to say that he was still awaiting

'... the working drawings from [the] architect. We will need this to ensure the extension is in keeping with the existing properties on the island. These will also need to be inspected by the surveyor who I have now approached and he is happy to complete the survey in order for him to assess measurements etc.'

47. On the same day Mr Sheehan wrote a circular letter on Peverel notepaper to all the residents. It referred to Mr Davies' application and the fact that Peverel was still awaiting detailed working drawings and plans from him to ensure that the extension was in keeping with the estate and did 'not encroach or alter the private estate boundary lines'. The letter continued:

'I understand that there has been some opposition to this application and as a result I have sought further advice from our senior management team. They have now advised that legally, we would have no grounds to unreasonably withhold consent for this application providing that the applicant is able to satisfy certain criteria. The crucial clause which dictated the reasoning and rationale behind the decision is outlined in Schedule 3, 1 of the Freehold Transfer Document.

The planning stage of the application which is overseen by the local council should have been the main recourse for objection by those affected by the proposal.

[The letter then set out the covenant in paragraph 1 of the Third Schedule]

In effect, this clause merely states that the extension must be in keeping with the submitted plans.

We have asked Dunster & Morton Chartered Surveyors ... to carry out an inspection of the project as an independent third party to ensure that the proposed extension work does not compromise or alter any of the private estate boundaries. Please note that the cost of this is being covered by the applicant and not your service charge.

Should you wish to make any comments regarding this decision or any legal interpretations of property transfer and covenants, I kindly request that any representations are sent in writing to our Luton office for the attention of our Company Solicitor, Mr Richard Sandler.'

48. On 31 May Mr Sheehan emailed Mr Davies enquiring whether he had had 'any success in obtaining those drawings from the architect' and adding that 'our surveyor is ready to carry out what is necessary and then we can grant consent providing all is in order. Please note to date this has not been granted'. On 4 June Mr Sheehan sent a chasing email for the architect's drawings. Mr Davies provided them and on 14 June Mr Sheehan emailed him saying that he had received them and that copies were that day being sent to Mr Walker (of Haslams, Chartered Surveyors) so that he could carry out an inspection. Mr Walker sent Peverel a four-page report on 22 June which reflected that he had been asked to check the plot's boundary and whether the extension would breach any covenants with regard to service installations.
49. Mr Sheehan and Mr Davies had a telephone conversation on 26 June, following which Mr Sheehan sent Mr Davies an email repeating that Peverel had not given its approval for the extension and that he must not commence any building work. On 28 June Mr Gearon of Peverel wrote, in place of Mr Sheehan, to Mr Davies pointing out that Mr Walker's report showed that the foundation piles proposed for the extension were within 1.5 metres of a storm water sewer and that in consequence Peverel was unable to give its approval to the extension. On 3 July Mr Davies asserted that as a result of Peverel's representations to him 'it would now be both unreasonable and unconscionable for you to withhold consent to my extension'. On 30 July Mr Davies' solicitors, Pitmans, put his case higher: they asserted that Mr Sheehan's email of 15 May had given a consent subject to two conditions, both of which had been satisfied.
50. The issue for the judge under this head was whether Pitmans' contention was correct. I do not understand it to be in issue that the two conditions referred to in the email were duly satisfied. The question is whether the email (i) amounted to an irrevocable approval subject to the satisfaction of both conditions; or (ii) was no more than an indication that if the conditions were satisfied, Peverel would (without committing itself to do so) issue a formal approval. The judge favoured the latter alternative. He said the email was:

'112. ... at best a statement of intent that consent will be given in the future if the 2 conditions are satisfied. It does not, however, bind Peverel to grant consent if, on further investigation, other reasonable objections to the granting of consent arise.'
51. The point is a short one. It is of course apparent from the emails and correspondence following the email 15 May that Peverel did not consider that the email had given the required approval. Nor does it appear to have occurred to Mr Davies that it did so: that point was first taken by Pitmans. I doubt, however, if these considerations can be decisive since the answer to the point turns on the construction of the email and subsequent documents cannot ordinarily be invoked in order to assist in its interpretation: those writing them may have been wrong. The judge did not, I understand, place any reliance on the later material, but focused on the email itself.
52. I consider that he was right to do so; and that he also came to the correct conclusion. The key phrase in the email is 'consent can be given on provision of the following'. That is not the equivalent of a statement that 'consent is hereby given conditionally upon the production of the following' It is admittedly close to it, but the phrase used is rather less precise; and I consider that the judge was right to regard its language as amounting to no more than a statement as to Peverel's intentions in the future if and when the requested material was provided. Mr Sheehan was in effect saying that if Mr Davies produced that material, Peverel would be able to give him

the formal approval that he required. Only, however, when it actually did so would it be giving him that approval. I also agree with the judge that Mr Sheehan's statement did not bind Peverel to give its approval when the further material was provided. His email was, in short, no more than a non-binding statement of intent. The result is that this ground of appeal also fails.

53. I would dismiss Mr Davies' appeal.

Lord Justice Wilson :

54. I agree.

Lord Justice Ward :

55. I also agree.