Right of pre-emption – application by grantee of right for the entry of a restriction – objection by registered proprietor – First-tier Tribunal upheld objection – appeal allowed – appropriate to enter restriction – many other points as to the operation and effect of the right of pre-emption considered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2016/0112**

BETWEEN:

(1) MARK LAW
(2) ANNABEL LAW

Appellants

and

ELIZABETH HAIDER

Respondent

Tribunal: Hon Mr Justice Morgan

Sitting in public in London on 27 April 2017

Mr Andrew Gore, counsel, instructed directly, for the Appellants

Mr Patrick Rolfe, counsel, instructed by Kenneth Bush Solicitors LLP, for the Respondent

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DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FtT") (Judge John Hewitt) released on 20 April 2016. Permission to appeal to the Upper Tribunal was granted on 29 July 2016 by Elizabeth Cooke as a Deputy Judge of the Upper Tribunal. That permission was restricted to certain identified points of law so that the appeal is pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007.

2. The matter which was formally before the FtT was an objection by Mrs Haider (the Respondent to this appeal) to the application of Mr and Mrs Law (the Appellants on this appeal) to enter a restriction under the Land Registration Act 2002 in relation to Title No. NK171471. The FtT decided that the Chief Land Registrar should cancel the application to enter a restriction in relation to that title and Mr and Mrs Law now appeal against that decision. As will be seen, the matters which were investigated by the FtT, and which also fall to be considered on this appeal, relate not only to the land in Title No. NK171471 but also to the land in Title No. NK211811 and relate not only to a possible restriction on Title No. NK171471 but also relate to unilateral notices on both titles and a restriction in relation to Title No. NK211811.

The background facts

3. Mr and Mrs Law are the owners of two parcels of land. The first of these is Narborough House, Main Road, Narborough, King's Lynn, Norfolk which is registered under Title No. NK274475. Mr and Mrs Law acquired this property in around 2001 and they live there. Mr and Mrs Law are also the registered proprietors under Title No. NK376690 of a large adjoining area of land known as the Park. They acquired that property from Mr and Mrs Haider in June 2008.

4. Mr and Mrs Haider are the owners of four registered titles concerning land in the vicinity of Narborough House and the Park. The first of these is Narborough Stables registered under Title No. NK209611. Mr and Mrs Haider lived at the Stables until they recently moved to New Zealand. Mr and Mrs Haider also own two parcels of land which are directly the subject of the present dispute. These parcels of land are registered under Title Nos. NK171471 and NK211811. The first of these is known as the Woodland, or Whin Close, comprising some 20 acres or so of ancient woodland, said to be largely unmanaged. The second of these parcels of land is known as Sovereign Meadows and I was told that this land comprises about 10 acres and is, as to part, a meadow and, as to other parts, woodland. Finally, Mr and Mrs Haider are the registered proprietors, under Title No. NK376336, of a wall which separates Narborough House from Narborough Stables. They acquired the wall from Mr and Mrs Laws in June 2008.

5. The layout of the various parcels of land is as follows. The Stables and Narborough House adjoin each other, fronting onto the same road, with the Stables being to the north of Narborough House. The Park is to the south of Narborough House and has a frontage to the same road as well as to another road. The Woodland lies behind, and has a boundary with, the Stables, Narborough House and the Park. Sovereign Meadows is on the other side of the road, facing both the Stables and Narborough House.

The boundary dispute

6. In 2003, Mr and Mrs Haider commenced proceedings in the Norwich County Court against Mr and Mrs Law, who served a Counterclaim. The litigation involved one or more disputes as to boundaries. After a mediation, the litigation was settled and, on 9 August 2004, the court made an order in Tomlin form. The Schedule to the order set out the terms of settlement. These terms provided for the Haiders to sell the Park to the Laws and for the Laws to transfer the wall, referred to above, to the Haiders. Paragraph 2(b) of the Schedule, which referred to his wall, required the Haiders to enter into a covenant to maintain the wall and it was expressly stated that the covenant was to be binding on the successors in title of the Haiders.

7. Paragraph 4 of the Schedule to the order is at the centre of the present dispute and is in these terms:

> "In the event of the Claimants or their estates selling any or all of the remaining land currently comprised in title number NK 171471 and/or Sovereign Meadows they shall give the Defendants the first option to purchase that land."

(In this paragraph, the Claimants are Mr and Mrs Haider and the Defendants are Mr and Mrs Law.)

8. The settlement in 2004 was implemented in relation to the Park and the wall. There were some difficulties in relation to the implementation of the settlement in those respects but it is not necessary to refer further to those matters.

The unilateral notices

9. On 17 September 2014, Mr and Mrs Law applied to enter a unilateral notice in relation to Title No. NK171471. The application stated that they were interested in that land as an intending purchaser under the order of the Norwich County Court of 9 August 2004. A unilateral notice was entered accordingly on the date of the application. On 27 October 2014, Mr and Mrs Law applied for a similar unilateral notice in relation to Title No. 211881 and a unilateral notice was entered accordingly on that date.

The restrictions

10. On 25 September 2014, Mr and Mrs Law applied to enter a restriction in relation to Title No. NK171471. They stated that they had a sufficient interest

in the restriction by virtue of the order of the Norwich County Court of 9 August 2014. The proposed wording of the restriction was to be:

> "No disposition of the registered estate (other than a charge) by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by Mark Law and Annabel Law of (address) or their conveyancer that the provisions of paragraph 4 of an Order of the Norwich County Court (claim number NR303977) dated ninth August 2004 have been complied with or that they do not apply to the disposition."

11. Notice of the application to enter a restriction in relation to Title No. NK171471 was given to Mr and Mrs Haider and on 30 October 2014, Mrs Haider wrote to the Land Registry objecting to the application. As the letter was signed by Mrs Haider alone, the Land Registry appears to have treated it as being an objection by Mrs Haider alone rather than by Mr and Mrs Haider and in the subsequent proceedings Mrs Haider alone is named as the objector. I suspect that Mrs Haider's letter was meant to be an objection for herself and her husband. No point has been taken by either side to this dispute in relation to the position of Mr Haider. I consider it is clear that he will be bound by my decision on this appeal either on the basis that Mrs Haider was acting for him as well as for herself or on the ground that he did not object to the restriction which had been applied for. Notice of the objection was given to Mr and Mrs Law and the matter was referred to the FtT for decision pursuant to section 73(7) of the Land Registration Act 2002. That was the sole matter which was formally before the FtT in this case.

12. On 21 October 2014, Mr and Mrs Law applied to enter a restriction in relation to Title No. NK211881. The application was in the same terms as for Title No. NK171471. Mr and Mrs Haider did not serve notice of objection to the application and on 27 October 2014 a restriction was entered in accordance with the application.

The proceedings before the FtT

13. On 16 December 2015, the FtT held an oral hearing into the matter referred to it. On 18 January 2016, the judge wrote to the parties and invited written submissions in relation to a number of points. These points raised questions as to whether paragraph 4 was void for uncertainty and whether terms should be implied into it, whether it was spent by reason of certain events which had taken place and whether any right granted by paragraph 4 of the Schedule to the order should be protected by the entry of a restriction. On the last point, the judge stated (on 18 January 2016) that he was satisfied that in certain circumstances a right of pre-emption was capable of being protected by both a notice and a restriction but he drew attention to the Land Registry Practice Guide 19, para. 6.6 which referred to a right of pre-emption which "expressly" limited the power of the registered proprietor to make a disposition. He also commented on the drafting of the proposed restriction. The judge also asked whether he ought to direct the Chief Land Registrar to cancel the two

unilateral notices and the restriction in relation to Title No. 211881; he asked this question because those entries were not formally the subject of the reference to him.

14. Both parties made detailed written submissions in response to the judge's invitation of 18 January 2016. On 20 April 2016, The FtT released its decision in relation to the matter referred to it. The judge set out the background in respect of the relevant land and the relevant notices and restrictions entered or proposed to be entered. He then made detailed findings of fact about certain events in 2014 and 2015 in relation to the way in which the Haiders put the Stables on the market and the way in which the Woodland and Sovereign Meadows were dealt with. For present purposes, I can summarise his findings of fact as follows:

    (1) On 15 June 2015, the Haiders wrote to the Laws stating that they were in a position to decide what to do with the land and added: "We invite you to put in your offer within 14 days of this letter"; the judge described this invitation as "genuine";

    (2) At no stage did the Laws made an offer, specifying a price, to buy the Woodland or Sovereign Meadows;

    (3) At no stage did the Haiders make an offer, specifying a price, to sell the Woodland or Sovereign Meadows to the Laws;

    (4) The Haiders received an offer from a third party for the Stables and for the Woodland and Sovereign Meadows but that third party later withdrew;

    (5) At the date of the hearing before the FtT, none of the properties owned by the Haiders was on the market;

    (6) The Laws had not responded to the Haiders' letter of 15 June 2015 in order to make life difficult for the Haiders in connection with their wish to sell their property;

    (7) The Haiders remained keen to sell the Stables but were equivocal about selling the Woodland and Sovereign Meadows.

15. In its decision, the FtT considered a number of points which it had earlier raised and it reached conclusions on some of them. The judge held that there was ambiguity in paragraph 4 as to what was meant by "selling" and there was no process, time frame or mechanism to resolve any dispute as to the price to be paid by the Laws. He therefore concluded that paragraph 4 was void for uncertainty. In the alternative to this finding, he considered the meaning of "first option" in paragraph 4. He held that the obligation imposed by paragraph 4 of the Haiders was to invite the Laws to make an offer to purchase the relevant land; the Haiders did not have to offer to sell the land and did not have to specify a price. In view of the fact that the Haiders had invited the Laws to make an offer to purchase the land and the Laws had not done so, any right conferred by paragraph 4 was spent. The FtT discussed the possibility of

implying further terms into paragraph 4 but pointed out certain difficulties of doing so. The FtT then considered whether it was appropriate for a restriction to be entered on the register in respect of Title No. NK171471. He held that the subject right of pre-emption was not capable of being protected by a restriction. He added:

> "I hold that ordinarily rights of pre-emption will be protected as to priority by way of a notice. In special circumstances further protection may also be given by way of a restriction. Those special circumstances might include where the grantor expressly agrees to the entry of a restriction or expressly agrees not to effect a disposition. Neither of these apply in the present case."

16. The FtT ordered that the application by the Laws to enter a restriction in relation to Title No. NK171471 should be cancelled. He then considered the position in relation to the two unilateral notices, and the restriction which had been entered in relation to Title No. NK 211881. In a passage which is somewhat unclear, he appeared to say that the ratio of his decision was that the application to enter a restriction in relation to Title No, NK171471 should be cancelled and that his conclusions as to paragraph 4 being void, alternatively spent, were obiter and he would not exercise a wider jurisdiction to give directions in relation to the two notices and the other restriction.

17. On 3 June 2016, the FtT refused an application by the Laws for permission to appeal to the Upper Tribunal. The FtT gave reasons for its refusal. In support of its earlier conclusion that paragraph 4 was void for uncertainty, it referred to a passage from the then 5th edition of Barnsley's Land Options at para. 6-057, which cited Ryan v Thomas (1911) 55 SJ 364 and Bailey v Church (1952) 160 EG 74. In relation to the availability of a restriction in respect of a right of pre-emption, the FtT said that it would be an odd result if every right of pre-emption could be protected by a restriction whereas a contract for the sale of land was, ordinarily, not capable of being so protected. Permission to appeal was granted by the Upper Tribunal on 29 July 2016; permission was restricted to four identified issues of law arising on the appeal and permission was not given in relation to any of the FtT's findings of fact.

The issues arising on the appeal

18. The submissions made by the parties in relation to this appeal have given rise to a number of issues which I would summarise as follows:

    (1) Was paragraph 4 void for uncertainty?

    (2) If paragraph 4 was not void for uncertainty, did the Haiders comply with the obligation imposed on them so that the rights vested in the Laws are now spent?

    (3) Should the Laws be able to enter a restriction in relation to their rights under paragraph 4?

(4) What should be the terms of any such restriction?

Was paragraph 4 void for uncertainty?

19. The FtT held that paragraph 4 was void for uncertainty because there was ambiguity as to what was meant by "selling" and there was no process, time-frame or mechanism to resolve any dispute as to the price to be paid by the Laws.

20. The wording of paragraph 4 can be divided into two parts. The first part seeks to identify a trigger event, namely, "the event of … selling". The second part seeks to identify the obligation upon the Haiders, namely, to "give … the first option to purchase". On behalf of the Haiders, Mr Rolfe argued that there were four features of paragraph 4 which made it impossible to know what was intended to be its effect. These features were:

    (1) The phrase "first option";

    (2) The word "selling";

    (3) The absence of any reference to timing; and

    (4) The absence of any reference to price or to any mechanism to ascertain a price.

21. There was no real dispute as to the legal principles to be applied to determine whether a provision is void for uncertainty. I can take the principles from Lewison on The Interpretation of Contracts, 6th ed., at paras. 8-10 to 8-17. In particular, I will seek to apply the following principles:

    (1) A provision in a contract is uncertain if:

        a) it is unintelligible or meaningless;

        b) the court is unable to select the intended meaning from a variety of meanings fairly attributable to it;

        c) the court is unable to discern the concept which the parties had in mind;

        d) the terms of the contract require further agreement between the parties in order to implement them;

    (2) The first task of the court is to attempt to construe the document applying the ordinary principles of interpretation;

    (3) The court will only hold an apparent contract is void for uncertainty as a last resort.

22. I will consider the submissions as to alleged uncertainty first in relation to the trigger event ("the event of … selling") and then in relation to the obligation to give "the first option".

The event of selling

23. Mr Rolfe submits that the phrase "the event of … selling" is so unclear that it is not possible to know what is meant by it. Mr Gore submitted that the event of selling land which is referred to in paragraph 4 is the event of entering into a conditional contract with a third party to sell the land or, in the alternative to that contention, the event of entering into a subject to contract agreement with a third party to sell the land. When such an event occurs, but not before, the Haiders come under an obligation to give to the Laws the first option to purchase.

24. Paragraph 4 refers to "the event of … selling". The use of the word "event" suggests a point in time. The use of the word "selling" could refer to a process (of selling) rather than a particular point in time when the Haiders could be said to be "selling". "Selling" land typically does involve a process over a period of time. Typically, a landowner begins by making a firm settled decision to sell followed by the taking of steps to give effect to that intention. Typically, those steps will involve instructing agents to market the property or putting the property up for auction. If the property is put on the market, typically an offer or offers will be made by a potential purchaser or purchasers, the seller will accept such an offer subject to contract and the matter will proceed to exchange of contracts and completion. In the light of that description of a typical process of selling land, when is the event of selling?

25. Mr Gore accepts that the event of selling in the present context cannot mean completion of a contract of sale because paragraph 4 obviously contemplates that the Haiders will perform the obligation in paragraph 4 before they transfer the land to a third party. Similarly, he accepts that the Haiders could not enter into an unconditional contract to sell to a third party before they perform the obligation in paragraph 4 because they would then be under an obligation to the third party which would be inconsistent with their obligation to the Laws under paragraph 4. However, he submits that the Haiders could avoid such an inconsistency by making their contract with the third party conditional upon the land not being sold to the Laws under paragraph 4. In the alternative, Mr Gore submits that the event of selling would occur when the Haiders agreed to sell to a third party subject to contract.

26. In order to answer the question as to the meaning of "the event of … selling", I consider that it is useful to ask why the question arises. Paragraph 4 refers to a trigger event, the event of selling. When that trigger event occurs, the Haiders are under an obligation imposed on them by paragraph 4. But in addition to identifying the relevant trigger event, it is necessary to ask a further question which involves a time element: when do the Haiders have to perform the obligation under paragraph 4? There are various candidates for the answer to that question. One might say that they have to perform the obligation within a reasonable time of the trigger event occurring. Or one might say that they have to perform the obligation in a way which gives to the Laws the "first" option to purchase, which means that the option must be given to the Laws before the Haiders enter into an incompatible contract to sell to a third party. (By "incompatible", I mean a contract whether conditional or unconditional

which imposes an obligation on the Haiders which would conflict with the Haiders' obligation to give a first option to the Laws; there could be a contract to sell to a third party, conditional on the Haiders first performing their obligations to the Laws, which would not be an incompatible contract.) The second of these answers is supported by the reasoning in Bircham & Co Nominees (2) Ltd v Worrell Holdings Ltd (2001) 82 P&CR 34 at [22] – [23] per Chadwick LJ. I consider that that is the appropriate answer in this case also. That answers the question as to the last date for performance of the obligation imposed by paragraph 4 and all that remains is to determine the earliest point at which an offer may be made under paragraph 4 without the offer being premature.

27. For example, if the Haiders had no intention of selling the land but gave the Laws the option of purchasing it at a time when the Haiders knew that the Laws would be unlikely to exercise that option and if the result of the Laws not exercising the option at that point was that they forever lost the right to purchase the land (a point mentioned below) then it might be appropriate to construe paragraph 4 so that the trigger event of selling did not occur until, at the earliest, the Haiders had formed a firm settled intention to sell the land. It might be objected that such a construction would mean that the occurrence of the trigger event would involve an inquiry into the state of mind of the Haiders. However, it is not unusual for rights of pre-emption to provide that the relevant right arises if the landowner "desires to sell" or some similar wording. Such wording does not appear to have caused difficulty in the past so the construction of paragraph 4 suggested above should not cause undue difficulty. I recognise that if the Haiders sought to manipulate the position by giving an option to the Laws at a time when the Laws would be unlikely to exercise it, the Laws might have the difficulty of proving that the Haiders did not have the requisite intention to sell.

28. My conclusion is that the event of the Haiders forming a settled intention to sell can be relied upon by them to enable them to take steps to comply with their obligation under paragraph 4, without those steps being considered to be premature. However, the Haiders do not have to comply with that obligation until just before they enter into an incompatible contract to sell the land.

The first option

29. Mr Rolfe submitted that an obligation "to give the first option to purchase", where there was no mention of price or timing, was uncertain and therefore void. He said that although suggestions could be made as to what the obligation amounted to it was impossible to know what was intended. If the obligation did have a meaning, it required the Haiders to do no more than to notify the Laws that the land was available to be purchased and to invite them to make an offer to buy the land, specifying the price offered by the Laws.

30. Mr Gore on behalf of the Laws says that paragraph 4 required the Haiders to give notice to the Laws that the land is available to be purchased by the Laws at a price specified by the Haiders. I will refer later to the arguments as to whether there were any constraints as to what might be specified as to the price. It seems implicit in this submission that the Haiders would also be able

to identify the terms on which the land was available to be purchased or could leave the matter to proceed as an open contract. Again, there might be arguments as to whether there would be any constraints as to the terms which might be specified by the Haiders. I did not receive any submissions on the question of possible terms as distinct from price and timing and I will not therefore consider that matter further.

31. It may seem to be only a narrow dispute between the parties as to which party has to name the price being offered by that party. However, this point will affect the later question as to whether the Haiders did perform the obligation on them in 2015 and the answer to that question might then give rise to the argument that the right is now spent. More generally, the point is potentially important because the requirement that a particular party specifies a price might limit the room for negotiation by that party and further, if the Haiders have to specify a price, they may be subject to constraints as to what price may be specified.

32. I will begin by attempting to apply the ordinary principles as to the interpretation of contracts and for that purpose I will consider the express words used in paragraph 4. The Haiders must give the Laws "the first option to purchase that land". I do not regard that phrase as particularly difficult to interpret. I consider that the natural reading of these words is that the Haiders must give the Laws an option to purchase the land and that the Haiders do not give an option to purchase unless they give an option which the Laws can accept. The Laws cannot accept a purported option if the Haiders do not specify a price for the land. The reference to the option being a "first option" is explained by Bircham & Co Nominees (2) Ltd v Worrell Holdings Ltd (2001) 82 P&CR 34 at [22] – [23], to which I referred above; the option must be given before the Haiders sell the land to someone else, in particular, by entering into an incompatible contract of sale in favour of a third party.

33. This interpretation of the obligation imposed by paragraph 4 is supported by the similar reasoning used in Smith v Morgan [1971] 1 WLR 803. In that case, the landowner had agreed that if she wished to sell the relevant land, she would give the other party "the first option of purchasing" that land "at a figure to be agreed upon". The clause in that case went on to refer to the landowner making an "offer for sale". The judge (Brightman J) held that the clause was not an agreement to agree. He said at 807 E – F:

> "What the conveyance purports to impose is an obligation on the vendor alone, that is to say, an obligation to make to the purchaser an offer for sale should the vendor wish to sell, such offer for sale to remain open for three months.
>
> It is axiomatic that an offer for sale must be capable of acceptance. It is not capable of acceptance if it omits to state a price. It, therefore, follows inevitably that the offer contemplated by paragraph 1 in the present case must be an offer which names a price."

34. Mr Rolfe relied on Ryan v Thomas (1911) 55 SJ 364 where there was an agreement to give "the first option" of purchasing certain premises in certain circumstances. The judge (Warrington J) held that the agreement was void for uncertainty. He said:

> "Here people have purported to come to an agreement; but, in fact, have not come to any agreement at all, because the terms of the agreement are not expressed. The words "first option" by themselves have no meaning; there is no mention of price, or time, or anything else."

That case was distinguished in Smith v Morgan on the grounds that there could not be an option without a price but there could be an offer to sell which required the offeror to specify a price.

35. When refusing permission to appeal, the FtT referred to a passage in Barnsley on Land Options which cited Bailey v Church (1952) 160 EG 74. In that case, the agreement granted "a first option" to acquire certain land at a price specified in the agreement. The issue was whether this was the grant of an option or only the grant of a right of pre-emption which could only be exercised when the grantor wished to sell the property. The court (Vaisey J) held that the latter was the correct interpretation and that a first option mean a right of first refusal. It has been held in other cases that a grant of "a first option" to acquire land at a price stated in the agreement is enforceable: see Mackay v Wilson (1947) 47 SR (NSW) 315 where the majority in the Court of Appeal in New South Wales held that the agreement granted an option and the minority held that the agreement created a right of pre-emption.

36. The right in the present case is clearly intended to be a right of pre-emption rather than an option. Accordingly, paragraph 4 grants a right which is essentially a right of first refusal. When the trigger event occurs, the Haiders are to give to the Laws the first option to purchase the relevant land. Just as in Smith v Morgan, I consider that the Haiders do not give an option to purchase the land unless they state something which is essential for the validity of an option, namely, the price.

37. If one treats a right to be given a first option as in substance a right of first refusal, there is authority that a right of first refusal requires the grantor to make an offer to the grantee of the right and such an offer must specify a price: see Manchester Ship Canal Co v Manchester Racecourse Co [1901] 2 Ch 37. That case concerned an agreement which was scheduled to an Act of Parliament which declared that agreement to be valid and binding upon the parties to it. Accordingly, the court could not hold that the agreement was void for uncertainty. However, both Farwell J ([1900] 2 Ch 352) and the Court of Appeal had no difficulty in construing the words of the agreement and coming to a clear conclusion as to what was involved in a right of first refusal. I would regard the decision in that case as being of persuasive authority when considering a simple agreement to grant a right of first refusal although I appreciate that in Ryan v Thomas and in Smith v Morgan the judges did not find that decision relevant when considering whether an agreement in different terms was void for uncertainty.

38. In summary, I conclude that on the true construction of the phrase "the first option" the Haiders are obliged, following a trigger event and before entering into an incompatible contract to sell the relevant land, to offer to sell the land to the Laws at a price specified by the Haiders.

39. At the hearing, I raised the question whether an obligation to give a first option requires the grantor to grant an option which would be capable of exercise by the grantee so as to bring into existence a contract of sale which complied with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. That point does not at present arise for decision and the parties did not make any submissions on it. In those circumstances, I will not discuss that point further.

40. My finding that the Haiders are obliged to offer any relevant land to the Laws at a specified price removes the difficulty suggested by Mr Rolfe as to paragraph 4 not providing for the price at which the relevant land was available to be purchased by the Laws. This finding does not however say anything about the way in which such a price is to be arrived at. Smith v Morgan did deal with that point where the judge said at 808 D-G:

> "However, I reject the defendant's submission that the plaintiff, should she wish to sell, is bound to offer the property at market value or at such value as the court may determine, as suggested by the points of counterclaim. Paragraph 1 of the second schedule to the conveyance says nothing whatever about market value and nothing about a reference to the court, even if the court were willing to accept such a reference. In my view it is implicit in paragraph 1 of the second schedule that a purchase, if it results from an offer, should be at a price acceptable to both parties. On that basis it appears to me that paragraph 1 can only mean one thing: that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the defendant, then there will be a purchase at a figure which has been agreed upon. If the offer is rejected, then cadit quaestio.
>
> The plaintiff must, of course, act bona fide in defining the price to be included in the offer. It is a matter of fact. If the plaintiff is proposing to sell by auction, the price to be specified in the offer to the defendant would be the intended auction reserve. If she is proposing to sell by private treaty the price to be specified in the offer would be the price intended to be named in the estate agent's particulars, or the lower price, if any, to which the plaintiff is, as a matter of fact, prepared to descend on such a sale. It may be that there will be difficulties on both sides in operating paragraph 1. There may be difficulties of proof for the defendant if he challenges the bona fides of the plaintiff, although I am not suggesting for one moment that the plaintiff, in fulfilling her obligation under paragraph 1, would

> seek to act in any other manner than in good faith. There may be difficulties on the plaintiff's side: an obvious inconvenience is the inconvenience of a three-month delay imposed upon the plaintiff when she makes her offer, if it be not promptly accepted or rejected."

41. I did not receive submissions specifically dealing with that passage. I note that in Miller v Lakefield Estates Ltd (1989) 57 P&CR 104, where the relevant wording of the right was different, May LJ said at 108:

> "However, although it is unnecessary for the purpose of reaching a final decision in this case, for my part I would very respectfully reserve my opinion whether *Smith v. Morgan* was indeed correctly decided. It is I think arguable that in that case the learned trial judge implied a substantial amount, perhaps too much, into what was otherwise a simple option clause."

42. On the other hand, the approach in Smith v Morgan has been considered to be helpful and has been followed in three cases at first instance, namely, Fraser v Thames Television [1984] QB 44 at 57B-C, QR Sciences Ltd v BTG International Ltd [2005] EWHC 670 (Ch), [2005] FSR 909 and [2005] EWHC 1500 (Ch) and Astrazeneca UK Ltd v Albermarle International Corporation [2011] EWHC 1574 (Comm), [2012] Bus LR Digest D1. In these circumstances, I hold that the reasoning in Smith v Morgan, as to the basis of the price, should be applied in this case.

43. Mr Rolfe also relied on the fact that paragraph 4 did not specify a time within which the Laws had to respond to any offer made to them by the Haiders. I consider that the court would imply that any offer made to the Laws had to give the Laws a reasonable time within which to respond to it. The length of a reasonable time would depend on all the circumstances of the particular case. That concept is to some extent uncertain as a matter of fact but it is not uncertain as a matter of law. Indeed, the implication of a term which refers to a reasonable time for a step to be taken is a commonplace, particularly in a conveyancing context.

44. I conclude that paragraph 4 is not void for uncertainty.

Is paragraph 4 now spent?

45. The answer to this question follows from my earlier conclusion that when the trigger event occurs, the obligation on the Haiders under paragraph 4 is to offer the relevant land to the Laws at a specified price. The Haiders never did offer any land at a specified price. Instead, they invited the Laws to make an offer for the land. Accordingly, the Haiders did not perform the obligation imposed on them by paragraph 4 and so it cannot be said that the Laws have enjoyed their rights under clause 4 so that their rights are now exhausted. Conversely, the Haiders did not enter into a contract to sell any land to a third party so that the Haiders did not commit a breach of paragraph 4. The result is that the rights and obligations under paragraph 4 remain effective and can potentially arise if there is a future trigger event under paragraph 4.

46. If I had held that the only obligation on the Haiders under paragraph 4 was an obligation to invite the Laws to make an offer for the relevant land, then the FtT has held that the Haiders had made a genuine offer of that kind in June 2015. The Laws did not respond to that offer but thereafter the Haiders did not contract to sell the land to a third party. If I had construed paragraph 4 differently, a question might arise as to whether the rights and obligations under paragraph 4 are now at an end or whether paragraph 4 remains effective and can potentially apply if there is a future trigger event under paragraph 4. As that question does not arise on my construction of paragraph 4, I will not discuss it further.

47. I note at this point that the result of my conclusions so far is that the Laws were entitled to enter the two unilateral notices in this case. I have held that paragraph 4 is not void for uncertainty and is not spent. It is agreed that the right created by paragraph 4 is an interest in land: see section 115 of the Land Registration Act 2002.

The entry of restrictions

48. The subject of the entry of restrictions in relation to a registered title is dealt with by sections 40 to 47 of the Land Registration Act 2002 and Rules 91 to 100 of the Land Registration Rules 2003. So far as material in the present cases, these provisions state:

(1) A restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register: section 40(1);

(2) A restriction may prohibit the making of an entry in respect of any disposition or a disposition of a specified kind: section 40(2)(a);

(3) A restriction may prohibit the making of an entry until the occurrence of a specified event: section 40(2)(b);

(4) Where a restriction is entered, no entry in respect of a disposition to which the restriction relates may be made in the register otherwise than in accordance with the restriction: section 41(1);

(5) The Registrar may disapply a restriction or provide that it has effect with modifications: section 41(2);

(6) Section 42(1) is in these terms:

> "(1) The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of—
>
> (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,

(b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or

(c) protecting a right or claim in relation to a registered estate or charge."

(7) Section 42(2) is in these terms:

"(2) No restriction may be entered under subsection (1)(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice."

(8) A person may apply to the registrar for the entry of a restriction if he has a sufficient interest in the making of the entry: section 43(1)(c);

(9) Rules may be made in relation to these provisions as to restrictions: section 43(2);

(10) The Rules may specify standard forms of restriction: section 43(2)(d);

(11) Section 43(3) provides:

"(3) If an application under subsection (1) is made for the entry of a restriction which is not in a form specified under subsection (2)(d), the registrar may only approve the application if it appears to him—

(a) that the terms of the proposed restriction are reasonable, and

(b) that applying the proposed restriction would—

(i) be straightforward, and

(ii) not place an unreasonable burden on him."

(12) Rule 91 specifies the standard forms of restriction set out in schedule 4 to the Rules;

(13) The standard forms of restriction include forms where the restriction refers to the consent of or the certificate of a third party; see in particular Form L;

(14) On an application for a restriction, the registrar may call for evidence as to the interest of the applicant: Rule 92(4);

(15) An application for a restriction to be disapplied or modified is governed by Rule 96.

49. Before seeking to apply these provisions in the present case, it is useful to address various points arising as to the operation of paragraph 4. Paragraph 4 refers to "the Claimants or their estates". After some discussion, the parties

appeared to agree that this phrase should be construed so that it does not include the Haiders' successors in title apart from the Haiders' personal representatives. The point was made that paragraph 2(b) of the Tomlin order referred to "successors in title" whereas paragraph 4 did not. Further, the parties appeared to agree that the burden of paragraph 4 was binding on the successors in title of the Haiders. This is a different question, and a different answer, from the question relating to the meaning of "the Claimants or their estates". That phrase is used in the words which describe the trigger event which gives rise to the obligation imposed by paragraph 4. That phrase does not define the persons who might be subject to the burden of the obligation in paragraph 4.

50. Both parties relied on section 115 of the Land Registration Act 2002 which provides:

> "(1) A right of pre-emption in relation to registered land has effect from the time of creation as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).
>
> (2) This section has effect in relation to rights of pre-emption created on or after the day on which this section comes into force."

51. The 2002 Act does not define "a right of pre-emption" but the parties are agreed that the right in this case is a right of pre-emption within section 115. Further, paragraph 4 was entered into on 9 August 2004 after section 115 came into force on 13 October 2003.

52. One of the circumstances where the registrar may enter a restriction is where such entry is necessary or desirable for the purpose of protecting a right or claim in relation to a registered estate: see section 42(1)(c). However, that is subject to section 42(2) which provides that a restriction may not be entered under that provision for the purpose of protecting the priority of an interest which is or could be the subject of a notice. The priority of the interest created by paragraph 4 has been protected by the two notices which have been entered in this case. The effect of the notices is that the priority of the interest created by paragraph 4 is protected for the purposes of sections 29 and 30. Accordingly, the Laws are not able to rely on section 42(1)(c) for the purpose of applying to enter a restriction in this case.

53. Section 42(1)(a) provides that the registrar may enter a restriction if it appears to him that such a restriction is necessary or desirable for the purpose of preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge. "Unlawfulness" covers a case where a disposition is in breach of a contractual restriction on making such a disposition.

54. Some rights of pre-emption expressly state that the grantor will not dispose of the relevant land without offering it to the grantee. The well known case of <u>Pritchard v Briggs</u> [1980] Ch 338 is an example of that. Other rights of pre-emption are drafted so that they identify a trigger event leading to the grantor

coming under an obligation to offer the land to the grantee. The present case is an example of that. Whether the right is drafted in terms which provide for an express restriction on a specified form of disposition or no such express restriction, the nature of a right of pre-emption is such that it imposes on the grantor a negative obligation requiring the grantor to refrain from disposing of the land in the way specified without performing the obligation to the grantee to give the grantee the rights to be conferred on the grantee. The nature of a right of pre-emption or a right of first refusal has been described in this way in a number of cases, for example, Manchester Ship Canal Co v Manchester Racecourse Co [1901] 2 Ch 37 at 51, Mackay v Wilson (1947) 47 SR (NSW) 315 at 325 and Pritchard v Briggs [1980] Ch 338 at 389G – 390C.

55. The entry of a notice to protect the priority of a right of pre-emption does not have the effect of preventing a disposition of the relevant land in breach of the negative obligation referred to above. The notice operates in a different way to give the right of pre-emption priority over the disposition. However, the entry of a suitably worded restriction to give effect to the negative obligation would have the effect of preventing the unlawfulness involved in a disposition in breach of that negative obligation. In that sense, it can be said that the entry of a restriction is necessary to prevent the relevant unlawfulness for the purposes of section 42(1)(a).

56. As to the meaning of "necessary or desirable" for the purpose of preventing unlawfulness, I doubt if it was intended that the Registrar should inquire into the background facts in order to assess the risk of unlawfulness actually occurring, in the absence of a restriction, and to conclude that a restriction was only necessary or desirable if there was a sufficient risk of such unlawfulness happening. In the typical case, the registrar would not be in any position to form that assessment. That reasoning suggests to me that where a restriction would prevent unlawfulness which could otherwise occur then the restriction is necessary to prevent unlawfulness. The difference between the two types of rights of pre-emption, referred to in paragraph 54 above, should not matter when one applies the test as to whether the entry of a restriction is "necessary or desirable".

57. In such a case, the registrar "may", but is not obliged to, enter a restriction. Section 42 does not spell out the considerations which the registrar might properly take into account when determining whether to exercise the power to enter a restriction. It may be relevant in this context to refer to section 43(3) which provides that where the registrar is asked to enter a non-standard restriction, he must consider whether the terms of the proposed restriction are reasonable and whether applying the proposed restriction would be straightforward and would not place an unreasonable burden on him. The registrar's decision under section 43(3) will affect his decision under section 42(1) as to whether the entry of a restriction is appropriate. I do not consider that it is necessary or desirable to attempt to define all of the considerations which a registrar might properly take into account when determining whether to exercise his power to enter a restriction. Mr Gore pointed out that in the case of Title No. NK211881 the registrar did enter the restriction which had been applied for without raising any difficulty about it.

58. It was agreed that where the registered proprietor objects to the registration of a restriction and the objection is referred to the FtT then it is for the FtT to consider the application of section 42 to the facts of the case. Therefore, it was for the FtT in this case to consider whether it was appropriate to exercise the power to enter a restriction in this case. On this appeal from the decision of the FtT it is necessary to consider why the FtT decided to direct the cancellation of the application for a restriction in relation to Title No. NK171471. As the FtT explained, the ratio of the decision was not that paragraph 4 was void or that it was spent but was some other reason.

59. The FtT recorded the submissions made for the Laws as being that all rights of pre-emption should be the subject of a restriction: see paragraph 78 of the decision. The FtT recorded the submissions for the Haiders that there had to be special circumstances to justify the entry of a restriction in a case where the right of pre-emption was protected by a notice: see paragraph 77 of the decision. The FtT preferred the submission that there had to be special circumstances to justify the entry of a restriction in such a case. The FtT held that special circumstances might include a case where the grantor agreed to the entry of a restriction or expressly agreed not to effect a disposition: see paragraph 82 of the decision. The reference to express agreements was included to accommodate the guidance given in paragraph 6.6 of Land Registry Practice Guide 19 which referred to option agreements and rights of pre-emption and explained that the priority of those interests could be protected by notice. Paragraph 6.6 then stated that if the agreement expressly limited the registered proprietor's powers to make a disposition, it might also be possible to apply for the entry of a restriction to prevent a breach of this provision. This statement was similar to a statement made in relation to contracts for sale in paragraph 6.3 of the Practice Guide. Paragraphs 6.3 and 6.6 did not expressly state that the existence of an express restriction in the contract for sale or the option or the right of pre-emption was the only circumstance where a restriction might be appropriate but it was the only circumstance which was expressly identified in the Practice Guide.

60. The distinction between a case where the right of pre-emption contains an express restriction on dispositions and a case where the right of pre-emption does not expressly so provide (but where the nature of the right carries with it the negative obligation not to dispose) is not provided for in the language of section 42. There is no obvious reason why a restriction should be necessary or desirable to prevent unlawfulness in one case but not in the other. The two cases give rise to the same considerations in that respect. There is the separate issue whether it is appropriate for the registrar to enter a restriction: section 42(1) provides that the registrar "may" enter a restriction. Where the agreement expressly states that a restriction may be entered that will be a good reason for entering a restriction. If the agreement expressly limits the registered proprietor's powers to make a disposition, the effect of the agreement will be clear and it will normally be appropriate to enter a restriction. If the agreement does not expressly limit the registered proprietor's powers to make a disposition, it will still normally be clear that the right of pre-emption carries with it the negative obligation not to effect the specified kind of disposition without first complying with the obligations owed to the

grantee of the right of pre-emption. I do not think that the difference between the two types of right of pre-emption, referred to in paragraph 54 above, should play any part in the decision whether it is necessary or desirable to enter an restriction to prevent unlawfulness nor in the separate question as to whether it is appropriate to enter a restriction.

61. Further, the FtT's reasoning that there had to be special circumstances before the registrar entered a restriction, in addition to a notice, is not based on anything in section 42. I cannot see why the generality of the statutory power to enter a restriction should be cut down in this way.

62. Accordingly, on the basis of the submissions made to the FtT, my provisional view is that the Laws have shown that the entry of a restriction is necessary or desirable to prevent a disposition in breach of paragraph 4 and there were no reasons identified before the FtT why the power to enter a restriction should not be exercised.

63. My approach to the question whether it is appropriate to enter a restriction in this case is in keeping with, or not contrary to, the way in which the subject is discussed in a number of textbooks and other places which were cited to me, namely, the Law Commission Report, Land Registration for the Twenty-first Century, Law Com No. 271 at para. 6.40, Megarry & Wade, the Law of Real Property, 8th ed. at para. 7-078, Ruoff & Roper on Registered Conveyancing at para. 44.005, Emmett and Farrand on Title at para. 10.008 and Barnsley's Land Options, 6th ed. at para. 6-048.

64. The FtT was influenced by paragraph 6.6 of Land Registry Practice Guide 19. Paragraph 6.6 refers to the case of an option or a right of pre-emption containing a term which expressly limits the registered proprietor's powers to make any kind of disposition and states that an application can be made to enter a restriction to prevent a breach of this provision. No doubt, such a case is within section 42(1)(a). But the application of section 42(1)(a) is not limited to such a case and the Practice Guide should not be read as having that effect.

65. I note that paragraph 6.3 of the Practice Guide has a similar statement in relation to contracts for sale. It may be that the thinking behind paragraph 6.3 is that it should not become routine practice to enter a restriction in relation to every contract for sale, even though a vendor under a contract for sale would be acting unlawfully if he disposed of the property to someone other than the purchaser without the purchaser's consent. It may be that there is normally no real need for a restriction in the case of a contract of sale because the priority of the contract of sale can be protected by the entry of an agreed or a unilateral notice, so that if the vendor transfers the land to a third party in breach of contract it would normally be sufficient protection for the contracting purchaser to enforce the contract against that third party. Further, the period of time involved between the making of the contract for sale and completion of that contract is usually fairly short.

66. The position under a right of pre-emption is different from the position under a typical contract for sale. First of all, the period between the grant of a right of pre-emption and its exercise may be many years. During that period, the

effective obligation on the grantor, even in the absence of an express provision to that effect, is the negative obligation not to carry out the specified disposition without offering the land to the grantee. Secondly, as discussed below, the remedy of the grantee of the right of pre-emption against a transferee who has become registered following a breach of contract by the grantor of the right of pre-emption may not always be entirely straightforward. In these circumstances, I consider that in a typical case, it should be considered appropriate for the grantee of a right of pre-emption to enter a suitably worded restriction in addition to entering a notice.

67. On this appeal, Mr Rolfe made a detailed submission as to the effect of the notices to protect the right under paragraph 4 on the position of a third party to whom the land had been sold and transferred in breach of the negative obligation on the Haiders not to sell the land without giving to the Laws the first option to purchase. Mr Rolfe's argument depended on his analysis of the decision of the Court of Appeal in Tiffany Investments Ltd v Bircham & Co Nominees (No. 2) Ltd [2004] 2 P&CR 10 ("Tiffany"). Before considering that case, it is useful to step back to the law as it was before section 115 of the Land Registration Act 2002 and, in particular, to the law as declared by Pritchard v Briggs [1980] Ch 338.

68. Pritchard v Briggs [1980] Ch 338 held that a right of pre-emption was, at least initially, an inchoate right which was not an interest in land. The right ceased to be inchoate and became an interest in land when certain events occurred. According to the majority view in that case, one such event was where the grantor disposed of the land in breach of the express or implied negative obligation not to dispose of the land: see [1980] Ch at 418H per Templeman LJ (with whom Stephenson LJ agreed) which view was applied in Kling v Keston (1983) 29 P&CR 212 and in Tiffany.

69. In Tiffany, the facts were somewhat unusual. In that case, a covenant in a lease provided that if the lessee wished to assign the lease, it had to offer the same to the lessor at a price to be stated by the lessee. In 1986, the then lessee (the Bailies) contracted to assign the lease to a purchaser (Tiffany) for £250,000. The Bailies did not at that stage, or at all, offer to assign the lease to the lessor for £250,000. Tiffany paid the purchase price but did not take an assignment of the lease. In 1999, Tiffany agreed to sell the lease to a new purchaser for £475,000. Issues arose as to the rights of the lessor. It was held that the contract of sale in 1986 between the Bailies and Tiffany had been a breach of the negative obligation not to assign the lease without offering it to the lessor. That breach was an event which changed the right of pre-emption from an inchoate right, which had not been an interest in land, into an interest in land in favour of the lessor. The lessor therefore had an interest in land which was prior in time to the rights of the contracting purchaser in 1999. This reasoning involved the application of the majority view in Pritchard v Briggs [1980] Ch 338 at 418H.

70. In Tiffany, what mattered was when the right of pre-emption changed its character from something which was not an interest in land into an interest in land. That precise question does not arise in the present case because the effect of section 115 of the Land Registration Act 2002 is that paragraph 4 created an

interest in land throughout. However, the reasoning in Tiffany seems to me to continue to be applicable in the present case in that it can be said that the inchoate right initially created by paragraph 4 would change its character so as to give the Laws a right in the nature of an option in the event of the Haiders selling the land to a third party in breach of the negative obligation not to do so.

71. Mr Rolfe argued that if the Haiders were to sell the land to a third party in breach of paragraph 4, the rights of the Laws under paragraph 4 (the priority of which is protected by the notices) would be binding upon the third party even when the transfer to the third party is registered. Mr Rolfe then submitted that the Laws would be entitled to require the third party to sell the land to them for the price paid by the third party to the Haiders. In support of this submission, Mr Rolfe can point to the reasoning in Tiffany at [38]. In that case, no offer to assign the lease to the lessor had been made in 1986 by the Bailies or by Tiffany. There was a later offer by the Bailies to assign the lease to the lessor for £475,000 but that was not relevant for present purposes. It was argued for Tiffany that the lessor could not acquire a right to take an assignment of the lease without an offer to assign to the lessor, not least because the covenant in the lease required the offer to specify the offer price. At [38], Sir Andrew Morritt V-C (with whom Waller and Sedley LJJ agreed) held that the terms of the 1986 contract between the Bailies and Tiffany supplied the price and the terms of an offer to the lessor. Further, it would be inconsistent with the majority view in Pritchard v Briggs to hold that the failure to give an offer notice could defeat the consequence of the breach of the obligation not to assign the lease.

72. I accept Mr Rolfe's analysis of the decision in Tiffany. In a straightforward case where the Haiders sold the land to a third party, the Laws could seek to enforce paragraph 4 against the third party and to purchase the land from the third party at the price paid by the third party. However, I am in some doubt as to what would happen if the sale to a third party was not a wholly straightforward case. What if the Haiders sold the land at an undervalue to a family member? Would the Laws be entitled to purchase the land at the price paid by the family member or would the Laws only be entitled to purchase at the price stated in an offer notice given by the Haiders or by the family member?

73. Before coming to my conclusion in response to Mr Rolfe's submissions as to the position of a purchaser of the land who has become the registered proprietor of it, I add for the sake of completeness that it might in some circumstances be possible for the Laws to require a purchaser from the Laws to re-transfer the land to the Haiders, on the ground that the sale by the Laws to the purchaser had involved a breach of contract by the Laws and also, on the part of the purchaser, the tort of inducing a breach of contract: see Barnsley's Land Options 6th ed. at paras. 6-092 and 6-094. The Laws could then enforce the right of pre-emption as against the Haiders.

74. My reaction to Mr Rolfe's submissions is that the priority conferred on the rights of the Laws by reason of the notices would give them considerable protection in the event of the Haiders disposing of the land in breach of

paragraph 4. However, a restriction would give the Laws a different kind of protection in that it would prevent there being a disposal of the land to a third party in breach of paragraph 4 in the first place. I cannot see that the fact that the Laws would have some, even considerable, protection in the event of a breach by the Haiders is itself a reason to deny the Laws the different, and better, protection which they would enjoy if a restriction were to be entered, so as to prevent a breach of paragraph 4 in the first place. Accordingly, I am not persuaded that the entry of a restriction should be rejected on this ground.

75. So far, I consider that all relevant considerations point to the appropriateness of entering a restriction in this case. However, Mr Rolfe had a further point. He referred to the draft restriction which required a certificate from the Laws or their conveyancer to allow a certain disposition to be registered. He relied upon the finding of the FtT that in the past the Laws had acted in a way which was designed to create difficulties for the Haiders when attempting to sell their property. I would not wish to allow the Laws to use the entry of a restriction as a means of causing difficulties in the future. The purpose of a restriction is to prevent unlawfulness on the part of the Haiders and thereby to protect the rights of the Laws. A restriction must not be used for an ulterior purpose to place the Haiders at a disadvantage from which the Laws could seek to benefit.

76. If the Laws were to act wrongfully in withholding a certificate referred to in the restriction, then the Haiders could take steps to remedy the position. They could apply to the registrar to disapply the restriction. That procedure might take time if the Laws objected and the objection had to be determined by the FtT. Another possibility would be for the Haiders to apply in the Chancery Division for an order vacating the restriction under the jurisdiction recognised in Nugent v Nugent [2015] Ch 121. That jurisdiction can be exercised on an interim application to the court and the established practice is to adopt a robust approach to the determination of any issues between the parties. Further, if the Laws showed that they had an arguable case to maintain the restriction, the court would have power to permit the restriction to remain but only if the Laws gave an undertaking in damages. The existence of that jurisdiction caused me to consider whether it would be open to me on the hearing of this appeal to permit a restriction to be entered only if it contained an express agreement by the Laws that they would be responsible for any losses caused to the Haiders as a result of the Laws wrongfully refusing or delaying to give a certificate pursuant to the terms of the restriction. However, this possibility was not suggested in argument, is not part of the general practice of the Land Registry and I can see difficulties arising if it were to be adopted.

77. Notwithstanding the point raised as to the scope for the Laws to misuse the benefits conferred on them by a restriction, my overall conclusion is that the arguments in favour of a restriction outweigh this consideration.

78. I remind myself that this is an appeal from the decision of the FtT not to permit the entry of a restriction. I should not interfere with the decision of the FtT unless it disclosed an error of principle. However, I conclude that the FtT did go wrong in principle in not adopting the reasoning which I have set out

above and in holding that there had to be special circumstances to justify the entry of a restriction in respect of the right of pre-emption in this case.

79. Accordingly, subject to one further point, I would be minded to allow the appeal and permit the entry of a restriction in respect of the right of pre-emption in this case.

80. The further point could arise under section 43(3) if the appropriate form of restriction was not in one of the prescribed standard forms in schedule 4 to the Rules. Before I consider that point, I need to address further issues which were argued as to the appropriate wording for a restriction in this case.

What should be the terms of the restriction?

81. In view of my decision that, in principle, the Laws ought to be able to enter a restriction in this case, the question arises as to the terms of such a restriction. The restriction which was applied for used the following wording:

> "No disposition of the registered estate (other than a charge) by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction is to be registered … "

82. The restriction which was applied for referred to "no disposition of the registered estate". The right of pre-emption referred to "the event of … selling any or all of the remaining land". The word "disposition" is wider than the ordinary meaning of "sale". Prima facie, therefore, any restriction entered in this case should not be in the wide terms which were applied for. Prima facie, the restriction should follow the wording of paragraph 4 and say something like: "no sale of the registered estate or any part of it by the proprietor of the registered estate is to be registered".

83. A number of questions were raised at the hearing as to the scope of the restriction which should be entered. Is a gift by the Haiders of any or all of the relevant land a trigger event for the purposes of paragraph 4? Is a lease for a long term in return for a premium a trigger event? If the Haiders were to charge the land and the proprietor of the charge were to wish to sell the land, would that be a trigger event? Following the hearing, counsel made further written submissions on the questions as to the effect of a proposed gift or lease of the land.

84. The right of pre-emption refers to the Haiders "selling" and gives the Laws the first option of "purchasing". The reference to "selling" does not, in my judgment, extend to an intended gift of the land. At the hearing, it was suggested that it might be appropriate to imply a term which would prevent the Haiders making a gift of the land or, alternatively, a term to the effect that an intended gift would be a trigger event for the purposes of the right of pre-emption. My initial reaction to those suggestions was that neither of these terms was appropriate. There are a number of dealings with the land which the Haiders might wish to carry out which are not expressly prevented by the right of pre-emption. One such dealing is a gift. Another is a charge. It might have

been reasonable for the parties to have considered these possibilities and to have discussed what the position should be in those respects. However, the right as granted contains no express terms dealing with those matters. As regards the suggestion that one should imply a term that an intended gift should be a further trigger event, that would involve a considerable extension to what had been expressed, namely, that the trigger event was an intended sale. The suggested implied terms are not necessary to give business efficacy to paragraph 4 and it is not obvious to me that they would have been immediately agreed in the course of negotiations if they had then been sought.

85. However, Gardner v Coutts & Co [1968] 1 WLR 173 provides some support for the suggestion that there should be an implied term making an intended gift a further trigger event. The wording of the right in that case was different from the right in the present case and the detailed wording was considered to have some bearing on the decision in that case. However, there are also general comments which appear to be of wider application to the effect that the scheme of a right of pre-emption suggests that the grantor should not be able to defeat the right by giving the land away: see at 179B.

86. Gardner v Coutts & Co was considered by the Court of Appeal in Nicholson v Markham (1997) 75 P&CR 428. The Court of Appeal did not hold that the decision in Gardner v Coutts & Co was wrong but they distinguished it in terms which make it difficult to say that every right of pre-emption which defines the trigger event as "a sale" carries with it the implication that a gift will also be a trigger event.

87. In his written submissions following the hearing, Mr Gore accepted that it would be difficult to argue in this case that a term should be implied to the effect that an intended gift was a further trigger event. I agree. In this case, I hold that an intended gift is not a trigger event for the Haiders' obligation to offer the land to the Laws. I also hold that there is no implied term preventing the Haiders making a gift of the land.

88. The significance of this ruling needs to be considered together with the Laws' acceptance that the trigger event is an intended sale by "the [Haiders] or their estates" and that this wording does not extend to an intended sale by successors in title of the Haiders, apart from their personal representatives. Accordingly, if the Haiders did give the land away and the donee later wished to sell the land, the donee's intended sale would not be a trigger event for the right of pre-emption.

89. I now turn to consider whether the grant of a lease could be a trigger event for the purposes of the right of pre-emption. Such a question has been referred to, inconclusively, in some of the cases dealing with such rights: see Smith v Morgan [1971] 1 WLR 803 at 809A and Murray v Two Strokes Ltd [1973] 1 WLR 823 at 825H.

90. Mr Gore submitted that there must be cases, such as the case of a grant of a lease for 999 years at a substantial premium and at a peppercorn rent which should be regarded as a sale for the purposes of the right of pre-emption in this

case. Mr Rolfe submitted that no lease could be a sale. Neither counsel referred to any authority to support their submissions.

91. I start with the words of the grant and the background circumstances in this case. Paragraph 4 refers to the Haiders "selling … the … land" and gives the Laws the first option "to purchase that land". At the time of the agreement, all of the land was owned freehold by the Haiders and there was no tenancy or lease of any part of it. Paragraph 4 refers to the title number in relation to the Woodland but does not give the title number in relation to the Meadows. The registered title in relation to the Woodland is a freehold registered title.

92. There is no real doubt about the ordinary legal meaning of "selling" in relation to land. A "sale" of land involves the transfer of the seller's title to the land. (It is not necessary in the present context to consider whether the "sale" occurs at the time of the contract to sell or on completion of that contract although I have already discussed that subject in paragraph 26 above.) Thus, if the land is freehold, a sale of it involves the transfer of the freehold title. On this basis, the grant of a lease out of a freehold title is not a sale. If the land is itself a leasehold title, a sale of it involves the transfer of that leasehold title but would not extend to granting a sub-lease out of the leasehold title.

93. Mr Gore is right that there may be little difference in economic terms between a sale of a freehold for a certain price and the grant of a lease of the same land for 999 years at a peppercorn rent for the same price. However, there is certainly a difference in legal terms between the two transactions as regards tenure and the respective rights and obligations arising from the relationship of vendor and purchaser as compared with the relationship of lessor and lessee.

94. I have considered whether there might be an available popular meaning for "selling" which extended to the grant of a long lease at a nominal rent in return for a premium. If there is such a popular meaning, I would not be inclined to apply it in the present context. Leases may be for a range of lengths of terms from very short to very long. Where on that range would one draw the line between a lease which is not a sale and a lease which in popular parlance could be a sale? Similarly, there is a range of terms as to premiums and rent. The rent may be nominal or a small ground rent or a rent which is below rack rent and the premium is calculated accordingly. Where in that range would one say that a lease becomes a sale?

95. Mr Gore might say that the difficulty with the range of lengths of term and the range of rents/premiums should be avoided by saying that one can recognise a lease which is a sale when one sees it even if one could not define with precision the point in the range when a lease becomes a sale. I am not persuaded by this argument. The question arises in relation to a contractual provision. The words of the provision must be given a meaning which is sufficiently clear for the parties to know where they stand. The only way of doing that is to hold that no lease granted out of freehold land is to be equated with a sale of that land.

96. The last matter I will consider is the wording in the draft restriction which refers to a disposition by the proprietor of any registered charge. Even if one

substitutes “sale” for “disposition” in this part of the draft restriction, it does not seem to me that this part of the draft restriction is appropriate. A charge by the Haiders is not a trigger event. A sale by the chargee in the exercise of its powers of sale is not a sale by the Haiders or their estates and, accordingly, is not a trigger event either.

97. Having reached these conclusions as to the types of transactions which should not be registered unless the Haiders had complied with the right of pre-emption, the next question relates to the expression of the restriction and whether a standard form of restriction can be adopted. The closest standard form is Form L. The standard wording in that case is:

> “No [disposition or *specify type of disposition*] of the registered estate … ”

98. It is obviously necessary in this case to specify a “type of disposition”. Can the restriction say: “No sale of the registered estate or any part of it” or “No transfer (by way of a sale) of the registered estate or any part of it” or does one have to say: “No transfer of the registered estate or any part of it”? In other words, is “a transfer (by way of sale)” a “type” of disposition? The third formulation is inappropriate as it would catch a transfer by way of gift and a lease. I consider that it ought to be possible to use the first or the second formulation as the specification of a “type” of disposition within the wording of Form L. Out of the first two possibilities, I prefer the second. I recognise that such wording introduces a distinction between transfers by way of sale and other transfers and that might involve the registrar having to determine an issue which arises from that distinction.

99. If I am wrong about the possible use of Form L, suitably adapted, in this case then the appropriate restriction will be a non-standard restriction to which section 43 applies. This can only be used if it appears to the registrar that the terms of the restriction are reasonable and that applying the restriction would be straightforward and not place an unreasonable burden on him. Procedurally in this case, I consider that such an assessment can be made by the Upper Tribunal on this appeal and I do not have to remit the matter to the registrar. On that basis, I consider that the proposed restriction would be reasonable and its application would be straightforward and would not place an unreasonable burden on the registrar. As before, I recognise that a reference to a sale in the restriction might give rise to an issue that needs to be resolved but nonetheless I am satisfied that approval under section 43(3) ought to be given.

Conclusion

100. I will allow the appeal and will permit the entry of a restriction on Title No. 171471 in accordance with the detailed findings in this decision.

101. This decision has obvious implications for the restriction in relation to Title No. NK211811. Although that title is not formally the subject of this appeal, my decision should apply to that title also and the Laws should take the appropriate steps either to withdraw the present restriction on that title and

apply to enter an appropriate restriction (referring to a transfer by way of sale) or should take the appropriate steps to modify the present restriction.

102. This case has raised a large number of points, some of which were far from straightforward. I am grateful to counsel for their able submissions. I also derived considerable assistance from the detailed discussion of rights of pre-emption in chapter 6 of Barnsley's Land Options, 6th ed.

MR JUSTICE MORGAN

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