



Neutral Citation Number: [2021] EWHC 764 (Ch)

Case No: PT-2020-000488

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 March 2021

Before :

Ian Karet (sitting as a Deputy High Court Judge)

Between :

- (1) Mehmood Mapara**
- (2) Saleem Shaikh**
- (3) Abdul Rashid Teladi**
- (4) Ismail Isa Amaan**

Claimants

- and -

Peter Demetriou
(also known as Panayiotis Demetriou)

Defendant

Mr Daniel Gatty (instructed by Shoosmiths) for the Claimants
Mr Montague Palfrey (instructed by Moreland & Co) for the Defendant

Hearing date: 11 March 2021

JUDGMENT

Ian Karet:

Introduction

1. This case concerns burial rights at Tottenham Park Cemetery, a privately owned cemetery in North London (the “Cemetery”). The claimants are the trustees of the Tottenham Park Islamic Cemetery Association (the “Association”) which is also referred to as the Tottenham Park Islamic Cemetery. The Association is an unincorporated association formed in 1981 to acquire and manage burial plots and cemeteries for its members who are all Sunni Muslims. The defendant is the current owner of the Cemetery.
2. The Cemetery was founded in 1912. In 1981 it was acquired by Badgehurst Limited (“Badgehurst”). By a series of deeds between Badgehurst and the trustees from time to time of the Association, Badgehurst granted burial rights for certain plots at the Cemetery.
3. The case commenced as an application for an interim injunction followed by a claim brought under CPR Part 8. The parties were represented as they had been at the injunction hearing. Mr Daniel Gatty appeared for the Claimants and Mr Monty Palfrey for the Defendant. The trial was held remotely due to the Covid-19 pandemic. At trial the parties agreed that no cross-examination of witnesses was required.

The Deeds

4. The dispute centres on a series of deeds made between September 1987 and October 2004 between trustees of the Association and Badgehurst (the “Deeds”).
5. By a deed made on 7 September 1987 Badgehurst granted to the trustees rights of burying 316 bodies in 316 specified plots in two areas of the Cemetery for a term of 999 years at a premium of £14,001 and a peppercorn rent. The relevant terms are as follows:

“THIS DEED dated as above made between:-

- (1) BADGEHURST LIMITED of Fen Lane Orsett Essex (hereinafter called “the Grantors”) and
- (2) [Certain individuals] the present Trustees of TOTTENHAM PARK ISLAMIC CEMETERY (hereinafter called “the Grantees”)

“3. The Grantees for themselves and successors in title hereby covenant with the Grantor [*sic*] and its successor in title as follows:-

- (1) At all times to comply with and observe the rules and regulations for the time being of [the Cemetery]
- (2) That only members of [the Association] shall be buried in the plots within either of the said areas of land
- (3) To keep both areas of land in a clean and neat condition at all times provided that if the Grantor is not satisfied that this condition has been complied with within a period of six months from the date hereof then the Grantor shall have the right to enter upon the land and carry out and necessary works thereto at the cost of the Grantees

- (4) To supply the Grantor or his successors in title names and addresses of the Deceased persons to be buried in both areas of land and carry out any necessary works thereto at the cost of the Grantees...

...

5. IT IS HEREBY AGREED AND DECLARED THAT the Grantor have the exclusive right to dig graves in the said plots of land at the following costs:-

(1) During the period of Two years from the date hereof at the rate of £20-00 per grave dug from Mondays to Fridays (inclusive) of each week and at a cost of £50-00 per grave dug on Saturday or Sunday of each week

(2) After a period of Two years from the date hereof at the rates of the Grantor from time to time

PROVIDED ALWAYS that if the Grantor shall fail to dig graves within a reasonable period of request by the Grantees so as to allow burial in accordance with the religion of the Grantees then the Grantees shall have the rights to dig the graves themselves.”

6. Seven further deeds were made up to October 2004. They are in terms similar but not identical to the 1987 grant. By each, Badgehurst granted the right of burying a specified number of bodies in that number of plots in a specified area of the Cemetery shown outlined on a plan. (A deed made in 1999 specifies an area of the Cemetery but not the number of bodies or plots.)
7. The Grantees in each case hold “the same” for a 999-year term from 25 December 1986, save for the 27 October 2004 deed which makes a grant from the date it was made. Each Deed provides for payment of a premium on grant and annual peppercorn rent.
8. The Grantees in each Deed agreed for themselves and “their successors in title” to comply with the rules and regulations of the Cemetery; to keep the specified areas in a clean and neat condition; only to bury members of the Association in their areas; and to supply the Grantor or his successor in title with the names and addresses of persons buried. The Grantees are permitted to re-use the plots after the permitted statutory period.
9. Each Deed provides that “the Grantor shall have the exclusive right to dig graves in the said plots of land at the following costs...”. Those costs are specified for the first two years after grant. After two years the costs are to be “the rates of the Grantor from time to time”, and there is a proviso that if the Grantor shall fail to dig graves within a reasonable period of request by the Grantees so as to allow burial in accordance with their religion then the Grantees shall have the right to dig the graves themselves.
10. There had been earlier grants to the trustees of rights and options, but they were not before the court. There was also before the court an earlier deed made on 4 May 1985. This was in a shorter form. Badgehurst (defined as “the Grantors”), granted to the trustees (defined as “the Grantees”):

“...the right of burying Fifty Six bodies in all those 56 Plots of unconsecrated ground shown edged in red in the plan annexed hereto and numbered...TO HOLD the same unto the Grantees for a period of Ninety nine years from the 4th day of May One thousand nine hundred and eighty five at a peppercorn rent (if demanded) for the purpose of burial... subject nevertheless to the rules

and regulations for the time being of the said [Cemetery] PROVIDED ALWAYS THAT after the expiry of the permitted statutory period of years from the date of each burial... the Grantees shall have the right to make further burials in each of the aforesaid Plots AND PROVIDED FURTHER THAT only members of the [Association] are buried in the plots....

11. The Defendant disputes that the Deed dated 28 April 2000 (the “2000 Deed”) was properly executed. The copy available to the parties is signed only by the Secretary of Badgehurst and by no other party. There is solicitors’ correspondence concerning its drafting which dates from December 1999. Silvers Solicitors for the Association sent what appears to have been a draft to the Association on 2 December 1999. On 9 December 1999 Silvers sent a completion statement, and a manuscript note on that letter says that it was paid by cheque on 10 December 1999. They sent a bill under a further letter also dated 9 December 1999.
12. In August 2018 Badgehurst transferred the Cemetery to Tottenham Park Cemetery Ltd (“TPCL”) for £100,000. In December 2018 TPCL went into voluntary liquidation. In early January 2019 the Defendant purchased the Cemetery from the liquidators of TPCL. I was not shown any assignment of the Deeds from Badgehurst to TPCL or from TPCL to the Defendant.
13. On 1 March 2019 the Defendant wrote to the Association to assert an exclusive right under the Deeds over each and every grave opening at his standard charges of £1,900 between Mondays and Fridays with different rates for the weekend. The Defendant demanded that no further graves be opened save by his team at his published rates.
14. In May 2019 the trustees filed a unilateral notice in respect of the 2000 Deed with the Land Registry.
15. The current Terms and Conditions of Use of the Cemetery provide as follows:

“E. Right to Bury in a Grave

28. A right to a burial in one private earth grave for one or two internments (Burial Right) can only be purchased from the Cemetery and is available to be purchased, subject to availability, by anyone not below the age of 18 years, not being a corporate entity, on payment of the appropriate Cemetery fees as published from time to time.

29. A Burial Right is for a term of 50 years from the date of purchase (the Term). Extensions to the Term of a further 25 years or 50 years can be purchased on payment of the appropriate fee as published by the Cemetery from time to time.

30. The Burial Right is exclusive of any additional services and confers no other rights or privileges.

...

42. No grave may be opened for interment without the written consent of the owner of the Burial Right (the grave owner) except for the interment of the grave owner.

43. No grave shall be opened at the Cemetery other than by the Cemetery or persons contracted to the Cemetery.

44. The Cemetery's interment fee as published from time to time must be paid at the time of booking the interment.”

16. In late April 2020 the Defendant is alleged to have buried a non-member of the Association in an area over which the Association claimed rights. It was also alleged that he had dumped tree waste on the Claimants' plots.
17. In June 2020 the Claimants applied for interim relief to restrain the Defendant from carrying out any such burials. In July 2020 the Claimants issued this claim seeking declarations of their rights under the deeds and injunctions against breach.
18. On 7 July 2020 Mr Justice Mann made a consent order on the Claimants' injunction application until the determination of the parties' rights under the deeds. That included provision for expert evidence by a single joint expert on the issue of the cost of and what would be reasonable charges for digging a grave for a Sunni Muslim burial at the Cemetery.
19. The parties instructed a joint expert but were unable to obtain a report, and the issue that would have been put to the expert was by order of Master Teverson separated from the issues at trial.

The issues

20. The Claimants seek declarations on the following agreed list of issues:
 - (1) Whether under the Deeds the Defendant has the exclusive right to dig graves in the Association's areas of the Cemetery.
 - (2) If the right was not granted to Badgehurst's successors in title, whether the Defendant can insist on digging graves for the Association, and charging for doing so, pursuant to regulations for the cemetery.
 - (3) If the Defendant has the right to dig graves for the Association under (1) or (2), whether there is to be implied into the Deeds a constraint on what he can charge – either of reasonableness or good faith. The Defendant accepts that if his right to dig graves arises under (2) above he can only charge a reasonable fee but not if it arises under (1)
 - (4) Whether the Claimants' rights under the Deeds are such that the Defendant is not entitled to arrange or permit burials of persons who are not members of the Association nor to dump rubbish within areas allocated to the Association by the Deeds.
 - (5) Whether the deed drafted in December 1999 and signed by one signatory in April 2000 (the “2000 Deed”) is valid.
21. At trial the Defendant accepted that he was bound by the grants in the Deeds. This means that the answer to first issue does not depend upon determining whether the rights granted were licences or rights in real property.

22. The parties agreed that for the purposes of the third issue, a term of reasonableness would be implied into the Deeds or the Cemetery regulations, so that it was not necessary to consider the arguments about a term of good faith.

The Law

23. The parties agreed that the approach to construction of the Deeds is that set out by the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24, in particular in paragraphs 10 to 15.

24. The question of the effect of defined terms has been considered in a number of decisions. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 Lord Hoffmann said:

“The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement.”

25. At the outset of the trial it appeared that the nature of the rights granted would be relevant to their transmissibility and effect. The parties agreed that as the Defendant was bound by the Deeds he could not derogate from the grant.

26. In *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264 Lawton LJ described the principle of derogation from grant as follows:

“The expression “derogation from grant” conjures up images of parchment and sealing wax, of copperplate handwriting and fusty title deeds. But the principle is not based on some ancient technicality of real property. As Younger LJ observed in *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at pp 225, 226, it is a principle which merely embodies in a legal maxim a rule of common honesty. It was imposed in the interest of fair dealing:

A grantor having given a thing with one hand, as Bowen LJ put it in *Birmingham, Dudley & District Banking Co v Ross*, is not to take away the means of enjoying it with the other. If A lets a plot of land to B, as Lord Loreburn phrases it in *Lyttelton Times Co v Warners*, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. The rule is clear but the difficulty is, as always, in its application.

As one would expect, the principle applies to all forms of grants. It was applied recently by the House of Lords to the sale of a car by the manufacturer: see *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577. The principle operates to restrict the future activities of a grantor. One field, and perhaps it was the earliest field, in which the principle finds expression is the grant by implication of easements over land retained by the grantor corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant over the property retained (see Parker J in *Browne v Flower*, at p 225). In such cases there must

necessarily be retained land over which the easement being implied is to operate. *Booth v Alcock* (1873) 8 Ch App 663 is an example of this.”

27. Gale on Easements (21st ed. at 1-25) notes that validity of a non-statutory perpetual burial right, is “undoubted, but the nature of right created is questionable”.

Discussion

The first issue

28. The parties argued this issue as one of construction of the Deeds. The Defendant conceded that he was bound by the Deeds and as a result the arguments raised in the skeleton arguments about the nature of burial rights (as a lease, an easement or something else) did not need to be decided. The Defendant further accepted that he was not the “Grantor” under the Deeds.
29. It was not argued that the Deeds granted leases, despite the use of language (in particular the agreement to pay rent) which might have been used in a lease.
30. I was shown a number of authorities relating to determination of rights relating to burials in cemeteries governed by statutes. It was agreed that they were not directly applicable to this case because the Cemetery was not created under statute.
31. The Deeds were made between the trustees and Badgehurst and cover an extended period. They gave rise to rights across parts of the Cemetery that were intended to endure in for very significant terms. The parties would have understood that time was an important factor in such a grant. The Association might endure for the entire period of grant but with new trustees from time to time. Badgehurst might not continue as the owner of the Cemetery for the full term. In that context it would be understood that the role of “successors” to the parties to the Deed would be important.
32. The Claimants say that as a matter of construction the Deeds use the defined term “Grantor” to refer to Badgehurst alone. The Deeds use “successor in title” in a number of places but not in respect of the right to dig graves. Accordingly, the Defendant has no right to dig graves under the Deeds.
33. The Defendant says that the commercial purpose of the Deeds was to provide an ongoing arrangement for burial rights at the Cemetery with the owner or controller of the land providing the digging and being responsible for the formalities associated with the provision of a cemetery in which burials can take place. The right to dig was part of the commercial arrangement and any other result would be unreasonable.
34. There was also some discussion of the assignment of the benefit and burden of the agreements, but this was not developed significantly. The Defendant suggested that the both the benefits and burdens on each party had been transferred to the parties. The Claimants suggested that the rights of the Grantor were by their nature personal, so depending on the identity of Badgehurst as the Grantor.
35. The Defendants’ position, that the owner of the Cemetery would want the right to dig graves there, would make commercial sense. But that is not what the Deeds say. The right is on the face of the Deeds for Badgehurst alone. Badgehurst had taken a premium for the rights upon grant. Badgehurst had in any event agreed that its rights

to dig were not exclusive; a third party might be employed where the time available to conduct a Muslim burial so demanded.

36. The Claimants noted a similarity with the drafting before the court in *City Inn (Jersey) Ltd v Ten Trinity Square Ltd* [2008] EWCA Civ 156. In that case there was in a deed a restriction on alterations without the consent of the “Transferor” as defined. That term was used in the relevant clause without the addition of “successors in title” which was used elsewhere in the deed. It was held that effect should be given to the definition and only the original transferor was entitled to give consent. That case, however, pre-dates *Wood v Capita* and it has been doubted in a number of cases since then that the approach taken in *City Inn* is in line with the current law.
37. While the use of defined terms is not decisive, the use of the words “successor in title” in some places but not others in the Deeds indicates that it was a considered choice. The right to dig was thus intended to be for Badgehurst alone and not for a successor in title. That does not lead to an absurd result. Badgehurst had expressly accepted that others might dig during its ownership of the Cemetery and had obtained a premium for the grants of burial rights. As the Defendant is a successor in title to the Grantor, he does not have the exclusive right under the Deeds to dig graves at the Cemetery.
38. If the matter had been considered as one of assignment of a benefit to the Grantor under an agreement, then in the context of the time span of these agreements and the nature of the of the rights granted, the right to dig appears to be a personal grant to Badgehurst. As I have noted, there was no evidence to show that rights under the Deeds had been assigned, and on that basis it is not possible to concluded that there was any effective assignment to consider.

The second issue

39. As the Defendant does not have an exclusive right to dig graves under the deeds, can he insist on doing so pursuant to regulations for the Cemetery?
40. Regulation no. 43 (set out above) provides that the Defendant has control over the opening of all graves at the Cemetery. If that applied to them, the Claimants would only be able to open a grave using the services of the Defendant or “persons contracted to the Cemetery”. There is no provision for what would happen if the Defendant was unable or unwilling to dig a grave in time for a Muslim burial.
41. Mr Palfrey accepted that the Defendant’s right under the regulations would not be absolute. For example, the Defendant would not be able to set an unreasonable price for digging a grave, and the Defendant could not require that graves be dug to unusual specifications in order to justify a greater fee. Further, the Defendant would be bound to allow the Claimants to dig graves if he could not do so within a reasonable period of request so as to allow burial in accordance with the Claimants’ religion. That was part of the grant to the Claimants from which he could not derogate under the principle in *Johnston v Holland*.
42. Those concessions are not part of the current regulations, and the Defendant cannot insist on digging graves pursuant to the regulations of the Cemetery in their current

form. He would have to accept a reasonable price and to allow the Claimants to dig should he not be able to do so in good time. That is not what they currently say.

43. The Claimants argued further that the right to dig was dealt with solely under the Deeds and that it was not possible for the Defendant to regulate that at all. There were two reasons for that. First, while Badgehurst held the exclusive rights to dig, an attempt to impose a fee different from that set out in the Deeds for the first two years would have been ineffective. Secondly, the Defendant could not insist on digging if he failed to do in a reasonable time.
44. The Claimants' first argument appears right so far as the first two years of the term were concerned. But that does not mean that Badgehurst would have had no right to try to regulate digging through regulations. That would have been subject to a restriction on derogation from grant, and an attempt to vary the price would likely have been an impermissible derogation. The Claimants' second reason is answered by the Defendant's acceptance that any right would be subject to implied terms of reasonableness of price and allowing the Claimants to do so should the Defendant not be able to do so in good time.
45. The Deeds do not address the question of digging graves beyond the right to dig reserved to Badgehurst. A successor in title to Badgehurst thus has some room to regulate in this matter through the regulations of the Cemetery. However, the Defendant does not have unlimited rights in this regard. He would not be able to derogate from the grants under the Deeds, and however he seeks to regulate he will be subject to that.
46. It also appears that the current regulations are directed towards grants of rights that are much shorter than the periods granted under the Deeds. The parties did not address whether that has any impact on what a fair price might be.
47. The result is that the Defendant cannot 'insist on digging graves for the Association', and the Claimants succeed on the issue as it was drafted.
48. The Defendant may in future be able to draft regulations that go further than the current position without derogating from grant. This means that the sixth issue of a reasonable price for digging may yet arise for decision.

The third issue

49. As noted above, the parties agreed at trial that for the purposes of the third issue a term of reasonableness would be implied into the Deeds or the Cemetery regulations, so that it was not necessary to consider the arguments about a term of good faith.
50. The Defendant's position was that while there was no grant of exclusive possession to the land it would be a derogation from the grants under the Deeds to deny a burial and that in any event that a term of reasonableness would be implied so as to limit the price the he could charge for digging a grave.

The fourth issue

51. During the course of argument, the Defendant accepted that the Claimants' rights under the Deeds are such that the Defendant is not entitled to arrange or permit burials

of persons who are not members of the Association. That was on the basis that while the Defendant did not concede there was grant of exclusive possession to the land at the Cemetery, he did accept it would be a derogation from the grants under the Deeds to deny the Claimants the use of the burial plots which were the subject of the Deeds if he gave them to third parties.

52. The Defendant also conceded the question of the dumping of rubbish. This was on the basis that as the Deeds contained an obligation on the Trustees and their successors to keep the land in a clean and neat condition at all times, the Defendant could not claim a right to dump rubbish that would put the Claimants in default of their obligations.

The fifth issue

53. During the trial the Defendant accepted that he was bound by the grants in the 2000 Deed and that if it had not been properly executed then it would take effect in equity so as to secure the rights of burial granted. To that extent the 2000 Deed is valid.
54. The remaining question whether it was validly executed was therefore put on the basis of whether there was enough evidence for the court to confirm that, on the balance of probability, it was duly executed – it being agreed that this would not affect the rights of the Claimants.
55. There was no evidence about the execution process. The fact that an interest in respect of it was only registered many years later suggests that, for whatever reason, it had been overlooked. The copy of the Deed available does not suggest that there was any version that was fully executed, and the later Deeds between the parties do not recite that it was.
56. There is, therefore, no evidence that it was validly executed. The fact that there was correspondence about the agreement and that consideration was paid and fees billed all suggests that it ought to have been executed, but in the absence of anything more, it is not possible to conclude that it was.

Conclusion

57. Five issues were raised at trial. The Claimants have succeeded on those as set out above, and I will make declarations accordingly.
58. The sixth issue (- the reasonable price for digging a grave) was not before the court due to the absence of a joint expert. The issue of a reasonable price might still arise if the Defendant sought to amend the regulations to a form that he contended did not derogate from the grants under the Deeds. In that case, the parties should seek further directions on determination of the remaining issue.