Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NOS. ERC.63 OF 1995 AND 418 OF 1995

IN THE MATTER OF an Application by HALF MOON BAY LIMITED - Application under Sections 5 & 6 of the Restrictive Covenants (Discharge and Modification)

AND

IN THE MATTER of Restrictive Covenants affecting three parcels of land registered (1) Volume 770 Folio 71; (2) Volume 770 Folio 72 and (3) Volume 787 Folio 98 registered in the name of Crown Eagle Hotels Limited - Respondent on the (1) 19th day of October, 1994 transfer No.828537 (2) 19th day of October, 1994 transfer No. 828537 (3) 20th January, 1995 respectively, all being the same transfer number.

| BETWEEN | HALF MOON BAY LIMITED | APPLICANT |
|---|---|---|
| A N D | CROWN EAGLE HOTELS LIMITED | RESPONDENT |

Mr. Bertham McCaulay Q.C. and Mr. R. Francis instructed by Mrs. Margaret McCaulay for Applicant.

Mr. Gordon Robinson instructed by Messrs. Nunes Scholefield, DeLeon & Company for Respondent.

Heard: March 18, 19, 20, 21 & April 18, 1996

LANGRIN, J.

This is an application by Motion on behalf of Half Moon Bay Limited under Sections 5 and 6 of the Restrictive Covenants (Discharge and Modification) Act seeking the following declarations:

1. That the land registered in the Book of Register of Titles at (1) Volume 770 Folio 71 (2) Volume 770 Folio 72 (3) Volume 787 Folio 98 are affected by the Restrictions referred to in the Consent Order of Mr. Justice Malcolm dated the 3rd day of September 1974 in the Suit C.L. 122 of 1971 and the affidavit of B.C.O.'B Nation dated 22nd June, 1971.

(2) That the said Restrictive Covenants are enforceable by the applicant herein, Half Moon Bay Limited.

The respondent, Crown Eagle Hotels Limited has also filed an application in Suit No. E.418 under Section 5 of the Restrictive Covenants (Discharge and Modification) Act seeking a declaration that the said covenants are personal only and therefore do not run with the land.

The Restrictive Covenants (Discharge and Modification) Act so far as is relevant provides as follows:

Section 5. "The Supreme Court shall have power on the application by motion of the Town and Country Planning Authority or any person interested -

(a) to declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or

(b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and is so, by whom.

6. An Order may be made under this Act notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with may not have been produced to the Court, ............., and the Court or Judge may act on such evidence of that instrument as the Court or Judge may think sufficient".

Both motions were consolidated but the parties agreed to proceed with Suit No. E.C.63 of 1995. This motion was filed on the 20th February, 1995. On the 23rd February 1995 an exparte injunction was granted restraining the respondent in terms of the covenants for a period of seven days from the 23rd February, 1995 with respect to the three parcels of land. No application for interlocutory injunction was made in this matter. However, at the very outset of the hearing of the motion before me an application

was made to amend the motion by asking for prohibitory and mandatory injunction as well as damages. I refused to grant the amendment on the basis that where the statute had provided for an exclusive remedy by way of declaration in respect of interpretation of restrictions affecting land, other remedies such as injunction or damages should not be granted.

In reaching that view I am also following the decision in Eldermire v. Eldermire P/C Appeal 33/89 in order to produce fairness and clarification.

Crown Eagle Hotels Limited is the registered proprietor of the lands comprised in Certificates of Title registered at Volume 814 Folio 21 and Volume 979 Folio 136 on which the main buildings housing the Holiday Inn Hotel are erected, hereinafter referred to as the 'Main Hotel'. They acquired this property from Rose Hall (H.I) Limited and the Certificate of Title in respect of the MAIN HOTEL were transferred to them on the 19th October, 1994.

The respondent, Crown Eagle Hotels Limited is also the owner of lands which adjoin the MAIN HOTEL comprised in three Certificates of Title registered at Volume 1231 Folios 784 and 785 (formerly Volume 770 Folios 72 and 71 respectively both of which were cancelled on the 17th December, 1990) and Volume 787 Folio 98. These three parcels are known as the ROCAMORA LANDS. The ROCAMORA LANDS were transferred from Norman Rocamora to HALF MOON BAY LIMITED on the 1st March 1966. They were transferred from Half Moon Hotel Limited to Rose Hall (Development) Limited at a price of US$125,000.00 by transfer No.220319 dated the 12th July, 1966 and registered on the 20th October, 1966. It is the instrument of transfer which contained the Restrictive Covenants which are the subject of the application before this Court. Rose Hall (Develiopments) Limited which acquired the land from the applicant, Half Moon Bay Limited transferred same to the Urban Development Corporation (UDC) by way of exchange pursuant to an agreement between John Rollins who had a controlling interest in Rose Hall (Developments) Limited and the Government of Jamaica. This transfer was registered on the 28th August, 1990 but was not expressly made subject to the covenants. The respondent

purchased the Rocamora Lands from the Urban Development Corporation at the same time as its purchase of the MAIN HOTEL.

Crown Eagle Hotels Limited is therefore the owner of the Main Hotel and the Rocamora LANDS which adjoin the hotel. Half Moon Bay Limited operates a Hotel on property which adjoins the Rocamora Lands.

None of the Restrictive Covenants which are relevant to the application are actually endorsed on the titles in respect of Rocamora Lands (i.e. Volume 1231 Folios 784 and 785 (formerly Volume 770 Folios 72 and 71) and Volume 787 Folio 98). The Certificates of Title appear to be subject to Caveat No.77113 lodged by the Registrar of Titles on the 17th March 1971. The effect of such Caveat was to require any future transfer of the lands (then Volume 770 Folios 71 and 72 and Volume 787 Folio 98) to be made subject to the Restrictive Covenants contained in instrument of Transfer No.220310. The directive in the Caveat to actually endorse the covenants has not been complied with although the lands would have been transferred after the caveat was lodged and endorsement of the Restrictive Covenants on any future transfer was a requirement of the Caveat. The Titles at Volume 1231 Folios 784 and 785 and dated the 17th December 1990 and came into existence after the lands were transferred to the Urban Development Corporation. There is no endorsement of the Restrictive Covenants on these titles.

In both applications before the Court the instrument of transfer No.220319 dated 12th July 1966 which imposed the restrictions cannot be located by the Office of Titles as a result of which the applicant relies on Section 6 of the Act which empowers the Court to act on such evidence of that instrument as the Court thinks sufficient to make the Order. In the instant case the covenants and the applicable words are clearly evidenced in other documents before the Court and so in all the circumstances the Court will act on it to determine the vital issue in the case.

The Restrictive Covenants were contained in paragraphs 2 and 3 of Instrument of Transfer No.220319 and are recited hereunder:-

"The purchaser for itself its successor and assigns as to the three parcels hereby transferred and with the intent to bind all persons in whom the three parcels or any part thereof shall for the time being be vested hereby Covenants with the vendor its successors and assigns:

(a) Not to erect on the three parcels or any part thereof any building other than single family houses and in any event the three parcels when built upon shall not contain an aggregate of more than twelve houses and no such house shall exceed two storeys in height.

(b) No business other than that of renting a house for family occupancy shall be carried on the three parcels or any part thereof.

(c) No beach improvement shall be effected in relation to the three parcels or any part thereof which shall be detrimental to the beach of Half Moon Hotel (owned by the Vendor)".

In Suit No. C.L. 122 of 1971, the applicant Half Moon Bay Limited sued Rose Hall (Developments) Limited - the former owner of the Rocamora Lands), Rose Hall (H.I) Limited (the owner of the hotel) and Holiday Inns of the Bahamas Limited (the then tenant) claiming inter alia the following relief:-

(i) to restrict the use of the Rocamora LANDS insofar as the same was used for the playing of tennis;

(ii) to enforce the covenants contained in the aforesaid transfer No.220319.

A Consent Judgment was entered on the 3rd September 1974 in Suit No.122 of 1971 - Half Moon Bay Limited v. Rose Hall (Development) Limited Rose Hall (H.I) Limited and Holiday Inns of the Bahamas Limited. Under paragraph 4 it was agreed by the parties to the Suit that the covenants recited in Transfer No.220313 would be endorsed upon the three Certificates of Title which constitute the Rocamora LANDS. The Consent Judgment entered into between the parties on the 3rd September, 1974 is set out in its entirety below:-

Consent Judgment

By and with the consent of the parties it is Hereby Ordered:

"That the Defendants and each of their servants or agents be restrained from

causing suffering or permitting the playing of tennis as a business or in relation to any other business, or the carrying on of any other activity offered as an amenity by or in the course of conducting the business of Holiday Inn Hotel (or however the same maybe called or known) on the said lands known as Rocamora Lands comprised in Certificates of Titles registered at Volume 770 Folio 71 Volume 770 Folio 72 Volume 787 Folio 98.

2. That enforcement of this injunction made in paragraph1hereof be suspended for a period of fifteen months (15) as from the date of this order (3rd September 1974) on terms that in this period which will end on the 2nd December, 1975 the Defendants, their servants and agents are permitted to continue their present user of the said lands for the purpose of playing tennis and the carrying on of any other activity now being offered as an amenity of or by Holiday Inn Hotel provided that such tennis and all ancillary activities connected therewith and all other activities aforementioned shall cease and the tennis courts lights be turned off at 9:30 p.m. each and every day and be not lit again until the following afternoon or evening.

Provided that on breach of the provisions above relating to the time at which such activities shall cease and the tennis courts lights be turned off, this suspension of the injunction shall cease and determine and the injunction at once have full force and effect.

3. THAT as a term of this order and in consideration of the suspension of the enforcement of the said injunction, the defendants and each of them agree and it is hereby Ordered that not later than the 2nd December, 1975 the Defendants do remove and keep removed from the said lands the said tennis courts lights and all other equipment thereon relating to or used in connection with the said activities referred to in paragraphs 1 and 2 above.

4. THAT by and with the consent of the parties it is also agreed and is hereby ordered that the covenants contained in paragraphs 2 and 3 of transfer 220319 (as set out in the affidavit of Mr. B.C. O'B Nation filed in this action dated the 22nd of June 1971 exhibiting his office copy of the said Transfer) be endorsed upon the said Certificates of Title referred to in paragraph 1 which shall be transmitted within thirty (30) days of this order to the Registrar of Titles for that purpose.

> AND it is further agreed that upon the said Titles being so endorsed the caveat filed by the plaintiffs herein dated the 17th March, 1971 against the said titles shall be withdrawn."

It is significant to note that the Covenants were never endorsed on the certificates as required by paragraph 4 of the Consent Judgment or the Caveat as stated above.

The effect of the Consent Judgment is that it can only be binding on the parties to the proceedings i.e. Rose Hall (Development) Limited, Rose Hall (H.I) Limited and Holiday INNs of the Bahamas Limited. Crown Eagle Hotels Limited, the current owner - not having been a party to these proceedings cannot be bound by the Consent Order made. That Consent Order is in every sense a contract and derives its force having regard to the circumstances at the time. Such a Consent Judgment operates in personam - i.e. against the parties in the proceedings only.

With the consent of the parties Mr. Heinz Simonitsch was cross-examined on his affidavits. The salient facts which emerged are as follows:-

1. He has been managing Director of Applicant's Company since 1962 and resides on the property. The Rocamora Lands were purchased by Applicant on the recommendation of several directors including himself in order to afford protection to the western end of the property, mainly Cottage No.1. This cottage is where celebrities, government heads and Royalties stay and have been staying over the years. They come to the Hotel to secure privacy, security, relaxation and peace. In the past guests include, Princess Margaret, the late President John F. Kennedy and Eddie Murphy.

2. Subsequent to the conclusion of the purchase of Rocamora Lands Mr. John Rollins who owned 50% interest in both Half Moon Limited and Rose Hall Limited approached Half Moon Limited to sell Rocamora Lands to Rose Hall Limited. The lands were sold primarily because the Board wanted to have a good relationship with John Rollins since he owned one-half interest in both adjoining hotels.

3. Under the Hotels Incentives Act, the Minister of Industry,

Tourism and Commerce on the 6th December 1994 made an Order which is cited as the approved Extension (Holiday Inn Ocean Beach Resort) Order 1974. The Order relates to an extension to be made to the Holiday Inn Ocean Beach Resort pursuant to an application by Crown Eagle Hotels Limited dated 10th August, 1974.

4. When the Rocamora Lands were sold to John Rollins none of the lands were retained by Half Moon Bay Limited. All three lots were sold to one purchaser.

Mr. Geoffrey Messado, Director of Crown Eagle Hotels Limited was cross-examined at length on his affidavits. His testimony was forthright and honest. In the main it turned on the alleged threatened breaches of the relevant covenants.

Mr. Gordon Robinson, on behalf of Crown Eagle Hotels Limited with his usual clarity and skill submitted that having regard to the words used to impose the covenants, the covenants in question are personal or collateral covenants and do not run with the land as:-

(a) the benefit of the covenant was not expressly annexed to any land.

(b) the covenants were not made with the Respondent, Half Moon Bay Limited as the owner of any particular parcel of land and those claiming under them as owner of any particular parcel of land to be benefitted and,

(2) The circumstances of the instant case are not such as could create a Scheme of Development or building scheme capable of annexing the covenants to the land.

Mr. McCaulay concedes any reliance on a building scheme.

I shall now proceed to an examination of the legal issues involved.

For the applicant to succeed in obtaining the declarations sought I am required to be satisfied that the applicant is entitled to the benefit of the restrictions purportedly running with the servient land.

A Restrictive Covenant cannot run with the land and thereby bind persons not parties to the original covenant, unless it is for the benefit or protection of land and if it is not, such covenants are generally referred to as personal covenants. Some covenants though having a close connection with land and which are in fact capable of running with land may not run with the land in a particular case because no proper words of annexation were used when the covenants were being imposed. Thus although a covenant maybe capable of running with land and in a particular case be intended by the parties to run that intention may not be achieved. The benefit of a covenant is said to be annexed to a parcel of land in any case where it is entered into for the particular benefit of such land and apt words were used to attach it to the land. See Preston and Newsom 3rd Edition p.13: Restrictive Covenant.

Equity provides three ways in which the benefit of a covenant may pass. These ways are by annexation, assignment and under a building scheme. The only method which is relevant here is annexation.

## Annexation

A$ is clearly stated in Preston and Newsom annexation is the metophorical nailing of the benefit of the restrictive covenant to a clearly defined area of land belonging to the covenantee in such a way that the benefit passes with any subsequent transfer of the covenantee's interest in the land.

Annexation involves a process whereby the original parties to the covenant demonstrate an intention through the words used in the covenant to attach the benefit to the land. Such wording requires clear manifestation of an intention because the effect of annexation is to attach the benefit to the land.

There are three types of annexation which are express, implied and statutory. Because no arguments were advanced on statutory annexation, I will refrain from dealing with that type.

## Express

In view of the fundamental importance placed on the attachment of the benefit of the covenant to the dominant land equity

tended to require one of the following two phrases for annexation to exist:-

(1) that the covenant was taken for the benefit of certain land, or

(2) that the covenant was made with the covenantee in his capacity as owner of the dominant land.

In both cases the dominant land must be identified in the instrument or be ascertainable from the terms of the instrument. Unless (1) or (2) was proved the Courts would hold that the covenant had not been attached. A formula of annexation is embedded in the very document which brings the restrictive covenant into being.

Whether or not the benefit of a restrictive covenant has been annexed is a question of construction. However personal covenants cannot run. The restrictive covenant must be made with the dominant owner as the owner of the dominant land and not just as an individual.

The words which fall to be considered in the instant case are set out in the instrument of transfer No.220319 dated the 12th July, 1996 as follows:-

> "The purchaser for itself its successors and assigns as to the three parcels hereby transferred and with intent to bind all persons in whom the three parcels of any part thereof shall for the time being be vested hereby covenants with the Vendor its successors and assigns ......"

The clear interpretation of the above restriction is that the covenants were for the benefit of the Vendor its successors and assigns. There is no expression of the covenants being for the benefit of any land or made with the vendor as the owner of any particular parcel of land or those claiming under them as owner of any particular parcel of land to be benefitted. Even if it is clear that the parties intended to annex the benefit of the covenant to some land, by express words or necessary implication three further questions arise. The Court must ascertain the identity of the land to which the covenant is annexed, determine upon the construction of the words by which the annexation is effected, whether the covenant is annexed to the whole of the land referred

to as a whole or to such land as a whole and also to each and every part of it; and decide whether the land to which the parties have purported to annex the benefit of the covenant is "touched and concerned" by the covenant; if not the annexation fails.

In Renals v. Cowlishaw (1879) 11 Ch. D. 886 where a purchaser covenanted with the vendors and "their heirs, executors administrators and assigns" not to build on the land conveyed, it was held that the words "assigns" meant merely assignees of the covenant as a separate entity from the land. Therefore upon a later conveyance of the land without mention of the covenant, it did not pass.

However in Rogers v. Hosegood (1900) 2 Ch.388 where a covenant was expressed to be for the benefit of the dominant owners, "their heirs and assigns and others claiming under them to all or any land adjoining", it was held to run with the land, the benefit of the covenant passing with the subsequent conveyance of the land.

In Ives v. Brown (1919) 2 Ch. 314 where the covenant was made with the covenantees "their heirs and assigns" and Sargant J. was of the view that the covenants were inserted because the covenantees were owners of adjoining property and with a view to benefitting them accordingly, the covenant was held not to be annexed as there were no expressed words whereby the covenants were expressed to be for the benefit of any land or made with the covenantee as owner for the time being of such land.

In Jamaica Mutual Life Assurance Society v. Hilsborough Limited etal 38 WIR 192 a case decided by the Privy Council is a clear example of covenants endorsed on the certificate which were not properly annexed as there were no apt words used to achieve annexation. In the Court of Appeal hearing it was held that annexation was not constituted solely by use of a prescribed formula but could be so constituted by intention "ascertained from an examination of the surrounding facts at the time of the sale". The Court went on to find in that case that there was an intention to annex the covenants from the surrounding circumstances. The Privy Council however expressly rejected this reasoning and were of the view that there

were no words in the instrument of Transfer stating that the restrictions therein were for the benefit of any land retained by the vendor though they found that land was in fact retained. In the instant case none of the lots was retained by the vendor.

Recently, the reasoning in the above case was applied in Keith Lamb v. Midac Equipment Limited & Terra Nova 1982 Limited CA 11/94. Here it was held inter alia that the imposition of certain covenants on the respondents' land are personal and only enforceable by the original parties because of the absence of apt words to achieve annexation of the benefit of the covenant.

I shall now proceed to an examination of whether or not the annexation of the benefit of the covenant was implied.

Implied

It may well be true that the vendor owned land adjacent to the Rocamora LANDS which are capable of benefitting or capable of enjoying the benefit of the covenants and it is a fact that the land could be touched and concerned by the covenants. However, notwithstanding this if no apt words were used annexation would fail as a matter of law. Additionally, the applicant did not retain land from a parent title from which the Rocamora Lands were transferred. It acquired the Rocamora Lands independent of its acquisition of any other land which it may have held.

In the final analysis it would seem that there would be no such implication unless:

(a) the covenant is clearly referable to a defined piece of land, and

(b) the parties intended that the benefit should attach to the land, and not merely to the covenantee personally.

Indeed, as Mr. Simonitsch testified the Rocamora Lands were sold to Rose Hall Limited to secure a good relationship between John Rollins and Half Moon Bay Limited since Rollins owned 50% of the interest of Rose Hall Limited, as well as Half Moon Bay Limited.

In applying the principles of law to the available evidence with the invaluable help of the submissions of Counsel for the respondent and the arguments of Counsel for the applicant I find myself forced to the conclusion that the application on the motion fails.

For the foregoing reasons I make the following declarations:

1. The parcel of lands now known as the Rocamora Lands, is not now affected by the Consent Order of Mr. Justice Malcolm dated the 3rd day of September, 1974 or by the restrictions imposed in the instrument of transfer No.220319 dated 12th July 1966.

2. Upon a true construction of the terms of Instrument of Transfer No.220319 dated the 12th day of July, 1966 the restrictions thereby imposed on Certificates of Title registered at Volume 770 Folio 71, Volume 770 Folio 72 (now registered at Volume 1231 Folios 784 and 785) are personal or collateral only and are only enforceable by the original covenantor and covenantee.

Because

(a) the benefit was not expressly annexed to any other land.

(b) the covenants imposed did not enure for the benefit of any other lands.

I award costs to the respondent against the applicant to be agreed or taxed.

Recommendation

Before parting with this matter I would like to recommend that because of the fundamental requirement as the law now stands for the need for special words of annexation in an instrument with respect to the benefit of covenants, Section 61 of the Coveyancing Act should be amended in order for it to operate to annex to the land the benefit of any covenant which touches and concerns the land in the absence of any contrary intention.

In my view the proposed amendment would preclude unnecessary litigation where the intention to annex the benefit of the restrictive covenants to the land is clear but there is a failure by the conveyancer to use apt words in the instrument.