IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03550

BETWEEN	**SUZETTE MILLAR**	**1ST CLAIMANT**
AND	**PAUL PRYCE**	**2ND CLAIMANT**
AND	**DUNCAN BAY DEVELOPMENT COMPANY LIMITED**	**1ST DEFENDANT**
AND	**MELROSE FINANCE COMPANY INCORPORATED**	**2ND DEFENDANT**

IN CHAMBERS

Registration of Titles Act sections 68, 70 and 71 – Whether the Claimants are *bona fide* purchasers for value without notice of fraud – Whether the Claimants acted in bad faith in failing to investigate prior transfers and adverse acquisition noted on registered title – Restrictive covenant requiring Claimants to apply for building approval through the 1st Defendants – Whether the 1st Defendant can refuse to process the Claimants' application because of the 2nd Defendant's allegation that its title was cancelled on a fraudulent application for adverse possession – Adverse possessor sold the property to a company that then sold same to the Claimants

Tamiko Smith instructed by Smith, Afflick, Robinson & Partners for the Claimants

Vincent Chen and Makene Brown instructed by Chen Green and Co. for the Defendants

January 26, 2022 and April 22, 2022

PALMER, J

Background

[1] The Claimants, who are spouses, purchased lands comprised in Certificate of Title registered at Volume 1527 Folio 828 of the Register Book of Titles ("the property") from Puerto Anton Developers Limited ("PADL") in July 2020. According to the title, the property was transferred in April 2020 to PADL from Le Wei, who acquired the property through adverse possession on August 22, 2019.

[2] There are several restrictive covenants on the title, but two are the subject of contention in this matter. Covenants no. 3 and 14 read:

> *3. No Building shall be erected on the said land unless:*
>
> *(a) Comprehensive detailed plans and specifications therefor shall be approved in writing by Duncan Bay Development Company Limited or its successors or assigns (hereinafter referred to as "Duncan Bay".*
>
> *(b) Such buildings or constructions shall not exceed twenty-five in height from ground level and shall not be located nearer than fifteen feet from any road boundary nor ten feet from any other boundary unless Duncan Bay's written consent for a lesser distance has been obtained.*
>
> *(c) Such building excluding any accessory buildings or erections shall have a minimum value of Eight Thousand ($8000) as certified by Duncan Bay.*
>
> *Plans and specifications for any alteration or improvement to any buildings or erections shall be subject to the prior written approval of Duncan Bay.*
>
> *14. The said land shall not be transferred unless the transferee shall agree to the provisions from time to time obtaining for the maintenance of public areas in the Duncan Bay Estate.*

[3] According to the affidavits of Ms Millar and Mr Pryce, after purchasing the property in 2020, contact was had with the 1st Defendant, Duncan Bay Development Company Limited ("DBDL"), in March 2021, seeking approval for the building plans in accordance with restrictive covenant no. 3. DBDL responded to indicate that Counsel had contacted it for Melrose Finance Company Incorporated ("MFCI"), who informed them that MFCI were the true owners and the property had been fraudulently transferred. The Claimants' Counsel contacted MFCI's Counsel on the matter and was told they would take action against DBDL if it provided the consent

sought according to the covenant. In May 2021, DBDL was contacted in writing by the Claimants' Counsel and sent the US$500 seven-day processing fee relating to the application. When the Trelawny Municipal Corporation was contacted, they advised that DBDL had not made contact regarding the building approval and that, in any event, the application could not be processed without DBDL's stamp of approval affixed.

[4] This failure or refusal of DBDL to complete the assessment as required under the covenant continues to inhibit the Claimants from constructing their house on the property. They state that, but for the interference by MFCI, DBDL would not be hindered in processing the approval and that there is no lawful or justifiable reason for such interference.

[5] Consequently, the Claimants filed a Fixed Date Claim Form seeking orders as follows:

i. *A Declaration that the 1st Defendant are not impeded in any way from processing the Claimant's application for building approval required under restrictive covenant no. 3 endorsed on the [property].*

ii. *A mandatory injunction requiring the 1st Defendant to process the Claimant's application for building approval and to provide its response to same within seven days from the date hereof.*

iii. *In the alternative, an order for Specific Performance requiring the 1st Defendant to process the Claimant's application for building approval and to provide its response to same within seven days from the date hereof.*

iv. *A Declaration that the 2nd Defendant is purposefully and without legal or justifiable cause obstructing the Claimants from exercising their rights and entitlements as the registered proprietors of the property.*

v. *A mandatory injunction requiring the 2nd Defendant to retract their demand addressed to the 1st Defendant not to take any steps to approve or consent to the Transfer of the property to the Claimant or to process the Claimant's application for building approval in accordance with restrictive covenant 3 endorsed on the said certificate of title for the property.*

vi. *An injunction restraining the 2nd Defendant whether by itself or its servant and/or agent from interfering with the Claimant's rights and entitlement, in any way, over the property.*

vii. *Costs of the Claim to the Claimant.*

viii. Such further or other relief as the Honourable Court deems just.

[6] In response to the claim, an affidavit was filed by Keith Russell, CEO of Ocean Point Limited ("OPL"), the agent for DBDL. As the CEO of OPL, he is familiar with the subdivision known as Duncan Bay Development in the parish of Trelawny. The Lots in the deposited plan are inspected and overseen by the DBDL as part of its obligations under the restrictive covenants endorsed on the relevant Certificates of Title framed to run with the Lots and enure to the benefit of all the Lot owners in the Duncan Bay Development.

[7] Mr Russell says that since 2007 his staff has regularly traversed the lots at Duncan Bay Estates and noted that it did not observe any activity on the property that could amount to trespass or adverse possession; a reference to the basis on which Le Wei claims to have acquired the property. He did not become aware that the property had changed ownership until the 1st Claimant approached DBDL regarding the intended application. He asserted that the fraud would have come to the attention of the Claimants had they done adequate searches of the registered title and that the rightful proprietor should be restored as the registered owner. He stated that Counsel advised him that the Claimants' Counsel could have traced the title's history through the adverse possession application number ADVP: 2169930 that appears on the face of the Title.

[8] He stated that the Defendants' Attorneys advised him that every purchaser of land must take care to secure for himself a good, sufficient and indefeasible title to the property that the burden of proving the same is on the purchasers. The Defendants sought orders as follows:

a) The Declarations and Orders sought by the Claimants in their Fixed Date Claim Form filed August 4, 2021 be denied.

b) An order that the title for the Lot 316 issued to the Claimants Volume 1527 Folio 828 be cancelled.

c) An order to restore the Cancelled Title for ALL THAT parcel of land part of SILVER SANDS part of DUNCAN BAY formerly known as JOHNSON PEN in the parish of TRELAWNY being the Lot numbered THREE HUNDRED AND SIXTEEN on the plan of part of Duncan Bay aforesaid deposited in the Office of Titles on the 29th day of

June, 1972 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1088 Folio 687.

d) Costs to the Defendants to be taxed if not sooner agreed.

e) Such further and/or other relief as the Honourable Court deems just.

[9] On the first date before Court on September 21, 2021, the claim was adjourned to January 26, 2022, allowing the parties to attend mediation and for any further affidavits to be filed. On the adjourned first hearing date, in addition to orders for the filing of submissions, it was ordered as follows:

i. The first hearing of the Fixed Date Claim Form is to be treated as the trial of the matter and heard summarily pursuant to Rule 27.2 (8) of the CPR;

ii. …

There is no substantial factual dispute between the parties. The 1st Defendant has failed or refused to process the Claimant's application for building approval based on the 2nd Defendant's assertion that the Claimant is not entitled to the property. I determined that the matter could be suitably dealt with summarily, given that the dispute surrounds the parties' interpretation of the law.

Defendants submissions

[10] The Court made orders for the Claimants to first file submissions to which the Defendants would respond and that the Claimants had a right to reply to authorities afterwards. As the Defendants raised several issues not raised in the original submissions of the Claimants, it was convenient to address the submissions made on behalf of the Defendants first, then the Claimants' submissions in their entirety afterwards.

[11] On the issue of whether the Claimants are *bona fide* purchasers for value without notice, the authority of ***Glenton McFarlane v Hopeton Ferguson*** [2017] JMSC Civ. 21 was cited for the proposition that for a party to qualify as a *bona fide* purchaser for value without notice, that party must have given valuable consideration and have acted in good faith. They must also have had no notice of

the interest of the former registered owner, whether actual, constructive or imputed. It was further submitted for the Defendants that the burden on the person seeking to invoke that principle to prove all the elements of such an assertion and that in failing to do detailed checks, the Claimants did not act in good faith.

[12] In ***Barclays Bank DCO v Administrator General and Hamilton*** (1972) 20 WIR 334, the Court of Appeal stated that it is the duty of the purchaser of land to *"take care to secure for himself a good, sufficient and indefeasible title to the property he proposes to purchase. It will not do for him to come into court and say, "I was ignorant, I did not know." He must make it his business to know."* On this point, it was submitted that the Claimants failed as purchasers to establish all the elements to qualify as bona fide purchasers for value without notice of the impropriety. According to the Counsel's submission, the title had been transferred twice since the purported acquisition by adverse possession without reference to the DBDL. Had the Claimants made the most basic of enquiries of DBDL, whose name appears on the face of the Title, it was contended, they would have been alerted to the dubious history of the property's acquisition. This, Counsel concluded, would leave the Claimants in a position where they are not *bona fide* purchasers for value without notice of the fraud because of the inadequate search.

[13] It was asserted that having raised the issue several times with Counsel for the Claimants after the Claimants made enquiries of DBDL, and the Claimants having failed to respond in affidavit form, they have been unable to establish that they have qualified to be treated as *bona fide* purchasers without notice of the fraud. Counsel further submitted that the Defendants, during their investigations, extracted the adverse possession application referred to on the face of the Title and themselves had traced the history of the Title. While Le Wei alleged that he had cleaned up, cultivated and taken possession of the property, the representative for DBDL says that they had been vigilant in their supervision of the property since 1992 and observed no such activity. Counsel suggests that the lack of discernible evidence of adverse possession in the form of enclosed land, cultivated land or proof of a shed on the property from the survey diagram should

have alerted the Claimants that the application for adverse possession was fraudulent and have put the world on notice of that fact. Further, on this point, Counsel submitted that the Claimants provided no evidence of enquiries that they made during the transaction. In the Defendants' view, it would have revealed the facts upon which fraud was the inescapable conclusion. The absence of this evidence, it was submitted, leaves the Court with the inevitable conclusion that the Claimants had made no such enquiries to avoid coming in possession of information they might not care to have. They instead refrained from making reasonable enquiries, it was submitted, for fear that they might reveal fraud.

[14] Together and in the alternative, it was submitted that the restrictive covenants on the Title present insurmountable impediments to the orders sought being granted. On the evidence of Keith Russell, the restrictive covenants were imposed to preserve a high standard within the subdivision development and are enforceable against the Claimants under the "schemes of development" under the Torrens System. According to the submission, the Court's equitable jurisdiction will allow the benefit of the covenant to be enforced against the successors in title. The essential element of this test is the intention of the common vendor.

[15] There are four criteria that Counsel submitted must be fulfilled to meet to establish the existence of a scheme of development, as delineated in ***Elliston v Reacher*** [1908] 2 Ch 374. Firstly, both the Claimants and Defendants must derive title from a common vendor. The Defendants contend that the Claimants and the 1st Defendant derive Title from the original vendor and developer of the subdivision of the land formerly registered at Volume 539 Folio 16. Secondly, prior to selling the property, the vendor laid out the estate, or a defined portion, for sale in lots, subject to restrictions intended to be imposed on all lots. The support for this contention is the fact that the subject property was previously laid out under the surrender application for Lots 300 – 316. Next, the common vendor must intend the restrictions to be and where for the benefit of all the lots intended to be sold. In the present case, it was submitted that the Restrictive Covenants were imposed on

lots 300 – 316 via the surrender application, which appeared as miscellaneous no. 46499 on the face of the parent title.

[16] Finally, it must be shown that the plaintiff and defendant or their predecessors in title purchased their lots from the common vendor upon the footing that the restrictions were to enure to the benefit of the other lots included in the general scheme, whether or not they were to enure for the benefit of other lands retained by the vendors. Reference was made to the preamble to the restrictive covenants, which state that the covenants are for the benefit of and are enforceable "by the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in the Certificate of Title registered at Volume 539 Folio 16". On this point, it was submitted that equitable jurisdiction of the Court would allow the restrictive covenants to be enforced against the successors in title regardless of the date of the actual purchase and even though the party seeking to enforce the covenant does not hold an interest in the land.

[17] Not having been modified or discharged, the covenants are enforceable against the Claimants, Counsel contended, and can only be modified according to the *Restrictive Covenant (Discharge and Modification) Act.* It was submitted that the 2nd Defendant is entitled to the benefit of the covenant. It was submitted that the Claimants could not, on the one hand, seek to force the 1st Defendant to exercise its duty under the restrictive covenants but prevent the Defendants from exercising benefits under the covenants as between the 1st and 2nd Defendants. It was submitted that the Claimants had failed to comply with covenant number 14 and have acted in breach of it. Had they sought to adhere to the covenant, the fact of the alleged fraud would have been apparent. According to the Defendants' interpretation, covenant 14 requires that the Claimants, as purchasers, enter into a contract with DBDL and, having failed to do so, cannot now seek to benefit from a fraud that has been committed.

[18] It was submitted that the Court should not aid and abet wrong-doers who, in the case of the predecessor in title to the Claimants, have committed fraud and, in the

case of the Claimants, have failed to comply with the restrictive covenant 14. It was submitted that on this ground, the Court should not compel the 1st Defendant to enter into contractual arrangements with wrong-doers. The Claimants, it was further submitted, do not come to the Court with clean hands and are to be viewed as wrongdoers or as claiming through wrongdoers.

[19] On the issue of the mandatory injunctions being sought, it was firstly submitted that insufficient evidence had been provided to show that the Court should exercise its discretion to grant these orders. Furthermore, the Court should not exercise this discretion as it cannot properly supervise and enforce the legal rights of the covenantor, covenantee and those entitled to benefit from the covenants. Counsel cited the decision of the Privy Council in ***Singh v Rainbow Court Townhouses Ltd*** [2018] UKPC 19, which applied the dicta of Buckley J in ***Charrington v Simons & Co. Ltd.*** [1970] 1WLR 725 and outlined the considerations for the Court in determining whether to grant a mandatory injunction. It states as follows:

> *"… Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and, if so, what kind of mandatory order will produce a fair result. In this connection, the court must … take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it would be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."*

[20] It was submitted further, that Court should exercise great caution before granting a mandatory injunction, and one "may be granted where the case is unusually sharp and clear, but it is certainly not a matter of course" (***Shepherd Homes Ltd. v Sandham*** [1971] Ch 340). The authority stated further that in the exercise of judicial discretion, though it was not possible to express all the grounds under which the Courts should grant a mandatory injunction, it should consider "the triviality of the damage to the plaintiff and the benefit that it would confer on the plaintiff" in arriving at a fair result.

[21] Rather than seek injunctive relief, it was submitted that the Claimants' remedy is to apply for a modification of the covenants. Furthermore, it was argued that the Court, as a matter of public policy, ought not to act to facilitate those seeking to fraudulently benefit from the provisions of the *Registration of Titles Act* which intended to facilitate genuine adverse possession. The Court, Counsel argued, should not grant the injunction to compel a party to perform anything illegal, impossible, unenforceable, or compel a defendant to perform personal services.

Claimant's Submissions

[22] The Claimants contend that the Defendants have failed to provide sufficient evidence of fraud against them as contemplated by the *Registration of Titles Act* ("the Act"). They assert that the only allegations of fraud are concerning the adverse possession application of Le Wei under ADVP 2169930, which shows that the MFCI is listed among the recipients of notices. The statutory declarations from Le Wei and other supporting Declarants, Jacqueline York, Dentist and Christopher Gallagher, Medical Practitioner who purportedly live in Duncan Bay. These documents set out that the application met the requirements of the Referee of Titles and the Registrar of Titles and, as such, was approved. Therefore, it is inferred that at the time of the Claimants' purchase, all checks regarding the title and status of lands would have revealed a properly constituted title with no apparent defects or issues to arouse their suspicion. Therefore, they contended that there is nothing before the Court to displace the protection afforded to the Claimants under the *Registration of Titles Act* or entitle the Defendants to refuse to recognise the Claimants as the rightful owners the subject lands or refuse to process the Claimants' building application.

[23] The Claimants contend that they enjoy the protection of sections 68, 70 and 71 of the Act, which are considered the sections giving rise to indefeasibility of title. These sections provide:

> *68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the*

> *application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.*
>
> *…*
>
> *70. Notwithstanding the existing in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:... "*
>
> *71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

[24] The plethora of case law on this issue, it was submitted, has firmly established that under the Torrens System of land registration, such as is reflected in the Act, a registered title confers on the proprietor of lands, indefeasibility of title except where fraud is established (Reliance placed on ***Cynthia Bravo v Avis Baxter et al*** (unreported) Supreme Court Jamaica [2005] HCV 00326 Judgment delivered October 12, 2006). Fraud within the context of the Act means actual fraud, and allegations as to fraud must not only be specifically pleaded but must be specifically proven by sufficiently cogent evidence to render a title invalid (Reliance placed on ***Albert Smith v Hazel Steer*** (unreported) Supreme Court Jamaica SCCA 91/2008 Judgment delivered May 8, 2009 and ***Daley v RBTT (Jamaica)***

Ltd. (unreported) Supreme Court, Jamaica CLI 195/D162 judgment delivered on January 30, 2007, para 25-29).

[25] Additionally, Counsel for the Claimant contended that such fraud must be committed by the registered proprietors and not by some predecessor in title. In ***Asset Co Ltd v Mere Roihi*** [1905] AC 176 cited in the local case of ***Fabian Lee Bradshaw et anor v Jonathan Ellis*** et al [2016] JMSC Civ 102 5 [para 53] states:

> *"Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon. '*

[26] In any event, Counsel argued, the Court in ***Albert Smith v Hazel Steer*** (unreported) Supreme Court Jamaica SCCA 91/2008 at paragraph 25, outlined that where, in rebuttal to a claim, the Defendants allege that the transfer was obtained by fraud, this raises a cause of action which must be pursued by initiating fresh proceedings. There is no evidence or assertion that a claim has been sought against Le Wei for fraud. Instead, the Defendants have made general statements of fraud about a previous proprietor. Having done so, Counsel submitted, the Court is being invited to refuse the orders being sought by the Claimants, make orders cancelling their title reverting the lands to the 2nd Defendant.

[27] The Claimants submitted that the Defendants had introduced matters immaterial to the claim at bar. Concerning the Defendants' assertion that the Claimants are not *bona fide* purchasers without notice, they contended that a purchaser usually advances this in defence to a claim of an equitable interest which was earlier in time. By this definition, the present claim is distinguishable from this principle.

[28] In any event, according to Black's Law Dictionary, 'notice', and in this context, actual or constructive notice means 'knowledge that can be acquired by normal means'. The Claimant contends that the allegations of fraud were not apparent. As for the requirements under this principle that the Claimant must have given valuable consideration and acted in good faith, and it was argued that these are not in issue. With regards to knowledge of the 2nd Defendant's interest, it was submitted that where the 2nd Defendant's title has been cancelled, any notice of their interest at the time of the purchase was irrelevant to the Claimants' transaction.

[29] Moreover, section 71 of the *Registration of Titles Act* explicitly provides that "...no person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered ...". Therefore, the doctrine of notice has been severely curtailed by the Act, it was argued.

[30] It was further submitted that the authorities cited in the Defendants' submission on this point are all distinguishable from the case at bar concerning both the factual circumstances and the legal issues before the respective courts. For instance, the case of ***Glenton McFarlane v Hopeton Ferguson*** involved the sale of lands by one vendor to two competing purchasers under the Conveyance Act and of paramount importance was the effect/timing of registering the competing deeds of conveyance. Similarly, the case of ***Gloria Plunket (Executrix-Estate of Lewis Nelson) v Huntly Reid*** involved a claim by a caretaker and squatter of lands against a subsequent purchaser. The vendor was the beneficial owner and person possessing *animus possedendi* defeating the claimant's claim of adverse possession and, in turn, ruling that the sale to the defendant should stand.

[31] With respect to the Defendants' submissions regarding the restrictive covenants and any modification or discharge of same, it was submitted that this too does not

apply to the case at bar. The Claimants contend that there has been no breach of the restrictive covenants. Restrictive covenant no. 14, which the Defendants highlighted, provides:

> *"The said land shall not be transferred unless the transferee shall agree to the provisions from time to time obtaining for the maintenance of public areas in the Duncan Bay Estate."*

[32] Counsel submitted that the covenant does not outline a method by which the transferee is to agree; however, what is undisputed is that at the bottom of page 2 of the Claimants' Agreement for Sale is the explicit provision that:

> *"Free from encumbrances other than the Restrictive Covenants and easements, (if any) endorsed on the Certificate of Title and such easements as are obvious and apparent."*

Under this term, Counsel argued, the Claimants have not only acknowledged the restrictive covenants endorsed on the title but had made the sale conditional to being encumbered thereby. This, it was submitted, fully satisfies the requirement of restrictive covenant no.14.

[33] Counsel continued that the crux of this claim is that the Claimants have, pursuant to restrictive covenant 3(a)-(c), submitted detailed plans and specifications to the 1st Defendant, which the 1st Defendant has refused to process. This, it was submitted, demonstrates in no uncertain terms that the Claimants were not only aware of the restrictive covenants but are acting in compliance with them.

[34] Finally, Counsel observed that the Orders sought by the Claimants are declaratory and mandatory in nature. As it relates to the declaratory reliefs, the Orders will make it abundantly clear that the Claimants are, in fact, the actual legal owners of the subject lands, thereby eliminating the risk to the 1st Defendant of potential action against it as postured by the 2nd Defendant in the letter dated April 13, 2021. These declarations will then pave the way for the 1st Defendant to be free to carry out its functions as prescribed by restrictive covenant no. 3.

Analysis and Findings

[35] Both Counsel have identified what I regard to be a central issue to be determined in this case, and that is whether the Claimants are *bona fide* purchasers for value without notice of fraud. The ***Glenton McFarlane v Hopeton Ferguson*** case relied upon by the Defendants outlines the position of the law in Jamaica. The Claimants must show that they had given valuable consideration and have acted in good faith when they acquired the property. They must also have had no notice of the interest of the former registered owner, whether actual, constructive or imputed.

[36] The Defendants assert that the purported adverse possession application by Le Wei was fraudulent. According to the Title, after his application was approved, Le Wei was issued a new Title on August 22, 2019, and transferred it to PADL on April 9, 2020. It was from PADL that the Claimants acquired the property by transfer registered on July 28, 2020.

[37] The Defendants do not assert that the Claimants were a party to the fraud that they allege against Le Wei. The Defendants contend that The Title refers to the DBDL in restricted covenant no. 3, which states as follows:

> *3. No Building shall be erected on the said land unless:*
>
> *(a) Comprehensive detailed plans and specifications therefor shall be approved in writing by Duncan Bay Development Company Limited or its successors or assigns (hereinafter referred to as "Duncan Bay".*
>
> *(b) Such buildings or constructions shall not exceed twenty-five in height from ground level and shall not be located nearer than fifteen feet from any road boundary nor ten feet from any other boundary unless Duncan Bay's written consent for a lesser distance has been obtained.*
>
> *(c) Such building excluding any accessory buildings or erections shall have a minimum value of Eight Thousand ($8000) as certified by Duncan Bay.*
>
> *Plans and specifications for any alteration or improvement to any buildings or erections shall be subject to the prior written approval of Duncan Bay.*

[38] According to the Defendants' argument, the fact of a reference on the face of the Title to DBDL (referred to as Duncan Bay) should have alerted the Claimants at the time of their intended purchase to have contacted DBDL regarding their obligations under the restrictive covenants. Upon such contact, they would have

been aware of the suspected fraud. The argument goes as far as to suggest that the decision of the Claimants not to go behind the Title they received from PADL and to investigate the adverse possession application of Le Wei was because they preferred to turn a blind eye to the possibility of fraud rather than to run the risk of unearthing something they found undesirable.

[39] The Defendants exhibited the declarations of parties filed in support of Le Wei's application as referred to and said that, in their opinion, there were defects in the application that ought to have mitigated against its approval, such as the fact the survey diagram did not show structures and boundary fencing that would support a contention that Le Wei took specific actions to demonstrate that rights of ownership were being exercised over the property, adverse to that of the 'paper Title' holder.

[40] The provisions of sections 68, 70 and 71 of the *Registration of Titles Act* ("the Act") referred to by the Claimants help determine this issue. Section 68 of the Act provides for the indefeasibility of the registered title, and section 70 directs that it remains indefeasible except in cases of fraud. Section 71 states:

> *71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

[41] The inference from this section is that in instances of fraud, persons contracting with or taking or proposing to take a transfer from the proprietor of registered land are required to inquire or ascertain the circumstances under which such proprietor or previous proprietor was registered. It is here that the Claimants' notice as to the existence of fraud would become relevant. It is undisputed that by the time the Claimants made contact with DBDL, the issuing of the new title to Le Wei had occurred two years prior. So they, being informed by the 1st Defendant of the 2nd

Defendant's assertion of the likelihood of fraud, could not count as notice of fraud, as by that time, the Claimants had already acquired the property. What it seems on the submissions that the Defendants are saying is that the Claimants, in the absence of any impropriety on the face of the Title, ought to have searched back to the adverse possession application to examine the declarations and then contact the Defendants to determine whether the declarations that the Registrar of Titles accepted were true. There is nothing even on the face of the adverse possession application that would alert anyone of impropriety. The mere fact of acquisition by way of adverse possession does not automatically mean that a fraud has occurred. I do not find anything on the face of the Title that would have alerted the Claimants to the possibility of fraud existing in the cancelling of the prior Title and the issuance of this new one.

[42] It has been contended that Numbers 3 and 14 of the restrictive covenants should have alerted the Claimants of the 2nd Defendant's possible interest in the property. Firstly, restrictive covenant 3 only becomes relevant when one seeks to apply for building approval, not at the point of purchase. DBDL plays no role at the time of purchase. It outlines particular building specifications for lots in the development. To preserve a specific standard or consistency, the proprietor must send the application for building approval to DBDL before being sent to the municipal corporation. While this requirement is on the face of the title, there would be no necessity to make contact with DBDL unless one intended to seek building approval. Restrictive covenant number 3 mentions DBDL as the approval agency to give written approval for building plans, to approve changes to the required height and distance of buildings from the boundaries and the minimum value of such structures. Approvals for alterations and improvements for buildings or erections also must be approved by DBDL in writing. By way of comparison, there is no such requirement for the restrictive covenant 14 to be approved by DBDL, in writing or otherwise. It reads:

> *14. the said land shall not be transferred unless the transferee shall agree to the provisions from time to time obtaining for the maintenance of public areas in the Duncan Bay Estate.*

[43] Counsel for the Defendants submitted that the fact of a mention of DBDL on the face of the Title meant that the Claimants ought to have entered into a written contract with DBDL before the transfer became effective to comply with restrictive covenant 14. Accordingly, it was submitted that having not done so, they have failed to comply with restrictive covenant 14 and cannot now seek to enforce restrictive covenant 3 against DBDL or at all. Counsel for the Claimants submitted that the Claimants signed an agreement for sale that contained a provision as follows:

> *ENCUMBRANCES, RESERVATIONS, RESTRICTIONS & EASEMENTS: Free from encumbrances other than the Restrictive Covenants and easements (if any) endorsed on the Certificate of Title and such easements as are obvious and apparent.*

[44] The purpose of restrictive covenant no. 14 is to ensure that proprietors comply with the requirements from time to time obtaining for maintenance of public areas in the development. The apparent purpose of the covenant is to ensure that the Claimants were made aware of the restrictive covenant relating to the maintenance of public areas and the signing of the agreement was a clear indication of their agreement with that covenant. The fact that the agreement acknowledges the covenant and the Claimants' signatures on the agreement meets the requirement to agree. At worse, it would not nullify the transfer such that the Title should be cancelled but limit their ability to benefit from that particular covenant. The restrictive covenant does not mention that the agreement needs be in writing with DBDL, especially when one sees where the restrictive covenants intended to involve DBDL; they explicitly did so.

[45] The statute is clear on this issue and places no requirement on the Claimants to look behind the Title of Le Wei, and even if they had, the application would not have shown evidence of fraud. And no enquiry of the 2nd Defendant would have proven fraud either, as there would have been a high likelihood that the registered owner dispossessed by adverse possession will naturally seek to dispute the veracity of the Applicant's assertion. The fact of a dispute does not prove fraud or disprove a claim that the applicant is entitled to dispossess the prior paper

Titleholder adversely. Section 71 provides that the registered title is indefeasible except in cases of fraud. While the Defendants are entirely within their rights to pursue an action against Le Wei, no action can be brought against the Claimants as there is no indication that they were party to any fraud or impropriety relating to their acquisition of the property or had notice of such impropriety at the time of their purchase. Also, while I do not find that the Claimants have not breached the restrictive covenants, the circumstances contemplated in ***Elliston v Reacher*** do not apply to this case as the Claimants as neither of the Defendants purchased the property from a common vendor.

[46] On the mandatory injunctions sought, the principles regarding the grant of injunctions are clear. The fact of the refusal to process the Claimants' application on the ground that essentially they are not the *bona fide* purchaser for value without notice of fraud or impropriety impacts the Claimants' lawful enjoyment of the property. Restrictive covenant no. 3 requires that the approval of DBDL be sought before building approval is obtained from the municipal corporation. The Claimants have given evidence that their enquiries of the municipal corporation revealed that the 1st Defendant had not made contact regarding the building approval. Therefore, the Claimants cannot enjoy the benefit of their property for reasons extraneous to the requirements of the propriety of the building approval application. I, therefore, find that there is a serious issue to be tried.

[47] Damages are also not a sufficient remedy for the Claimants, given the purchase of the property and their intention to construct their residence on the property. The 2nd Defendant, on the other hand, can pursue its cause action against Le Wei concerning this allegation of fraud, and their only remedy would likely be in damages. The exercise of the Court's discretion to grant a mandatory injunction ought to be used where the balance of convenience weighs in favour of the grant of the injunction to compel the 1st Defendant to process the application for building approval in the period for which the fee was paid; seven days. While approval cannot be automatic, for example, where the stipulations outlined in restrictive covenant 3 have not been complied with, it cannot be unreasonably refused or

refused for reasons other than those relating to the stipulations laid out in the restrictive covenants.

[48] The principle in ***Charrington v Simmons*** is applicable in this matter, and the following is worth repeating:

> *:... A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it would be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."*

[49] In other proceedings, a Court could find that Le Wei's application for adverse possession was fraudulent. To that extent, the grant of the orders compelling the 1st Defendant to process the Claimants' application might be considered detrimental to them. Still, as already stated, the 2nd Defendant's claim of fraud is properly against Le Wei and not the Claimants. I do not accept that the other mandatory injunctive relief sought is appropriate and is therefore refused.

[50] Based on the preceding, on the Fixed Date Claim filed on August 4, 2021, I order as follows:

i. A declaration is made that the 1st Defendant is not impeded in any way from processing the Claimants' application for building approval as required under restrictive covenant number 3, endorsed on Certificate of Title registered at Volume 1527 Folio of the Register Book of Titles ("the property").

ii. A mandatory injunction is granted requiring the 1st Defendant to process the Claimants' application for building approval and to provide its response within seven days of the date hereof.

iii. A declaration is made that the 2nd Defendant has no legal or justifiable cause to obstruct the Claimants from exercising their rights and entitlements as registered proprietors of the property.

iv. An injunction is granted restraining the 2nd Defendant, whether by itself or its servants and/or agents from interfering with the Claimants' right and entitlements, in any way, over the property.

v. Costs are awarded to the Claimants against the Defendants, to be taxed if not agreed.

vi. Claimants' Attorneys-at-Law are to prepare file and serve the orders herein.

By necessary implication, the orders as sought in the affidavit of Keith Russel are refused.