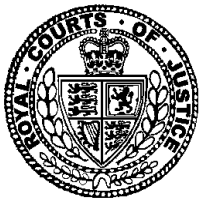

Neutral Citation Number: [2019] EWCA Civ 544

Case No: A3/2018/0626

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL (CHANCERY DIVISION)
AND FURTHER ON APPEAL FROM THE COUNTY COURT AT TORQUAY AND NEWTON ABBOT
Birss J : [2018] EWHC 347 (Ch)
HH Judge Carr : B00TQ111

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 April 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE BAKER
and
MR JUSTICE NUGEE

- -

Between :

CHURSTON GOLF CLUB LIMITED	**Appellant**
- and –	
RICHARD HADDOCK	**Respondent**

- -
- -

Ms Joanne Wicks and **Mr Malcolm Warner** (instructed by **Kitsons LLP**) for the **Appellant**
Mr Leslie Blohm QC and **Mr John Sharples** (instructed by **Stephens Scown LLP**) for the **Respondent**

Hearing dates : 13-14 February 2019

- -

Approved Judgment

Lord Justice Patten :

1. This is an appeal by Churston Golf Club Limited ("the Golf Club") against an order of Birss J dated 23 February 2018 dismissing their appeal against the earlier order of HH Judge Carr dated 8 December 2017 who held that the Golf Club is under a positive obligation to erect and maintain a substantial stock-proof fence, wall or hedge along the boundary between its property and that of the claimant, Mr Haddock. The appeal requires us to consider two issues: (1) whether the provisions of clause 2 of a conveyance of the Golf Club's land to the Mayor, Aldermen and Burgesses of the County Borough of Torbay ("the Old Council") on 20 December 1972 falls to be construed simply as a covenant to fence or rather, as Mr Haddock contends, as the creation of an easement of fencing in favour of Mr Haddock's property as the dominant tenement; and (2) if the latter whether, as the courts below have held, it is possible to create such an easement by express grant.

2. Permission was given by Asplin LJ for a second appeal in relation to issue (2) on the basis that it raises a point of law of some general importance but the Golf Club was left to apply to this Court for permission to appeal on ground (1). Although questions of construction of this kind do not ordinarily satisfy the test for a second appeal contained in CPR 52.7(2), I am satisfied in this case that the issue of construction is so obviously bound up with the ground of appeal for which permission has been granted as to create a compelling reason for granting permission to appeal on that ground also.

3. It is convenient at this stage to summarise the factual and procedural background to the appeal. The case concerns two adjacent parcels of freehold registered land at Churston in Devon. The land now occupied by the Golf Club was until December 1972 owned by The Churston Golf Club Limited ("CGC"). The other parcel of land with which we are concerned was owned at that time by the trustees of the Churston Barony Settlement ("the Trustees"). Clause 2 of the conveyance of the Golf Club land sold by CGC to the Old Council on 20 December 1972 contained a covenant between the Old Council as purchaser and the Trustees (who were also parties to the deed) in the following terms:

> "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 stockproof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto".

4. As a result of changes due to local government re-organisation, Torbay Borough Council ("the Council") has now replaced the Old Council as the owner and registered proprietor of the Golf Club land but it is common ground that nothing turns on this for the purposes of what we have to consider. There was a statutory vesting of the property in the Council under The Local Authorities (England) (Property etc.) Order 1973 (SI 1973/1861) para 16(3)(a)-(b) and Schedule 4 Part II which included the transfer to the Council of any contractual or other obligations imposed on the Old Council under the 1972 conveyance.

5. The parties to this appeal are lessees of their respective parcels of land from the Trustees and the Council. Mr Haddock has been the tenant of Churston Court Farm since 2002. The Golf Club are the tenants and registered proprietors of their land under a lease for

a term of 999 years granted by the Council on 3 April 2003. On 31 March 2015 Mr Haddock issued proceedings against both the Council and the Golf Club alleging that his farming operations had been adversely affected by their failure to maintain an effective fence or hedge along the boundary between the two parcels of land in accordance with the terms of clause 2 of the 1972 conveyance. He sought a declaration that both the Council and the Golf Club were liable to erect and maintain such a fence or hedge and damages for the loss of use of his land as pasture for cattle raising. Prior to the trial he took an express assignment of the benefit of the clause 2 covenant so as to avoid any argument as to whether the benefit of it had passed to him under s.78 of the Law of Property Act 1925 ("LPA 1925").

6. The claim against the Council was settled shortly before trial leaving the Golf Club as the only defendant. The claim for damages was originally pleaded in a sum of £150,000 to £200,000 based on a calculation of the value of the use of the farm land had a stock-proof fence been in place. But at the trial the judge awarded Mr Haddock £1,000. He held, however, that clause 2 of the 1972 conveyance created a fencing easement and not merely a covenant to fence so that its burden fell on and was enforceable against the Golf Club as the lessees of the servient tenement. But he also expressed the view that the burden of clause 2 passed, if by no other means, under s.79 LPA 1925.

7. On appeal Birss J (see [2018] EWHC 347 (Ch)) affirmed Judge Carr's decision that, on its true construction, clause 2 created a fencing easement but did not accept that, looked at simply as a covenant, the burden would have passed to the Golf Club under s.79. That part of Judge Carr's reasoning was, he said, contrary to the decision of the House of Lords in *Rhone v Stephens* [1994] 2 AC 310.

8. The decision that clause 2 created a fencing easement so-called raises the question whether such an easement can be created by express grant as opposed to custom or prescription. In *Crow v Wood* [1971] 1 QB 77 Lord Denning MR certainly expressed the view that an easement of fencing could be created by a grant under s.62 LPA 1925 and from this Birss J reasoned that such an easement lay in grant and could therefore be created by express grant between the parties to the 1972 conveyance. This is the first time that this point has been directly considered by the Court of Appeal but it only arises if the courts below were correct in their construction of clause 2 of the 1972 conveyance. I propose to deal with that question first even though it involves some consideration of the nature of the fencing easement which is said to have been created in this case.

Construction

9. An easement is a right over land in separate ownership. The right is not personal but is appurtenant to the land of the dominant owner. As such, it must accommodate the dominant tenement and be capable of forming the subject matter of a grant. These essential characteristics of an easement were set out authoritatively in the judgment of the Court of Appeal in *Re Ellenborough Park* [1956] 1 Ch 131 as recently confirmed by the decision of the Supreme Court in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2018] 1 WLR 1630. Easements may impose negative restrictions on the servient tenant such as preventing the servient owner from interfering with light, water or support derived from the servient tenement. But easements properly so-called do not ordinarily impose obligations to repair on the servient owner. Even where the easement is positive in nature, such as a right of way, the servient owner is

not required to keep the road or other land over which the right is exercisable in good repair and if he chooses to carry out repairs he will have no legal right to recover a contribution from the owner of the dominant tenement absent an agreement to that effect.

10. There are, however, instances in which an obligation to repair may arise either from custom or by statute and so-called fencing easements are no more than instances where the law will impose on the owner of land an obligation to keep his land fenced for the benefit of the owners or users of the adjoining land. Such an obligation is not an easement in the sense described above. It does not grant the owner of the dominant tenement the right to do anything on the servient tenement or the right to prevent the servient owner from interfering with rights such as light or support provided by his land. Instead it imposes an obligation on the servient owner which the owner of the dominant tenement may enforce for his benefit qua owner and which the owner of the servient tenement comes under as an incident of his ownership of that land.

11. Fencing easements (which I shall refer to in this judgment by that name simply for convenience) have a long history but an uncertain legal basis. In *Egerton v Harding* [1975] 1 QB 62 the issue was whether the owner of a cottage adjoining a common was under an obligation to fence off her garden against the common so as to prevent cattle from straying from the common. The duty to fence was found by the judge in the County Court to be based on custom and to be enforceable by those, like the defendant, who chose to exercise the right to graze cattle on the common as a defence to an action for cattle trespass.

12. The defendant had originally pleaded the existence of a fencing easement based on prescription but was allowed to amend at the trial to plead that it was based on custom. Dealing first with prescription, Scarman LJ said (at page 68):

> "We now deal with grant (and enclosure). As between neighbours, an obligation to fence, described in old editions of *Gale on Easements* (we refer particularly to the 4th ed. (1868), p. 460, quoted in *Lawrence v. Jenkins* (1873) L.R. 8 Q.B. 274, 279) as a spurious easement, can arise by prescription or lost modern grant: "in theory, it is capable of being created by covenant or grant": *Jones v. Price* [1965] 2 Q.B. 618, 639, *per* Diplock L.J. True, its positive character (hence Gale's epithet "spurious") creates difficulties (see *Austerberry v. Oldham Corporation* (1885) 29 Ch.D. 750): but it is a private right and obligation between neighbouring landowners. Until the passing of section 36 of the Real Property Limitation Act 1833, it was a right enforceable as between freeholders by the writ de curia claudenda: *Jones v. Price and Fitzherbert's Natura Brevium* (1794), vol. 1, p. 127. In the present case it is sufficient merely to emphasise that the easement - be it "spurious" or genuine - owes nothing to custom, from which it is totally distinct. Custom, being local law, displaces within its locality the common law; an easement is a matter of private right and obligation recognised and enforceable by the general law. The defendants are faced with great difficulties when they seek to establish a right in the nature of an easement. There is no

> evidence of any enclosure of Sprat's Cottage, and no evidence directly implicating its occupiers of prescriptive right or of lost modern grant. There is evidence that for a number of years the occupiers of Sprat's Cottage maintained the blackthorn hedge in cattle-proof condition: but there is no indication as to whether this was done voluntarily or as a matter of obligation towards the common. Such evidence does not go far enough: it has to be shown that the fence was maintained "as a matter of obligation towards the adjoining owner": *Jones v. Price* [1965] 2 Q.B. 618, 635 *per* Willmer L.J., citing *Hilton v. Ankesson* (1872) 27 L.T. 519."

13. The Court of Appeal therefore on the evidence rejected prescription based on immemorial user (and therefore a presumed grant) as the legal basis of the fencing obligation. But it accepted (at page 71E) that there could by custom be an obligation on adjoining landowners to fence against the common and that based on immemorial usage the court would presume a lawful origin of the duty:

> "The old law, as recognised by the authorities to which we have referred, appears to us to have been as follows. A duty to fence against another's land could arise by grant or custom. As between freeholders it was a duty enforceable by the writ de curia claudenda: if it was a duty for the benefit of a manorial waste in which copyholders had an interest recognised by their lord, it arose by custom upon which copyholders could rely because, by reason of the "imbecility" of their estate, they could not prescribe. In short, the duty was recognised as one that could arise; whether its juridical basis was grant or custom depended upon the character of the landholding and the circumstances prevailing in the vill or manor.
>
> Custom is, therefore, a possible source of the duty to fence against Binswood Common, a duty which the judge found recognised by immemorial usage. If the judge was entitled to find proved the immemorial usage, as we think he was, it is not possible to fault him, as a matter of history, for treating its origin as in custom in the absence of evidence to the contrary: in all probability he was right.
>
> But, in our judgment, there is a way of deciding this case which does not require a judge to be a legal historian. In our opinion, once there be established an immemorial usage of fencing against the common as a matter of obligation, the duty to fence is proved, provided always it can be shown that such a duty could have arisen from a lawful origin. In the present case we are prepared to assume that the mists of the past obscure the historical origin of the usage. Yet it is plain that the duty could have arisen from one of several lawful origins: as between neighbouring owners it could have derived from grant or prescription: within a manor, it could derive from custom by which the lord protected the interests of his copyholders, or from

> enclosure. We may never know the history of Binswood Common or the origin of the usage under which the owners of land adjoining the common regard themselves as obliged to fence the common: but we know that the usage could have derived from one of several lawful origins."

14. The same issue about the legal basis of an alleged duty to fence arose in the earlier case of *Jones v Price* [1965] 2 QB 618 which is referred to by Scarman LJ in *Egerton v Harding*. In that case the boundary in question was between two adjoining farms rather than between a property and common land. The plaintiff farmer sued for cattle trespass and was met with a defence alleging a duty to fence. The Court of Appeal held that there was no evidence to establish a prescriptive obligation to repair based on either immemorial user or the doctrine of lost modern grant. But the members of the court accepted that as between adjoining owners a duty to fence could be established by prescription: something which had been conceded by the successful appellant.

15. In his judgment Willmer LJ said (at page 633E):

> "It is clear that a right to require the owner of adjoining land to keep the boundary fence in repair is a right which the law will recognise as a quasi-easement. There is nothing, for instance, to prevent adjoining occupiers from making an agreement between themselves that one or other shall keep the boundary fence in repair. Such an agreement, however, binds only the parties to it, for a covenant to perform positive acts, such as would be involved in the maintenance of a fence, is not one the burden of which runs with the land so as to bind the successors in title of the covenantor: see *Austerberry v. Oldham Corporation*. The evidence in the present case certainly does not prove that there was ever any agreement between the plaintiff and the defendant, and, for the reason already given, it is not sufficient for the defendant to prove that there was at some time in the past an agreement between the respective parties' predecessors in title. The defendant can, therefore, only succeed if he establishes that the right which he claims has been acquired by prescription. This is the way in which his case was pleaded in the amended defence and counter-claim. That such a right can arise by prescription is well recognised in a number of cases to which we were referred. In the report of *Pomfret v. Ricroft* there is a useful note setting out the ancient practice for the enforcement of such a right as follows:
>
> > "The ancient remedy was by the writ de curia claudenda, which lay for the tenant of the freehold against another tenant of land adjoining to compel him to make a fence or wall, which he ought, by prescription, to make between his land and the plaintiff's."
>
> Such a prescriptive right was commonly established by proof of immemorial usage. This is shown by *Star v. Rookesby*, a case of

> error brought before the Court of Exchequer Chamber on a judgment by default. The plaintiff declared that the tenants and occupiers of the defendant's close had, time out of mind, made and repaired the fence between the plaintiff's and the defendant's close, and that, for want of repair, the defendant's cattle came into the plaintiff's close. It was held:
>
> > "The plaintiff has made himself a sufficient title in this declaration, by showing the defendant bound to this charge by prescription; which prescription is sufficiently alleged."'"

16. Diplock LJ (at page 639) agreed that an obligation to fence could be established by prescription:

> "Such an obligation, described by Gale as a "spurious easement," is anomalous. It is of very ancient origin, and was originally enforceable by the writ de curia claudenda. It is by no means clear whether such an obligation can today be newly created so as to run with the land, except by Act of Parliament. It can undoubtedly exist by immemorial usage. It is tempting to think that its real origin lies in local custom, but this explanation was rejected in 1670 in *Polus v. Henstock*. The rationalisation which has been current since then is that it can arise by prescription at common law, from which it must follow that, in theory, it is capable of being created by covenant or grant. In 1827, the Court of King's Bench was prepared to assume that it could be created by covenant (see *Boyle v. Tamlin*) but, since it is a positive obligation, this assumption cannot survive the decision of the Court of Appeal in *Austerberry v. Oldham Corporation*. It was not, in any event, easy to reconcile with *Spencer's case*. In theory, therefore, it can lie only in grant. There is no precedent in the books for such a grant. I find it difficult to envisage its form. It would be interesting to consider whether the doctrine of lost modern grant is applicable to such an obligation, as well as common law prescription. Most enclosures and their boundary hedges can be proved to have been created after 1183, so that, if the obligation exists at all, it must be by virtue of a lost modern grant. Much as I have enjoyed the erudite argument of counsel, however, I see no need to decide this question on the present appeal. There was, in my view, no evidence before the county court judge from which either a prescriptive obligation or a lost modern grant could be inferred."

17. It is common ground that Diplock LJ's rejection of custom as a legal basis for the obligation to fence was the result of a mis-reading of what had been decided in *Polus v Henstock*: see *Egerton v Harding* (supra) at page 70. But his acceptance that a positive obligation to fence binding on successors in title cannot be created by covenant is an important part of the background to the issue of construction which arises in this case.

18. Finally, I need to mention *Crow v Wood*, another decision of this Court, which was relied on by Birss J for his view that a fencing easement lies in grant and can therefore be created by express grant. The case, like *Egerton v Harding*, concerned an action for cattle trespass brought by the owner of a property adjoining a moor in Yorkshire where the defendant, along with other farmers, had the right to graze sheep. Both the moor and the adjoining farms had originally been in common ownership but one of the farms had been sold off together with the right to graze or stray sheep on the moor and this right was subsequently let to and exercised by the defendant farmer. The plaintiff later acquired one of the other farms adjoining the moor but failed to keep the walls and fences along the boundary with the moor in repair. As a result, sheep belonging to the defendant strayed on to the plaintiff's land. She sued the defendant for cattle trespass and he claimed the benefit of a fencing easement created either by implied grant or under s.62 LPA 1925 on the sale of the first farm.

19. There was a considerable amount of evidence to indicate that it was customary for the owners of farms adjoining the moor to fence against the moor but the defence was pleaded, as I have said, on the basis of implied grant or under s.62. Lord Denning MR said (at page 83):

> "The judge held that the custom was established. But this is not sufficient by itself to put an obligation on Mrs. Crow to fence her land. It appears from the old books that a right to have fences kept up does not arise by custom: see *Bolus v. Hinstorke* (1670) 2 Keb. 686. It can arise by prescription at common law: see *Lawrence v. Jenkins* (1873) L.R. 8 Q.B. 274; but this is only of avail as between adjoining owners. It does not avail when the lands have been in common ownership, as here, until recent years: see *Kilgour v. Gaddes* [1904] 1 K.B. 457.
>
> The custom is, however, of importance because of section 62 of the Law of Property Act, 1925, to which I now turn. It follows section 6 of the Conveyancing Act, 1881, in the selfsame words:
>
> > "(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, *easements, rights, and advantages* whatsoever, appertaining or *reputed* to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, *or enjoyed with*, or *reputed* or *known* as part or parcel of or appurtenant to the land or any part thereof."
>
> Mr. Mills, who appears for Mr. Wood, says that that section is to be applied to the conveyance of July 11, 1951, when the common owner sold Stable Holme Farm to the Featherstones. He says that at that time the right to stray 40 sheep on the moor, and the right to have the other farmers maintain their fences and walls, was an *easement, right* or *advantage* which was enjoyed with Stable

> Holme Farm and passed under the conveyance, although it was not expressly mentioned."

20. Having ruled out both custom and prescription as a possible basis for the obligation, Lord Denning (at page 84) turned to consider s.62:

> "Section 62 has already been considered in this court, notably in *Wright v. Macadam* [1949] 2 K.B. 744 and *Phipps v. Pears* [1965] 1 Q.B. 76. It is clear from those cases that when land in common ownership is severed and one piece of it sold off (as in the present case) then by virtue of this section all rights and advantages enjoyed with that piece of land will pass to the purchaser provided that they are *rights or advantages which are capable of being granted by law so as to run with the land and to be binding on successors*. Thus a right to use a coal-shed is such a right. It is in the nature of an easement and passes under section 62. But a right, given by contract to have a road kept in repair, is not such a right. It is a positive covenant which does not run with the land and is not binding on successors: see *Austerberry v. Oldham Corporation* (1885) 29 Ch.D. 750.
>
> The question is, therefore, whether a right to have a fence or wall kept in repair is a right which is capable of being granted by law. I think it is because it is in the nature of an easement. It is not an easement strictly so called because it involves the servient owner in the expenditure of money. It was described by Gale [*Easements*, 11th ed. (1932), p. 432] as a "spurious kind of easement." But it has been treated in practice by the courts as being an easement. Professor Glanville Williams on *Liability for Animals* (1939), says, at p. 209: "If we put aside these questions of theory and turn to the practice of the courts, there seems to be little doubt that fencing is an easement." In *Jones v. Price* [1965] 2 Q.B. 618, 633, Willmer L.J. said: "It is clear that a right to require the owner of adjoining land to keep the boundary fence in repair is a right which the law will recognise as a quasi-easement." Diplock L.J., at p. 639, points out that it is a right of such a nature that it can be acquired by prescription which imports that it lies in grant, for prescription rests on a presumed grant.
>
> It seems to me that it is now sufficiently established - or at any rate, if not established hitherto, we should now declare - that a right to have our neighbour keep up the fences is a right in the nature of an easement which is capable of being granted by law so as to run with the land and to be binding on successors. It is a right which lies in grant and is of such a nature that it can pass under section 62 of the Law of Property Act, 1925."

21. Lord Denning (like Diplock LJ) was, I think, wrong to exclude custom as a possible basis for the fencing obligation as the decision in *Egerton v Harding* demonstrates and there was, as I have said, much evidence to the effect that an obligation based on custom

was both factually and legally a more obvious explanation for the origin of the duty. But it is part of the ratio of Lord Denning's judgment that a fencing easement can be created by a grant under s.62 LPA 1925 and both other members of the Court agreed with this analysis. Leave to appeal was refused by the House of Lords and it has not been contended that we can treat the decision as having been made *per incuriam*.

22. The argument about the effect of the 1972 conveyance is therefore confined to a dispute as to whether Birss J was right to conclude that a fencing easement can be created by express grant. The Golf Club had contended (relying to some extent on what Diplock LJ had said in *Jones v Price*) that although a fencing easement could in theory be granted expressly, it would be practically impossible to do so without falling foul of the rule in *Austerberry v Oldham Corporation* that the burden of a covenant is not binding on successors in title who were not privy to the deed or contract. The reality therefore is that the fencing obligation can only be established by prescription or on the basis of custom.

23. Birss J did not accept this. He said:

> "24. In my judgment that is wrong. The trio of Court of Appeal decisions makes it clear that the origin of the fencing easement lies in grant (or at least that is one origin). That is a necessary part of the reasoning which leads to the courts accepting that these obligations exist at all. Given that, then it seems to me that it must be possible for two parties to actually create such a right by grant in a conveyance, in other words in a clause in a conveyance of the relevant land. That does not mean such an easement has in fact been created in any given case but if, on its true construction, a clause purports to create an easement of fencing, in other words the objective view of the intention of the parties is that that is what they intended to achieve, I cannot see any good reason in law or principle why that should be declared legally impossible. Since clauses in conveyances can grant other sorts of easement, there is no reason why they cannot create this sort of easement. To hold that this is the law does not mean any attempt to create an easement which imposes any other sort of positive obligation is now possible. Far from it. That wider sort of positive obligation easement has not been recognised by the courts. But since a fencing easement is a thing which can exist, can run with the land and whose origin can lie in grant, I cannot imagine why two parties who wish one to be granted cannot do so.
>
> 25. This is not the same as the situation in *Rhone v Stephens* [1994] 2 AC 310 . In that case the House of Lords held that section 79 of the Law of Property Act 1925 , which is essentially a word saving provision making it unnecessary to refer to successors in title, had not reversed *Austerberry* and did not convert a positive covenant to maintain a roof into an easement which ran with the land. However crucially in my judgment, the House of Lords were not concerned in that case with a fencing easement—that is to say with a positive obligation which the law

> had by then already recognised could run with the land. The issue in *Rhone v Stephens* was whether section 79 could in effect turn any positive covenant into a new kind of positive easement. The answer was no. *Jones v Price* is referred to and so their Lordships will have been well aware that that the case stood for the proposition that a fencing obligation could run with land. They did not contradict it. The reference picks up part of the judgment of Willmer LJ in which he noted that *Austerberry* prevents a positive covenant running with land.
>
> 26. It is clear law (and counsel for the appellant did not dispute) that clauses in a deed which conveys property can be construed as a grant of an easement even though they are framed expressly in terms as a covenant and even though the word "covenant" is used (see eg *Rowbotham v Wilson* [1843–1860] All ER Rep 601, 603, and *Russell v Watts* (1885) 10 App Cas 590). Therefore the fact that a clause uses the word "covenant" does not mean it only takes effect as a covenant and cannot do so as a grant. Moreover, as explained by Diplock LJ in *Jones v Price* , the decision in *Austerberry* is concerned with the inability of provisions which are covenants as distinct from grants, to run with the land. Diplock LJ specifically drew the distinction between a grant and a covenant when he distinguished *Austerberry* . His judgment was that something which is a grant does not fall foul of *Austerberry* . It seems to me therefore that it follows that in a case in which the provision is construed as a grant, *Austerberry* is irrelevant."

24. The 1972 conveyance which contains the "covenant" to fence effected a sale of the Golf Club land to the Old Council for the sum of £125,000 and reserved to the vendor (CGC) a right of drainage (coupled with a right of entry) over the land conveyed in favour of adjoining land retained by the vendor. The Trustees were made parties to the deed for the purpose of the purchaser's covenant under clause 2 which I quoted earlier and also for the purpose of giving a covenant (jointly with CGC) to erect and maintain a stock-proof fence to divide a field owned by the vendor part of which was to be retained on the conveyance. This is contained in clause 3.

25. I should also mention clause 4 of the conveyance which contains a restrictive covenant by the Old Council "and all those deriving title under it" in favour of the Trustees to maintain the use of the land conveyed as a golf course. There are provisions dealing with a possible cesser of this user and the redevelopment of part of the land but they do not affect the question of construction which we have to decide.

26. The 1972 conveyance was obviously drafted professionally and both in its form and the terminology it employs indicates that the draftsman understood the basic rules governing the creation of easements and the imposition of covenants. The drainage easement in favour of CGC's retained land was expressly reserved and the covenants (both positive and negative) were expressed to enure for the benefit of the covenantee's land and not for the covenantee personally. The language of clause 4 was therefore effective (regardless of s.78 LPA 1925) to annex the benefit of the restrictive covenant

to each and every part of the Trustees' land and to impose the burden on the land conveyed and each of its successive owners.

27. The judge placed some weight on the reference in clause 2 to the fencing covenant being one "that the Purchaser and all those deriving title under it will maintain and forever hereafter" keep the fence or hedge in good repair. But it would be normal in the case of a fencing covenant for the original covenantor to frame his own obligation as a promise that not only he but also his successors in title would maintain the fence thereby making clear that his own liability would not terminate on a subsequent sale of the land. The existence of such an enduring liability is the reason why the purchaser will (if properly advised) take a covenant in similar terms from a subsequent purchaser of the land. But I am not persuaded that the terms of the covenant in this case were unusual or were sufficient in themselves to convert what was expressed to be a covenant into some form of easement. Had that been the draftsman's intention one would have expected in a carefully drafted conveyance of this kind to see the easement included in terms as an express grant of such a right by way of exception to the land conveyed to the Council. As it is clause 2 is framed (like clause 3) in the language of a covenant and in my view should be treated as one.

28. In *Austerberry v Oldham Corporation* the Court of Appeal held that the burden of a positive covenant did not run with the land except to the limited extent permitted by the doctrine of privity of estate in the case of a lease. The purchasers of land had covenanted that they and their heirs and assigns would make up a road adjacent to the vendor's retained land and keep it in repair. The covenant was held to be unenforceable against the Corporation who were the purchasers' successors in title. In discussing the earlier authorities, the Court recognised that the burden of an obligation to repair could be passed to successors in title as an incident of a property right such as an easement or rent-charge. At page 781 Lindley LJ said:

> "We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it."

29. But in that case the conveyance did not in terms grant any such right to the vendor and the members of the Court were not prepared to construe the clause as anything more than a "mere covenant to repair" notwithstanding its reference to the covenantor's heirs and assigns. The point is picked up by Lindley LJ at page 783 where he says:

> "I am not aware of any other case which either shews, or appears to shew, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all it is a mere personal covenant. If the parties had

> intended to charge this land for ever, into whosesoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative case; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and, therefore, it seems to me to shew that they did not intend to have a covenant which should run with the land."

30. In his judgment Birss J referred to two cases in which the Court found that a right in the nature of an easement had been granted even though the word "covenant" was used. The first in time is *Rowbotham v Wilson* (1860) 8 HL Cas 348 which concerned an action for damage caused by subsidence due to mine-workings beneath the surface of the plaintiff's land. The land in question had been allotted under a private Act of Parliament at a time when the mines already existed and the award included a clause declaring that it had been agreed that the lands allotted should be enjoyed by the allottees without the mine owners being liable for damages on account of working the mines. The clause was held to operate as the grant of a right to the mine owners to disturb the surface of the land which enured for the benefit of successive owners of the mine.

31. Lord Wensleydale (at page 362) said:

> "I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable, are sufficient to effect that purpose.
>
> If the words could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the land in the hands of the assignee of the covenantor; but if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface. Therefore, if the award be valid, the Plaintiff, as assignee of the surface, would be bound either by the order of the Commissioners, or by the grant."

32. The case was, however, concerned with the terms of the award and is of little real assistance in construing the 1972 conveyance. Somewhat closer to the present case is *Russell v Watts* (1885) 10 App.Cas. 590 where various building leases were granted as part of a scheme and the issue was whether there had been a reservation of a right to light. The House of Lords held that although there had been no express reservation of such a right in the leases, one could be implied from the covenants in the leases and other material such as the plans. Lord Fitzgerald said (at page 614) that the decision "ought to rest on the fair interpretation of the leases and mortgage, guided by the light of the surrounding circumstances" which, as a statement of general principle, is impeccable. But again the case on its facts concerns very different documentation from

the conveyance in the present case and does not really assist in relation to what, in my view, is a relatively straightforward issue of construction.

33. Although the interpretation of the language of any agreement is highly contextual, the recent decisions of the Supreme Court confirm that in a professionally drawn document the words used will normally be given their conventional meaning: see *Arnold v Britton* [2015] AC 1619 at [18]. This is not a case where it can be suggested that the draftsman made a mistake or where, from the context in which the agreement came to be made, one can derive a different or particular meaning for the words used. Still less does the case require some resort to the concept of commercial common sense in order to displace the ordinary meaning of clause 2.

34. The parties to the 1972 conveyance entered into a conveyance of the Golf Club land which included covenants to fence. They did so against a background of settled law that only negative covenants (such as the one contained in clause 4) could bind successors in title and that fencing covenants were therefore enforceable only as against the original contracting parties. But any conveyancing solicitor would also have known that this problem could be, and usually was, overcome by a chain of indemnity covenants so that there is no obvious reason to suppose that the parties in the instant case would not have seen that as the solution to any problems of enforcement which would arise on a subsequent disposal of the Golf Club land. In these circumstances, there is no justification in my view for construing clause 2 as anything else but a covenant and to do otherwise would, I think, be at odds with both the language and the composition of the conveyance. Mr Blohm QC for Mr Haddock suggested that although s.79 LPA 1925 operates as a word saving provision and does not alter the substance of the law as to the burden of what types of covenant may run with the land, its effect does nonetheless re-inforce the construction of clause 2 as an easement by emphasising the intention of the parties that its effect should endure beyond the original parties to the deed. But even with the benefit of the section, clause 2 is not in my view able to overcome the obvious objections to it being construed otherwise than in accordance with the language which the parties used. I do not accept that s.79 (which is a general word saving provision) should be treated as converting a positive covenant to fence into an easement in order to give some effect to the incorporation of a reference to the covenantor's successors in title. That would give far too much weight to particular words in the clause. But, if and so far as necessary, I would also regard the other features of clause 2 as amounting to the expression of a contrary intention which would exclude the addition of the s.79 formula.

35. For these reasons, I would allow the appeal. I should also say that the judge was plainly right in [41] of his judgment to say that the burden of clause 2 (as a covenant) did not run under s.79 LPA 1925. The contrary view expressed by Judge Carr is inconsistent with the decision of this Court in *Austerberry v Oldham Corporation* and that of the House of Lords in *Rhone v Stephens* (supra).

36. In these circumstances, it is not necessary and I do not propose to deal further with the question whether it is possible to create a fencing easement by express grant. Both sides have provided some interesting, indeed illuminating, submissions about the historical and legal origins of the obligation to fence but we are, I think, bound by the decision in *Crow v Wood* and any further consideration of this issue is best reserved to a case in which the point is essential to the outcome of the appeal.

Lord Justice Baker :

37. I agree.

Mr Justice Nugee :

38. I also agree.