proceedings, other than for the enforcement of the security, to recover any amount payable u the contract or payable pursuant to any guarantee for the payment o .e loan or any interest thereon.

(2) In this section 'security' includes bill of sale, mortgage, lien, and charge of any real or personal property, and any assignment, conveyance, transfer or dealing with any real or personal property to secure the repayment of any loan.

(3) The provisions of this section shall have effect notwithstanding the provisions of the Real Property Act, 1900, and the Bills of Sale Act, 1898, or any other Act or law to the contrary."

Mr. Flannery for the defendants argues that this action is an action to recover money payable under the contract. Mr. Beaumont argues that this is not such an action, but is one quite outside the contract, and that s. 24 only precludes proceedings to recover the amount of the loan and interest.

There is no reported decision directly in point, but reference has been made to the following authorities: *Stock Motor Ploughs Ltd.* v. *Forsyth* (1); *Batchelor & Co. Pty. Ltd.* v. *Websdale* (2); *Cummings* v. *Y. Z. Finance Co. Pty. Ltd.* (3); *Y. Z. Finance Co. Pty. Ltd.* v. *Cummings* (4); *Gange* v. *Hatzidoulis* (5); *Barwick* v. *Latec Investments Ltd.* (6).

There are passages in each of these cases which tend to support the defendants' contention, although it is true to say that in no case was the point raised in this case directly in issue.

In *Batchelor's* case (7) Sugerman J. said: "The section might, perhaps, have been more happily worded, but even as it stands the object which I gather from a consideration of its terms is to confine the money-lender who has taken a security for his loan to the enforcement of his security in the sense of his rights against the specific property to which it applies, and to disentitle him from recovering against the general assets of the borrower, or of a guarantor, by action against him personally."

Herron C.J. said in *Cummings'* case (8): "The section in question is designed to relegate a money-lender to its security if any is taken to secure the payment of the money lent, and there is in the section a clear restriction of the right of the money-lender to recover any amount payable under the contract except by way of enforcement of the security. In my opinion this was an action to recover the amount payable under the contract."

In *Gange's* case (9) Sugerman J. said that he had come to the conclusion that the section should be construed as contended for by the plaintiffs in that case, and continued: "The plaintiffs' construction rests on the intelligible principle, referred to in the cases cited, although stated more widely than the occasion demanded in *Batchelor & Co. Pty. Ltd.* v. *Websdale*, that where security over specific assets is given for an advance the giver of a security should not also be under a personal liability enforceable against his estate generally".

(1) 1932) 48 C.L.R. 128.
(2) [1963] S.R. (N.S.W.) 49; 79 W.N. 494.
(3) [1963] S.R. (N.S.W.) 419; 80 W.N. 741.
(4) (1964) 109 C.L.R. 395.
(5) (1964) 64 S.R. (N.S.W.) 138; 81 W.N. (Pt. 2) 286.
(6) (1966) 40 A.L.J.R. 215.
(7) [1963] S.R. (N.S.W.), at p. 54; 79 W.N., at p. 497.
(8) [1963] S.R. (N.S.W.), at p. 420; 80 W.N., at p. 742.
(9) (1964) 64 S.R. (N.S.W.), at p. 141; 81 W.N. (Pt. 2), at p. 288.

In *Barwick's* case (10) Windeyer J. said: "The enactment is obviously not for the benefit of money-lenders but for the protection of persons having dealings with them. A borrower who gives security may repay the loan in full and redeem his security. If he does not, the money-lender has no other remedy than to realize the security, and he cannot get more from the borrower than doing that produces."

The passages quoted indicate the approach made to the construction of this section by the courts, and I think that I should follow this line of construction, which is the one which commends itself to me. I appreciate the arguments advanced by Mr. Beaumont on behalf of the plaintiff, but I think s. 24 was intended by the legislature to relieve a borrower from any action in respect of a transaction when security had been taken by a money-lender. If the money-lender leaves the security in the hands of the borrower he does so at his peril.

I therefore hold that s. 24 of the *Money-lenders and Infants Loans Act*, 1941, as amended, is fatal to the plaintiff's argument. There will be judgment for the defendants.

Judgment for defendants.

Solicitors for the plaintiff: *McGuren & Co.*

Solicitors for the defendants: *G. D. Campbell & Co.*

O.M.L.D.

(10) (1966) 40 A.L.J.R., at p. 217.

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*ELLISON AND ANOTHER v. O'NEILL AND OTHERS

Court of Appeal: Wallace P., Walsh and Jacobs JJ.A.

March 7, 8; May 24, 1968.

Restrictive Covenant—Dominant tenement and servient tenement both subsequently subdivided—Application for order declaring covenants unenforceable—Whether covenants intended to benefit lots into which dominant tenement subdivided—Whether covenants void for uncertainty.

B. was the owner of a large block of land under the *Real Property Act* on which his home was erected. In 1957 B. sold part of this land to his nephew, E., and the latter's wife, and Mr. and Mrs. E. built their home thereon. In 1962 B. granted to Mr. and Mrs. E. a right of way to the street in consideration of which, in the same instrument, the latter covenanted with B., inter alia, that any building thereafter erected by them or their successors in title adjacent to the common boundary should in relation to the mean lateral level of the common boundary line be of a single storey construction, and that the floor of any such building should be constructed at a height not greater than three feet above the mean lateral level of the common boundary. There was another covenant relating to the construction of a path or driveway for pedestrian and vehicular traffic. The land entitled to the benefit of the covenant was stated in the memorandum of transfer of the right of way to be the whole of B.'s land above-mentioned,

and the land s ct to the burden of the covenant was stated to be the adjoining land r. and Mrs. E. above-mentioned.

The common boundary took the form of two adjacent sides of a rectangle, the point of the right angle being to the north. The western portion of this line was some ninety-five feet long and its south-western end was some fifty-three feet lower than its north-eastern end. The eastern portion of this line was some seventy-five feet long and its south-eastern end was some eighteen inches lower than its north-western end. Thus there was a steep slope down directly from the eastern end to the western end of the boundary.

B. died in January 1963. In 1964 his niece, Miss B., who was his executrix and successor in title, subdivided the dominant tenement into three lots. She transferred Lot 3, which was not large enough for a building allotment, to Mr. and Mrs. E., pursuant to a promise made by B. before his death; Lot 1 to Mrs. S. and Lot 2 to Mr. and Mrs. O. Mr. and Mrs. E. having consolidated Lot 3 with their other land, subdivided the whole into two blocks and wished to sell one of them free of the covenants. Accordingly they made application for a declaration that the covenants were unenforceable, as to both on the ground that the benefit of the covenants appertained only to the whole of the dominant tenement, and not to any one or more of any number of lots into which it might be subdivided; and as to the first that it was void for uncertainty. This application was dismissed: see *Re Ellison and the Conveyancing Act* (1967), 87 W.N. (Pt. 1) (N.S.W.) 1. On appeal,

Held: (1) (By Wallace P. and Walsh J.A., Jacobs J.A. dissenting) That on their true construction both covenants were intended to be, and were, for the benefit of the land which B. retained, as a whole, and not to any one or more of any number of lots into which it might be subdivided.

Re Arcade Hotel Pty. Ltd., [1962] V.R. 274, referred to.

(2) (By Wallace P. and Jacobs J.A., Walsh J.A. not deciding) That the first covenant was void for uncertainty.

(3) (By Wallace P. and Walsh J.A., Jacobs J.A. dissenting) That the appeal would be allowed with respect to both covenants.

Decision of Hardie J., *Re Ellison and the Conveyancing Act* (1967), 87 W.N. (Pt. 1) (N.S.W.) 1, reversed.

APPEAL.

This was an appeal, by applicants for an order under s. 89 of the *Conveyancing Act*, 1919, as amended, against the dismissal of the application. The facts are set out in the judgment of Wallace P.

G. D. Needham Q.C. and *B. A. Malpass*, for the appellants (applicants).

J. M. N. Rolfe, for the respondents (respondents).

Cur. adv. vult.

WALLACE P. This is an appeal from an order made by Hardie J. on 24th August, 1967, whereby he dismissed with costs a summons which had been brought by the appellants under sub-s. (3) of s. 89 of the *Conveyancing Act*—see *Re Ellison and the Conveyancing Act*(1). By that summons the appellants had sought an order that the two clauses of a restrictive covenant which had been entered into by the appellants with the predecessor in title of the respondents were not enforceable on two grounds. As to the whole covenant the appellant claimed that it was intended as shown by its wording to be annexed to the land benefited by the covenant as a whole, and not to each and

(1) (1967) 87 W.N. (Pt. 1) (N.S.W.) 1.

every part thereof following its subdivision into a number of lots, and as to the first clause of the covenant it was claimed that it was void for uncertainty.

The grounds of appeal read as follows:

"1. That his Honour was in error in holding that the owners for the time being of Lot 1, and of Lot 2 Deposited Plan 511176 are each entitled to the benefit of the covenant contained in Transfer No. J451275.

2. That his Honour was in error in holding that the covenant contained in Transfer No. J451275 was one entered into for the benefit of the land on which the home of the original covenantee was erected and the curtilage of that home.

3. That his Honour was in error in holding that the covenant was not so uncertain as to be unenforceable."

Prior to 1957 one Edward Lionel Benjamin owned an area of land having an outlet to the western end of Gore Street, Lane Cove, being the whole of the land comprised within Certificate of Title Volume 7521 Folio 55. In 1957 the appellants (the male appellant being a nephew of the said Edward Lionel Benjamin) purchased a portion of this land and this portion became the land comprised in Certificate of Title Volume 7366 Folio 111. By memorandum of transfer and grant dated 19th December, 1962, the said Edward Lionel Benjamin granted to the appellants a right of way appurtenant to the land comprised in Certificate of Title Volume 7366 Folio 111, such right of way being triangular in form and giving access to Gore Street. This memorandum of transfer and grant was registered dealing No. J451275 and it was by this dealing that the appellants entered into the covenant which has given rise to this litigation. The covenant (which really consists of two covenants) reads as follows—

"1. That any building hereafter erected by the transferees adjacent to the common boundary of the parcels of the land contained in the said certificates of title shall in relation to the mean lateral level of the said common boundary line be of a single storey construction and the floor of any such building shall be constructed at a height not greater than three feet above the mean lateral level of the common boundary line as aforesaid.

2. That if the transferees shall construct on their said parcel of land a path or driveway for pedestrian and vehicular traffic passing to and from the said land to and from the portion of land subject of the above easement then no part of such pathway shall be wider than thirteen feet six inches at the said common boundary line.

"The benefit of the foregoing covenants shall be appurtenant to the land in Certificate of Title Volume 7521 Folio 55.

"The burden of the foregoing covenants is upon the land in Certificate of Title Volume 7366 Folio 111. The said covenants may be released varied or modified by the transferor or his executors administrators or assigns."

In these covenants the phrase "the said certificates of title" refers to Certificates of Title Volume 7366 Folio 111 and Volume 7521 Folio 55.

The said Edward Lionel Benjamin died in January 1963 and his executrix and successor in title was his niece, Miss Barbara Olga Benjamin.

In September 1963 Miss Benjamin applied for approval to subdivide the land and approval was given and the subdivision registered in the month of April 1964. This subdivision was said to have been "initiated" by the said

Edward Lionel [illegible]amin in his lifetime. It had the effect of subdividing the area which had [illegible]ained with Edward Lionel Benjamin after the transfer in 1957 of part of his land to the appellants and to which the benefit of the said covenants had been annexed into three lots, being Lots 1, 2 and 3 of DP511176. Of these, Lot 3 was transferred to the appellants by Miss Benjamin on 27th July, 1964, pursuant to a promise which had been made by Mr. Benjamin. This Lot 3 was thereafter consolidated by the appellants with the land purchased by them in 1957 (that is to say the land in Certificate of Title Volume 7366 Folio 111) and when so consolidated the certificate of title for the consolidated area was Volume 9960 Folio 143. Later the appellants subdivided this consolidated area into Lots 1 and 2 DP230777. The appellants wish to sell Lot 1 of DP230777 and hence this litigation. Part of such Lot 1 (being the part which was formerly Lot 3 referred to above) is not subject to the covenants because it is part of the land which had the benefit of the covenants. The balance of such Lot 1 is part of the land burdened.

Returning to Lots 1 and 2 of DP511176, these are now in the ownership of the respondent, Mrs. R. I. Stabback as to Lot 1, and of Mr. and Mrs. O'Neill as to Lot 2. The latter disappeared from the picture as active respondents at an early stage and in fact withdrew at the commencement of the proceedings before Hardie J., presumably for the reason that owing to the topographical features of the subject lands they have no practical interest in the covenants. In other words the covenants did not "touch and concern" their Lot 2, because much of it is comparatively low-lying and the covenants were obviously aimed at protecting and maintaining harbour views obtainable from the late Mr. Benjamin's cottage and the elevated area which is now Lot 1 (that is to say the lot now owned by Mrs. Stabback).

It will thus be seen that the land which had the benefit of the covenants has been subdivided into three lots of which Lot 3 became as a matter of title part of the land burdened by the covenant, and furthermore the land burdened by the covenant plus this Lot 3 has been subdivided into two lots. I should perhaps add that the right of way to which reference has been earlier made was released after the subdivision as aforesaid of the land benefited by the covenants and a new right of way giving access to Gore Street for Lots 1 and 2 of DP511176 and also to the appellants' Lots 1 and 2 of DP230777 was created.

The first ground of appeal raises a question of some general importance.

The question is not whether the legal personal representative of the covenantee can enforce the covenants against the appellants as covenantors. Nor is it claimed that the covenants arose out of a building scheme. The question is solely whether as a matter of construction the covenants can be enforced by the owner—Mrs. Stabback—of part of the area of land to which the benefit of the covenant was duly annexed.

For a number of reasons I have formed the view that the covenants are not enforceable by Mrs. Stabback.

In the first place I find that I am unable fully to appreciate the meaning of the phrase "each and every part" of the land intended to be benefited, as used in such cases as *Drake* v. *Gray*(2) and *Re Selwyn's Conveyance*(3), or

(2) [1936] Ch. 451.

(3) [1967] 2 W.L.R. 647; [1967] 1 All E.R. 339.

the phrase "parts as well as the whole", as used by Sholl J. in his dissenting judgment in *Re Arcade Hotel Pty. Ltd.*(4). Such phrases can scarcely be taken literally. If they are to be taken as a compendious reference to such subdivided portions of the land benefited as the local authority may permit (in accordance with the wishes of the covenantee or his successor) it to be subdivided, then in my opinion there should be clear words in the covenant to express such an intention. Minimal subdivisional areas in Sydney vary from municipality to municipality and even in some cases amongst wards within a particular municipality, so that merely to say that a covenant applies to "each and every part" of the burdened land is to ignore the realities of the situation and this aspect seems important, when a question of construction is involved, involving the extraction of the covenantee's intention.

In the second place I am unable to construe the wording of the subject covenants "the benefit . . . shall be appurtenant to the land in Certificate of Title Volume 7521 Folio 55" as meaning "each and every part" of the land comprised within such folio. To my mind such a phrase simply means what it says, namely the two roods twenty and a half perches (or whatever the particular area may be) shewn in the plan (invariably outlined in red) on the relevant certificate of title. How can (by way of extreme yet relevant example) a square foot of such land answer the description of "*the* land in Certificate of Title Volume 7521 Folio 55"? It would have been so easy for the covenantee when drafting the covenant to extend the benefit to (for example) "each and every lot into which the land benefited may hereafter be lawfully subdivided"—but this he did not do. I do not, with respect to Hardie J., see any difficulty in attempting to contrast the construction of the description of the land burdened with that of the land benefited. If the covenant, for example, were that not more than one residence be erected on land "in" or "comprised within" a certain certificate of title, the meaning is clear and the construction attracts no problem of whether the whole of the land or each and every part thereof is meant. Indeed one could not seriously construe such a phrase as meaning "each and every part". The same comment, I think, applies to the covenants in the instant case. Generally (though perhaps not always) the problem only arises in connection with the land benefited.

Thirdly I find it difficult to assign to the covenantee, in the light of relevant circumstances and the words selected to compose the covenant, an intention that each and every part of his land (whatever be the full meaning of that phrase) should have the benefit of the covenant, because it is almost beyond dispute that the important first clause of the covenant (and probably the second covenant also) did not touch and concern a substantial proportion of the land comprised within Certificate of Title Volume 7521 Folio 55 (cf. *Re Ballard's Conveyance*(5)). This is because of the topography of the area and in particular the situation of Lot 2 presently owned by the O'Neills.

The evidence and circumstances indicate that the late Mr. Benjamin desired to protect the view from his cottage and as he then owned the whole of the land in Certificate of Title Volume 7521 Folio 55 it was natural enough that he should desire the whole of such land to be the land benefited.

(4) [1962] V.R. 274, at p. 290.

(5) [1937] Ch. 473.

Fourthly, we know that the covenantee intended to give the area which became Lot 3 of D 176 to the appellants (an intention implemented by Miss Benjamin) and such Lot 3 was part of the land benefited and to which in no circumstances could the covenant ever apply. With respect to those who hold the contrary view, it seems to me quite impossible to assign to the covenantee in these circumstances an intention that "each and every part" of his land should be benefited. For, if Mrs. Stabback can enforce the covenants, so can not only the O'Neills but also the appellants, and such an odd result was almost certainly not intended to be achieved by the covenantee.

Fifthly, the concluding sentence of the covenants provides (s. 88): "The said covenants may be released varied or modified by the transferor or his executors administrators or assigns"—and this wording does not seem to me at all consistent with the intention that "each and every part" of the covenantee's land was intended by him to be benefited.

Along more general lines I would add that the view which I have reached seems to be consistent with the reasoning and decisions in the majority of the cases to which we were referred, although one does not doubt that in an appropriate case a different result is necessary (for example, as in *In re Ecclesiastical Commissioners*(6)). But I prefer the reasoning of Smith J. in *Bohn* v. *Miller Bros. Pty. Ltd.*(7); of Adam J. in *Langdale Pty. Ltd.* v. *Sollas*(8) and of Lowe J. (with whom Gavan Duffy J. agreed) to that of Sholl J. in *Re Arcade Hotel Pty. Ltd.*(9). The explanation of these cases given by McInerney A.J. in *Re Miscamble's Application*(10) (a case in which it was necessary to examine the effect of s. 79A of the *Property Law Act* 1958 (Vic.), a provision inserted after the decision in *Re Arcade Hotel Pty. Ltd.*) in no way suggests disagreement from the reasoning therein, as I read his Honour's judgment.

I will now turn to the ground of appeal which claims that the first clause of the covenant is unenforceable because of its uncertainty. With much respect to the learned judge I am unable to give any reasonably clear meaning to this covenant.

In the absence of the plans and photographs which formed part of the evidence, it is scarcely practicable to give full details of the topography of this area. The relevant features can however be summarized as follows: The "common boundary" and the "said common boundary line" referred to in the first clause of the covenant takes the form of *two* adjacent sides of a rectangle, the point of the right angle being to the northwards and in the general direction of Mrs. Stabback's cottage. On the plans this boundary line is lettered A-N-M. The distance between N and M (which is south-west of N) is about ninety-five feet and N is about fifty-three feet higher than M. The distance between N and A (which is south-east of N) is about seventy-five feet and A is about one and a half feet lower than N. Thus there is a steep (and rugged) descent from N to M and an almost equally steep descent diagonally from A to M. The floor of Mrs. Stabback's cottage is nearly seventy feet higher than the point M.

(6) [1936] Ch. 430.
(7) [1953] V.L.R. 354.
(8) [1959] V.R. 634.
(9) [1962] V.R. 274.
(10) [1966] V.R. 596.

With these topographical features in mind, the phrase "mean lateral level" is to me (as it was to at least one of the surveyors who—rightly or wrongly—gave evidence) practically meaningless. Various solutions were offered both in evidence and during argument before us, which however were inconsistent with one another and none of which gave me any degree of satisfaction. It seemed to be a common suggestion that the word "lateral" should be ignored. I had earlier written several pages of analysis for the purpose of demonstrating how indeterminate and ambiguous the phrase "mean lateral level" in this context is, but on reflection and with respect to those who may hold a contrary view, I think it is so obvious that I am content to adopt the description given by Mr. Surveyor A. E. Richards that the phrase as applied to the line A-N-M is "unintelligible and meaningless".

To this difficulty there must be added the problem of giving some reasonable measure of precision to the word "adjacent" in this context. Its presence (which cannot be ignored as was suggested in argument) seems to indicate that the covenant was not intended to extend and apply to the steeply descending slopes of the southern and western portions of the land burdened or to the lower end of the boundary N-M because of its steep descent. As earlier indicated the point M is almost seventy feet below the floor level of Mrs. Stabback's cottage. Probably the draftsman had vaguely in mind an area fairly close to the line A-N, which is elevated and fairly level, and possibly—though this is doubtful—part of the line N-M also. But this is not good enough and is all too vague and uncertain to render a restrictive covenant of this type enforceable. In my opinion the first clause of the covenant should be declared unenforceable as being void for uncertainty.

In the result I would allow the appeal. I do not have to consider the suppositious case of the entirety of the land benefited reverting to one ownership (see *Re Miscamble's Application*(11)).

The following orders should be made: The order of 24th August, 1967, is set aside. In lieu thereof declare that the restrictions imposed by the covenant contained in Transfer No. J451275 are not enforceable by Rona Irene Stabback, Gordon James O'Neill and Lorna Laver O'Neill or any one or more of them. As regards costs I consider that in all the circumstances the appellants should pay the costs of the respondents Gordon James O'Neill and Lorna Laver O'Neill of the proceedings before Hardie J. but that there should be no other order as to costs in regard to such proceedings. The costs of the appellants of this appeal however should be paid by the respondent, Rona Irene Stabback, who is to have a certificate under the *Suitors' Fund Act*.

WALSH J.A. The questions raised by this appeal, the terms of the covenants with which it is concerned and the facts of the case are stated in the reasons for judgment prepared by the other members of the court. The primary question is whether the land now owned by the respondent Mrs. Stabback and the land now owned by the respondents Mr. and Mrs. O'Neill are entitled to the benefit of the covenants, so that these are enforceable against the appellants by those respondents, as the respective owners of those two parcels of land.

(11) [1966] V.R., at p. 600.

The amended summons, which was heard by Hardie J. (see *Re Ellison and the Conveyancing A* 2)), sought, inter alia, an order that the restrictions arising under the covenants are not enforceable by any person. But, if the appellants succeed on the primary question which I have stated in the preceding paragraph, I am of opinion that the order should not be in that form, because the appellants are the original convenantors and, in my opinion, they are not entitled, in any event, to an order absolving them from the liability, if any, which they have as such convenantors to the personal representative of the original convenantee. In these proceedings, to which that personal representative is not a party, the court should be concerned only with the question whether the respondents, or any of them, can enforce the covenants, to which they were not parties, but which the respondent Mrs. Stabback claims are enforceable by her as owner of land to which the benefit of the covenants is annexed.

In the reasons which he gave for dismissing the application, Hardie J. said: "The applicants have pressed upon the court the submission that, having regard to the principles established by the authorities, a restrictive covenant such as that under consideration is, in the absence of the words 'or any part thereof' or some other clear indication of contrary intention, created for the benefit of the specified benefiting land considered as an entirety and that accordingly such a covenant ceases to have any operation or effect if and when the benefiting land ceases to be owned as one entire parcel.

"I do not propose to examine the authorities cited for that proposition. In my view the correct principle is stated accurately and succinctly by Goff J. in *Re Selwyn's Conveyance*(13), where he said: 'Counsel for the defendant further says that the modern tendency is to regard a covenant for the benefit of adjoining or neighbouring land, especially if it be part of a specified estate, as for the whole and not the part, and certainly that result was reached in the cases before Buckley J. and Stamp J. Basically, however, it is in my judgment a question of construction of the particular covenant' "(14).

It was stated in the instrument by which the covenants were given that "the benefit of the foregoing covenants shall be appurtenant to the land in Certificate of Title Volume 7521 Folio 55". I agree with the proposition that the question whether they are to be regarded as being for the benefit of that land, considered as an entirety, or as being also for the benefit of any portion of that land which is subsequently held in separate ownership, is a question of construction. But that proposition does not in itself provide an answer to the question raised by this case. If the language of the instrument which contains the covenants, considered in the light of any surrounding circumstances which may legitimately be regarded as an aid to construction, contains a sufficient indication, either that the benefit of the covenants is attached only to the designated land as an entirety, or that it is attached also to portions of the land, then the problem is solved by construing the covenants in accordance with that indication.

(12) (1967) 87 W.N. (Pt. 1) (N.S.W.) 1.
(13) [1967] 2 W.L.R. 647, at p. 656; [1967] 1 All E.R. 339, at p. 346.
(14) (1967) 87 W.N. (Pt. 1) (N.S.W.), at pp. 3-4.

But, if there is not any definite pointer towards one construction rather than the other, to be found in other provisions in the instrument or in the circumstances to which it relates, it has to be determined what meaning should be given, without such aid, to a provision that the benefit is to be appurtenant to the land in a specified certificate of title. In that situation, it is necessary to consider whether it is proper to attach to the words the meaning which, to one's own mind, seems preferable or whether there is a body of authority which suggests the answer which, in the absence of any sufficient contrary indications, ought to be given. The line of inquiry which I have just suggested is the same, I think, as that expressed herein by Jacobs J.A. by his reference to the submission for the appellants that such words have, according to the authorities, the prima facie meaning of the land in its entirety, and by his statement that it is consistent with authority to determine that the words are "neutral".

In the statement made in *Re Selwyn's Conveyance*(15) which Hardie J. cited, Goff J. referred to a submission that "the modern tendency is to regard a covenant for the benefit of adjoining or neighbouring land, especially if it be part of a specified estate, as for the whole and not the part". But, in my opinion, the authorities in England and in this country go further than showing a "modern tendency" towards that construction. The preference for treating the benefit as attaching to the whole has been indicated fairly consistently over quite a long period. I think it is shown by the Court of Appeal in *Drake* v. *Gray*(16), although in that case, for the particular reasons given, the opposite construction was adopted. In that case it was said, as it has been in many others, that the question is one of construction. But, nevertheless, the view was accepted that "it must be shown" that the benefit was intended to enure to each portion of the land, as had been stated in the earlier authorities to which the court referred. This was stated by Slesser L.J. at p. 458 and at p. 461 and the reasons of the other members of the court were not inconsistent with it. It is true that it was there asserted (see p. 468) that it is not essential, in order that this may be shown, that some particular form of words such as "the land and every part of it" be used, and I am respectfully of opinion that that assertion could not be disputed. Nevertheless, although there may be a variety of ways in which that intention may be indicated, no particular form of words being necessary, the reasoning in the case supports the view that, unless there is some indication to the contrary, where there are words attaching the benefit to land described simply as the land in a specified certificate of title, those words will be taken to refer to the land as a whole. It may be added that, if the distinction drawn by Romer L.J. at pp. 464-465 between two classes of covenant, which distinction has been discussed several times in subsequent cases and not always with approval, is accepted and applied, this would favour the appellants in the present case.

I do not intend to discuss all the other authorities dealing with this question. I agree with the opinion expressed by Lowe J., with whom Gavan Duffy J. agreed, in *Re Arcade Hotel Pty. Ltd.*(17) that there was a course of authority which, if followed, required the view to be taken that, prima facie, the benefit

(15) [1967] 2 W.L.R., at p. 656; [1967] 1 All E.R., at p. 346.
(16) [1936] Ch. 451.
(17) [1962] V.R. 274.

of a covenant of the kind with which the court was there concerned enured to the land as an enti I think the same view is consistent with *Re Roche*(18) and with the recent English cases of *Russell* v. *Archdale*(19) and *Re Jeff's Transfer*(20), as well as with the earlier Victorian cases discussed in *Re Arcade Hotel Pty. Ltd.*

In that case, Sholl J. delivered a vigorous dissenting judgment. But, whatever criticisms may be made in relation to the logic of the rule or in relation to its historical development in the case law, my opinion is that a rule of construction applicable to this problem has become established. The rule is not a hard and fast rule. It is a rule that, prima facie, one construction is to be adopted rather than the other. It may, of course, be displaced. In my opinion, an acceptance of the rule does not invoke the strictures against rigidity in matters of construction made in *Perrin* v. *Morgan*(21), or place the court in a self-imposed "thraldom" (at p. 415). The rule may be used for the resolution of the problem of construction in cases in which, unless some prima facie rule is adopted, there is really no criterion for resolving it, and the answer will depend upon what the particular judge thinks is a desirable result, and much confusion and uncertainty will be caused (cf. *Perrin* v. *Morgan*, at pp. 420-421).

Some would say that, if there is to be a rule, it should be the opposite of that which I regard as having become established. That would, no doubt, have been the view of Sholl J., and it has been adopted by the legislature in Victoria which enacted the amendment to the *Real Property Act* of that State, which was considered in *Re Miscamble's Application*(22).

However, I am of opinion that it is desirable to recognize and to make use of the rule which, in my opinion, has become established by the course of authority. In *Re Arcade Hotel Pty. Ltd.*(23) Lowe J. added to his reasons the following statement: "Since I wrote the above opinion I have had the opportunity of reading and considering the judgment of my brother Sholl J. I do not fail to appreciate the weight of the argument he submits on the question which I have considered and on which my own judgment rests. Nor can I say that I would have come to the same conclusion as I have if the matter had been free of authority, but it seems to me that where the decision rests on the meaning of language commonly used in the same context not only here but in England, it is undesirable that it should be construed differently here from the construction given to it in England. Moreover, the undesirability is even greater where the English decisions are those of the Court of Appeal. The case is one, I think, to which the considerations adverted to in *Piro* v. *W. Foster & Co. Ltd.*(24) should be applied."

It may now be said that his Honour's reference to *Piro* v. *Foster* has diminished in significance by reason of later pronouncements by the High Court but, in my opinion, the substance of what Lowe J. said remains valid. It is still desirable that there should be uniformity upon such a subject as the law of property (cf. *Sexton* v. *Horton*(25)), although this is not to be pur-

(18) (1960) 77 W.N. (N.S.W.) 431.
(19) [1964] Ch. 38.
(20) [1966] 1 W.L.R. 841; [1966] 1 All E.R. 937.
(21) [1943] A.C. 399.
(22) [1966] V.R. 596.
(23) [1962] V.R. 274, at p. 278.
(24) (1943) 68 C.L.R. 313.
(25) (1926) 38 C.L.R. 240, at p. 244.

chased at too high a price, and this Court is free to depart from it if it seems right to do so. But, in the present case, a departure from the prima facie rule to which I have referred would appear to be a reversal of what has been generally accepted, not only in England but in Victoria and in this State, and may be supposed to have been known to solicitors and conveyancers and, therefore, to have affected instruments executed on their advice.

My examination of the foregoing problem may seem unduly long, but I have thought it necessary because my inclination would be to reject the submission of the appellants on this point, as they are the original convenantors who have received a substantial benefit by a gift of land which belonged to the original covenantee. I am not anxious to allow them this escape route from the main practical consequences of the covenants into which they entered. But I think nevertheless that they are entitled to succeed on that submission. In my opinion, they are entitled to succeed because, prima facie, the relevant words in the covenants should be construed in their favour and there is nothing in the instrument or in the proved surrounding circumstances which is sufficient to displace that construction.

With respect, I do not dispute the correctness of the statement of Hardie J. that it is reasonable to suppose that the parties "contemplated that at some time or other the benefited land would probably be subdivided", if by this is meant that, assuming they had thought about the matter before the covenants were executed, they would have considered it likely that, at some time in the future, there would be some subdivision. But, in my opinion, that is not a sufficient indication that the words attaching the benefit of the covenants were meant to make it enure (to use the words of the learned judge) "for the benefit of any residential allotments into which it might subsequently be subdivided".

If the evidence had shown that, when the covenants were executed, Mr. Benjamin, the covenantee, had already decided that there was to be a subdivision in the near future and that the appellants knew this, probably I should have regarded that as a sufficient ground for construing the covenants in favour of the respondents. I agree entirely with Jacobs J.A. in regarding the evidence as being in an unsatisfactory state on this aspect of the case. I have not overlooked the fact that at the hearing counsel for the respondent, Mrs. Stabback, sought to ask the appellant, Mr. Ellison, about discussions between himself and Mr. Benjamin prior to 19th December, 1962, concerning the granting of a restrictive covenant, and this was disallowed. But it is not suggested that, if it had been allowed, evidence might have been elicited that Mr. Benjamin said then that he had decided to subdivide his land. In the absence of any positive evidence, and in the light of Mr. Ellison's sworn denial that a gift to him of part of Benjamin's land was discussed prior to 19th December, 1962, and in the light of the submissions made to this Court, it is impossible for the Court to decide the case on the footing that a subdivision was in the actual contemplation of the parties at the time when the covenants were given. I can find no other factor tending to the conclusion that the construction for which the respondent, Mrs. Stabback, contends should be adopted. Therefore, the appellants are entitled to succeed on the primary question. That conclusion makes it unnecessary for me to deal with

the questions of uncertainty which were also debated. I am of opinion that the appeal should be allowed.

In all the circumstances of the case, I think that the respondent, Mrs. Stabback, acted quite reasonably in disputing at the hearing the claims of the appellants, and I think that there should be no order as to the costs of that hearing, except an order for the costs of the respondents the O'Neills. I agree with the orders proposed by the learned President.

JACOBS J.A. The present appellants applied in equity for orders under s. 89 of the *Conveyancing Act*, 1919, as amended (see *Re Ellison and the Conveyancing Act*(26)). They are the registered proprietors of land in respect of which by registered dealing number J451275 they entered into the following covenants:

"1. That any building hereafter erected by the transferee adjacent to the common boundary of the parcels of the land contained in the said certificate of title shall in relation to the mean lateral level of the said common boundary line be of a single storey construction and the floor of any such building shall be constructed at a height not greater than three feet above the mean lateral level of the common boundary line as aforesaid.

2. That if the transferees shall construct on their said parcel of land a path or driveway for pedestrian and vehicular traffic passing to and from the said land to and from the portion of land subject of the above easement then no part of such pathway shall be wider than thirteen feet six inches at the said common boundary line.

"The benefit of the foregoing covenants shall be appurtenant to the land in Certificate of Title Volume 7521 Folio 55.

"The benefit of the foregoing covenants is upon the land in Certificate of Title Volume 7366 Folio 111. The said covenants may be released varied or modified by the transferor or his executors administrators or assigns."

The words "said certificates of title" where used in the covenant refer to the land in Certificate of Title Volume 7366 Folio 111, that is to say the present appellants' land, and the land in Certificate of Title Volume 7521 Folio 55, that is to say the land which was intended to have the benefits of the covenants. The latter land was owned by Edward Lionel Benjamin who was the other party to the registered dealing Number J451275. This dealing was a transfer and grant of an easement of way in favour of the present appellants. It was executed on 19th December, 1962, although it had been the subject of earlier negotiation and discussion. The said Edward Lionel Benjamin died a few weeks later. His successor in title Barbara Olga Benjamin carried out a subdivision of the land of Edward Lionel Benjamin, a subdivision which had been initiated by him in his lifetime. By this subdivision three lots were created. Two of these lots were sold and the third was given to the present appellants pursuant to a promise of gift which had been made by Edward Lionel Benjamin during his lifetime. The present appellants now seek declarations that the restrictions arising under the covenants contained in the document J451275 are not enforceable by any person, or alternatively that the

(26) (1967) 87 W.N. (Pt. 1) (N.S.W.) 1.

restrictions are not enforceable by any person other than a person who is registered as a proprietor of all the land formerly contained in Certificate of Title Volume 7521 Folio 55. I should add that after the subdivision to which I have referred not only was part of this land given to the present appellants but the remaining two lots were sold to different owners.

The grounds upon which it was argued before Hardie J. and before us that the restrictions were not enforceable were, first, that the covenant was void for uncertainty and, secondly, that it was a covenant the benefits of which was annexed to the whole of the land in Certificate of Title Volume 7521 Folio 55, so that when that land was divided in ownership the covenant ceased to be enforceable as one annexed to the land. It was not argued that the covenants did not touch or concern the land intended to be benefited, and I see nothing in the evidence which would lead to a conclusion that the covenants did not touch and concern the whole of that land.

The position is complicated to some extent by the fact that the present appellants are the original covenantors. So long as they are the owners of the land the subject of the burden of the covenant it seems to me that the covenant regarded as a personal covenant by them is binding upon them and it is enforceable by Barbara Olga Benjamin as the personal representative of Edward Lionel Benjamin. However, no reliance has been placed by the parties upon this aspect of the matter and upon the view that s. 89 of the *Conveyancing Act* is concerned only with covenants the benefit of which is annexed to land, there seems no reason why orders should not be made under that section, without affecting the validity of any personal covenant which may in particular circumstances be still in existence.

Hardie J. came to the conclusion that the present appellants were not entitled to the orders and declarations which they sought. He determined that the covenants were not void for uncertainty, and he also determined that the benefit of the covenants was appurtenant not only to the whole of the land in Certificate of Title Volume 7521 Folio 55, but also to each and every part of that land. He held that the words "adjacent to" were not uncertain in the context and that the words "mean lateral level" where used in the same covenant also were not uncertain. I respectfully agree with the conclusion that these latter words are not uncertain. The words "mean level" may be capable of various applications, but, when they are used in a covenant of this kind, it is necessary for the court as a question of construction to decide which is the appropriate application. I do not think that the question can be determined by the evidence of the surveyors and their usages, although such evidence was called. The word to which the expert witnesses could give no effect was the word "lateral". However, as I have said, I doubt whether in the circumstances this is a question which can to any degree be determined by such expert witnesses. If in this context the word can be given no meaning which adds anything to the words "mean level", then I think that it should be ignored. However, I am not satisfied that it can be given no meaning in this way. It seems to me to express rather inelegantly the idea of taking the mean level along the side of the parcels of land where there is a common boundary. First, there is a reference to the common boundary of the parcels of land and then there is a reference to "the common boundary line". I think that the

word "lateral" is intended to reinforce the concept of the mean level being taken along that of the land where there is this common boundary. It is true that probably the same result is achieved by the use of the words "common boundary line" but I do not think that this tautology is a ground for holding the words and therefore the covenant to be uncertain.

In relation to the words "adjacent to" in the present context I find much greater difficulty and here regretfully I find myself obliged to differ from the conclusion of the learned judge at first instance. The words "adjacent to", although vague (see *Camberwell Corporation* v. *Waldmann*(27)) may be capable of being regarded as certain where in the context and in the circumstances they can be related to an existing situation. Thus in *Cave* v. *Horsell*(28) in respect of the words "adjoining shops" it was held that these words were not limited to the shops physically in contact with the demised shop but extended to another shop, namely No. 6 in the street. However, in that case and in that type of case meaning and application of the word can be determined at the time of the making of the covenant. It is possible to say with certainty in the light of the circumstances what the parties intended. In a case such as the present one this is not possible. I do not think it is sufficient that, if a building were erected or proposed to be erected, one could of that building or proposed buildings say that it was or was not adjacent. I think that it would be necessary to be able now or at the time of the making of the covenant to point out upon the ground where a building might be built without being said to be adjacent to the common boundary of the parcels of the land. It is this difficulty which has compelled Mr. Rolfe to submit that in the context any building on the land of the covenantors would be adjacent to the common boundary line and to concede that any other construction of the words would make it very difficult to find the necessary certainty. I do not think that the words can refer to any building constructed upon the land of the covenantors. The covenant refers only to such buildings when they are adjacent to the common boundary. If the reference were to an existing building I think that it could be determined whether the parties intended that it should or should not be within the description "adjacent to". However, since the covenant looks to buildings to be built in the future, I do not think that the necessary degree of certainty can be found in the language. I therefore think that the first of the covenants is void for uncertainty upon this ground.

The second covenant will only be unenforceable if the appellants are correct in the submission that these covenants were intended only to be annexed to the whole of the land and not to the land and every part of it. Hardie J. came to the conclusion that the covenant was intended for the benefit of the land and each part thereof. Primarily he came to that conclusion upon the circumstance that in his view size and shape of the land made it reasonable that the parties should have in mind that at some time the benefited land would probably be subdivided into at least two residential blocks. I am not prepared to dissent from this view of the circumstances which was taken by the judge at first instance. I would only differ from his conclusion if Mr. Needham were correct in his submission that prima facie the words "the land in Certificate of Title Volume 7521 Folio 55" meant the land as a whole. If that

(27) (1945) 72 C.L.R. 250, at p. 257.

(28) [1912] 3 K.B. 533.

be so then there is no ambiguity and, although surrounding circumstances can be looked at, I doubt whether a possibility of some subdivision in the future could be regarded as such a factor that the prima facie meaning of the words should be discarded. However, I am not satisfied that these words have the prima facie meaning for which Mr. Needham contends. I think that it is consistent with authority to determine that these words are neutral and that they may refer either to land as a whole or to the land and each part thereof. It will then depend on the circumstances in which they were used which meaning is given to them.

"The question whether the covenants are annexed to the whole of the land expressed to be protected, as a whole, or to the whole and each and every part is purely one of construction. Often this question is easily resolved, owing to the presence of a provision which, either expressly or by necessary implication, shows that the annexation is to each and every part. Such words are, for instance: 'all or any of their lands' [1900] 2 Ch. 388; 'such part or parts of the lands subject to the settlement as shall, etc.' [1937] Ch. 651; [1939] Ch. 1; 'the said land and every part thereof' [1936] Ch. 430; 'so that every person for the time being entitled to any estate in any such lands shall have a right to the observance' [1935] Ch. 591. But very difficult questions of construction may arise." *Restrictive Covenants Affecting Freehold Land*, Preston and Newsom, 4th ed., at p. 18.

Mr. Needham has relied on certain passages in *Re Union of London and Smith's Bank Limited's Conveyance*; *Miles* v. *Easter*(29), at p. 628 in particular. On this page in the judgment of the court, which was delivered by Romer L.J., there is reference to the well-known case of *Renals* v. *Cowlishaw*(30). Of that case, Romer L.J. said: "It is a judgment that has received the approval both of this Court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land. In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the Vice-Chancellor, 'it must appear that the benefit of the covenant was part of the subject-matter of the purchase'."

I can appreciate Mr. Needham's submission that by these words it is suggested that there is some onus on the party who seeks to show that the benefit was intended to enure to each portion of the land. However, I have come to the conclusion that this puts the matter too highly and that this view was not necessarily intended by the words which I have quoted. The question

(29) [1933] Ch. 611.

(30) (1878) 9 Ch.D. 125.

commences as, and always remains, one of construction. In practically every case the words [illegible]ary. We have had the benefit of a very useful summary of the cases in schematic form presented to us by Mr. Needham. I do not think that it is useful to go through all these cases in order to discuss the words used in each of them to describe the land to be benefited. I think that it is probably true, as Mr. Needham has submitted, that in recent decisions in England there has been a tendency to commence the question of construction involved with a presumption that general words refer to the land as a whole and not to each part thereof. I here refer particularly to *Russell* v. *Archdale*(31) and *Re Jeff's Transfer*(32). It is also true that the Supreme Court of Victoria in *Re Arcade Hotel Pty. Ltd.*(33) by a majority affirmed an express principle that the question was covered by English authority as well as some Victorian authority, and Lowe J., at p. 278, declined to say that he would have come to the conclusion which he did, namely that the covenant referred only to the whole of the land, if the matter had been free of authority. At p. 277 he refers to earlier decisions of the Supreme Court of Victoria and distinguishes another decision of that Court upon the ground that considerations in evidence and the true construction of the covenant then in question led to a conclusion that the benefit of the covenant was annexed to each and every part of the land. Sholl J. entered a vigorous and learned dissent and I would quote from that dissenting judgment at some length, at p. 291: "Is there then some particular virtue in the addition of the words 'or any part thereof' to the description of the benefited land? Why should that be so? Unless there is something in the wording of the covenant clearly restricting those entitled to the benefit of it to the person or persons from time to time holding a whole property in a single ownership, why should the benefit of the covenant not be understood to be distributed over the benefited land, in the same way as the burden over the burdened land? I can see no logical reason why not; and as a mere matter of language I can see no such reason. There may, of course, sometimes be words used that a court must construe as conditioning the right to enforce the covenant upon the single ownership of the whole of the benefited land. There have been cases in which ownership of a named 'estate' has been referred to, which have been so treated. For example, in *Re Ballard's Conveyance*(34) the words referring to the convenantee were 'the said Emily Harriett Ballard her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate of Sir John Blundell Naple' and in *Re Freeman-Thomas Indenture*(35) the covenant was entered into with F. 'and other the owner or owners for the time being of the Ratton Estate in the said county of Sussex his and their heirs and assigns'. The courts in these cases treated the words as describing the beneficiaries of the covenant in terms which could not properly be applied to any but the owners of the whole 'estate' in one ownership, and no doubt a covenant could easily be drawn to express such a requirement, e.g. by referring to 'the registered proprietor or proprietors for the time being (in the one ownership) of all that piece of land', etc. But why do not the mere words 'registered proprietor or proprietors for the time being

(31) [1964] Ch. 38.
(32) [1966] 1 W.L.R. 841; [1966] 1 All E.R. 937.
(33) [1962] V.R. 274.
(34) [1937] Ch. 473.
(35) [1957] 1 W.L.R. 560; [1957] 1 All E.R. 532.

of the land comprised in certificate of title numbered so and so' adequately describe the subsequent registered proprietors of portions of such land, just as they would the registered proprietors of portions of the burdened land? With respect, I dissent from the view of those who think a distinction must or should be drawn." And later, at p. 293: "If it is not necessary to add 'or any part thereof', as a matter of ordinary language, in order to distribute the benefit of a covenant, the law does not make it essential. Indeed, in *Drake* v. *Gray*(36) itself, the Court of Appeal unanimously held that the benefit of a restrictive covenant was annexed to every part of the benefited land notwithstanding the absence of the words 'or any part thereof'; and two of the learned judges expressly stated that such words were not essential: see per Slesser L.J. at p. 461, and per Greene L.J. (as he then was) at p. 468."

I agree with Sholl J. upon the importance of the decision of the Court of Appeal in *Drake* v. *Gray*(37). There were in that case no words indicating that the benefit was to extend to all parts of the land but the fact that a partition was in course at the time was regarded as a circumstance which could determine how the general words would be construed. In New South Wales in *Re Roche and the Conveyancing Act*(38) Myers J., although he came to the conclusion that the words in question in that case referred only to the whole of the land intended to have the benefit, nevertheless approached the matter purely as one of construction and, as I read his judgment, commenced with no presumption that because of the general words used only the land as a whole was intended to be benefited.

My conclusion, therefore, is that it is erroneous to regard the problem of construction as different from any other problem of construction. In this connection it is not inappropriate to refer to the decision of the House of Lords in *Perrin* v. *Morgan*(39). The words "the land contained in" [a named certificate of title] never stand alone independent of surrounding circumstances any more than the word "money" in a will ever stands alone. In each case there is almost inevitably a background with the assistance of which meaning can be given to the ambiguous word or words. In each case it is necessary that the courts eschew the course of adopting a prima facie meaning which simplifies the task but makes the result less meaningful.

It may be that different problems arise when the benefit is conferred on the owner for the time being of certain lands. Such a phrase may upon its face regard the lands as an indivisible whole because of the reference to ownership. I express no concluded opinion upon this point. However, when the reference is to the land in a certain certificate of title I can observe no principle of construction (in the absence of any artificial rule) which would limit those words to the land as a whole. I am inclined to think that quite apart from surrounding circumstances such a reference to lands includes the land and every part thereof. It may be tested by examining one particular parcel of land out of the whole and asking the question: "Is that land which is included in the relevant certificate of title or which was so included at the relevant time?" By analogy to easements, to which restrictive covenants in equity bear some

(36) [1936] Ch. 451.
(37) [1936] Ch. 451.
(38) (1960) 77 W.N. (N.S.W.) 431.
(39) [1943] A.C. 399.

resemblance, one would conclude that a reference to the land benefited generally would be sufficient to enable the benefit to enure to each part of the land. See in this connection the recent article, "The Benefit of Restrictive Covenants", 84 *Law Quarterly Review* 22, at p. 27. In that article the learned author examines the English authorities and comes to the conclusion that there is no rule that particular words are necessary referring either directly or indirectly to each and every part of the land before the benefit can enure to every portion of the land. Having read that article, which arrived after the hearing of argument in this case, I am reinforced in the conclusion which I had previously reached before having the benefit of reading that article.

I have also had the benefit since writing these words of reading the reasons of the learned President in which he expresses inability fully to appreciate the meaning of a reference to the land and each and every part thereof. I must confess that I cannot share this difficulty, nor do I think that the question is affected by variations in the subdivisional requirements of local councils. I do not think that these requirements reflect the realities of the problem of construction involved, unless they demonstrably and obviously would bar a subdivision. I think that generally speaking the realities are that in the case of land intended to be subdivided or capable of subdivision a covenant much more likely than not is intended to be read distributively.

In the present case there is no positive evidence that a subdivision was in actual contemplation between Mr. Benjamin and the present appellants. The state of the evidence is somewhat extraordinary in that the projected subdivision, at least to the extent of the proposed gift of part of Mr. Benjamin's land to the present appellants, must have been mentioned within days or at the very most less than two weeks after the execution of the document containing the restrictive covenant. Yet Mr. Ellison denied that it had ever been mentioned at the time when the covenant was made. If I thought that the question turned upon whether or not Mr. Benjamin had indicated his proposal to make a gift to Mr. Ellison at the time when the covenant was executed I would feel most unhappy that the case should turn on evidence in the state in which it now appears. It is true that Mr. Ellison swore that there had been no mention of the proposed gift to him at the time when the covenant was executed, but at the time when he gave that evidence he was apparently under the misapprehension that a whole year passed before the death of Mr. Benjamin. In fact only a few weeks passed and Mr. Ellison then corrected his statement that the mention of the gift was a few days before or after Christmas (which would have brought the mention of the subdivision and gift to him within a day or so of the execution of the covenant) to about the New Year which took the first mention a few days later. All this seems most unsatisfactory, but in my view it is not a determining matter in the present case. It seems to me that with the various land dealings that were going on by way of grant of right of way and the like and taking account of the size of the piece of land of Mr. Benjamin in that locality at that date I cannot be satisfied that the learned judge at first instance was incorrect in his view that a subdivision sooner or later must have been in contemplation, and that there would be no reason to think that the benefit of the covenant should enure only to the land so long as it remained unsubdivided. Taking the view which I do that the words "the land in the certificate of title" raise no presumption that only the

whole of the land was meant and that the surrounding circumstances are the true guiding factor, I think that the circumstances were such that Hardie J. could well come to the conclusion that the whole and each part of the land was intended, and I am not prepared to dissent from that conclusion. I would, therefore, propose that there be a declaration that the first of the two covenants is not enforceable upon the ground that it is void for uncertainty, but that otherwise the appeal be dismissed. In the circumstances, since neither appellant nor respondent was wholly successful, I think that there should be no order as to the costs of this appeal.

By majority, appeal allowed. Order of 24th August, 1967, set aside. In lieu thereof declare that restrictions contained in Transfer No. J451275 are not enforceable by Rona Irene Stabback, Gordon James O'Neill and Lorna Laver O'Neill or any one or more of them. Appellants to pay costs of respondents Gordon James O'Neill and Lorna Laver O'Neill in proceedings before Hardie J. No other order as to costs of those proceedings. Cost of appellants of this appeal to be paid by respondent Rona Irene Stabback, who is to have a certificate under Suitors' Fund Act.

Solicitor for the appellants (applicants): *K. W. Tribe.*

Solicitors for the respondents (respondents): *Joseph P. Sharah & Co.*

O.M.L.D.