

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.R.C. M199 OF 1992

IN COURT

IN THE MATTER OF ALL THAT PARCEL of land part of TERRA NOVA No. SEVENTEEN WATERLOO ROAD, IN THE PARISH OF ST. ANDREW, being the Lot numbered Nine on the Plan of Nos. 13, 15, and 17 Waterloo Road, aforesaid deposited in the Office of Titles on the 4th day of January, 1946, of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being the land comprised in Certificate of Title registered at Volume 477 Folio 90 of the Register Book of Titles now known as 10 Merrick Avenue Kingston 10 in the parish of St. Andrew.

AND

IN THE MATTER OF RESTRICTIVE COVENANTS NUMBERED 5, 6 and 10 respectively, affecting the user hereof.

AND

IN THE MATTER OF the Restrictive Covenant (Discharge and Modification Act).

Miss Hillary Phillips and Mrs. Denise Kitson instructed by Messrs Perkins, Grant, Stewart, Phillips & Company for the Applicant, Midac Equipment Limited.

Mr. Clifton Daley, Miss Carol Vassell & Mr. Dwight Dacres instructed by Daley, Walker & Lee Hing for the First Respondent Objector Keith Rutherford Lamb.

Mr. Michael Hylton and Miss Debbie Fraser and Mr. Patrick McDonald instructed by Myers, Fletcher & Gordon for the Second Respondent Objector, Terra Nova (1982) Limited.

Heard: June 17, 24, November 22, 23, 1993 & January 28, 1994.

LANGRIN, J.

This is an application by Originating Notice of Motion on behalf of Midac Equipment Limited under Section 5 of the Restrictive Covenants (Discharge and Modification)Act seeking the following declarations:

- "1. Whether all that parcel of land now known as 10 Merrick Avenue part of Terra Nova number Seventeen Waterloo Road, and being the land comprised in Certificate of Title registered at Volume 477 Folio 90 of the Register Book of Titles is affected by the restrictions imposed by Instrument of transfer number 90867.
2. What, upon the true construction of the said Instrument of Transfer, is the nature and extent of the restrictions thereby imposed and whether the same are enforceable, and if so, by whom."

The applicant is the registered proprietor of lands comprised in Certificate of Title registered at Volume 477 Folio 90 of the Register Book of Titles being all that parcel of land now known as 10 Merrick Avenue, Kingston 10 in the parish of St. Andrew. The applicant acquired title to these lands by Instrument of Transfer registered on 20th July, 1981 and the Certificate of Title states as follows:-

"The abovenamed Mary Connelly Christie covenants with Frank Merrick Watson the Registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 480 Folio 51 above mentioned his heirs executors administrators transferees and assigns to observe the following restrictive covenants." of which Nos. 5, 6, and 10 are in the following terms:-

- "5. That the land shall not be used save for residential purposes or any purpose in respect thereto.
6. That no dwelling house shall be erected on the said land at a cost or value of less than £1700 including any used out-buildings.
10. That no church, school, tavern, livery, stables or offensive trade business or occupation shall be permitted on the said lands."

The first and second objectors are the registered owners of other lands forming part of the "Terra Nova" estate and their certificates show that their estates are subject to incumbrances not all of which are identical to those of the applicant. Indeed there are no restric-

tive covenants on the Certificate of Title of the second objector.

The relevant conveyancing history may be summarised as follows:
by Certificate of Title registered at Volume 480 Folio 51 lands were registered in the name of Frank Watson. That the said Frank Watson sub-divided the lands then comprised in Certificate of Title registered 480 Folio 51 and transfer the lands comprised in Certificate of Title registered at Vol.477 Folio 90 to Mary Connelley Christie by way of Instrument of Transfer No. 70867 dated the 3rd April, 1947. Mary Connelley Christie died and the said land was transferred by her personal representative, Kathleen Avis Christie, to Norbrook Furniture Company Limited by way of Transfer No. 288184 dated 11th and registered on 13th July, 1972. The said land was transferred to the applicant.

The land formerly registered at Volume 479 Folio 78 and owned by Keith Lamb was part of land registered at Volume 480 Folio 51 and was cut off and transferred by Frank Watson to Hubert and Ivy Lowe who covenanted with Frank Watson the registered proprietor of the remaining land comprised in Certificate of Title registered at Vol. 480 Folio 51 his heirs, executor, administrator, transferees and assigns to observe, inter alia, the following restrictive covenant:-

- (4) "The said land shall not be used
save for residential purposes
or any purpose in respect thereto."

By Instrument of Transfer No.70867 dated April 3, 1947, Frank Watson transferred to Mary Christie the lands comprised in the said certificate of title subject to the incumbrances noted thereon and being a portion of the lands registered at Volume 480 Folio 51. The instrument of transfer further states:

"And the said Mary Connelley Christie covenants with the said Frank Merrick Watson his heirs, executors administrators, transferees and assigns to observe the restrictive covenants set out in the schedule hereto".

The schedule contains ten restrictive covenants including numbers five, six and ten which I have already stated supra.

The Restrictive Covenants (Discharge and Modification)

Act so far as is relevant provides as follows:-

- Sections "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 if 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, or the Judge in Chambers, as the case may be, and the Court or Judge may act on such evidence of that instrument as the Court or Judge may think sufficient."

At the very outset Mr. Daley made a preliminary objection to the hearing of the motion on the basis that all the parties are not before the Court, and the status of the applicant merely depends upon a Consent Order which permitted it to bring the proceedings. I dismissed the preliminary point since it was abundantly clear that the statute gave the applicant a right to bring the proceedings.

Miss Phillips with her usual clarity and skill submitted the following:

1. The burden of the Restrictive Covenants will only run with the land in Equity and be enforceable against it if it has been made for protection of the covenanted land which land has been clearly identified.
2. The only person who have the benefit of the covenant is Frank Watson while the only person upon whom the burden exists would have been Mary Christie. The words used in the Instrument of Transfer do not annex the benefit of the covenant to any particular land.
3. For an individual to be entitled to the benefit of a Restrictive Covenant he must be an express assign of the benefit of the Restrictive Covenant and of some or all of the land for the protection of which it was taken.

4. Just because there is a subdivision does not make it a Building Scheme. There must be reciprocity of obligations which the parties are aware of at the time of purchase. The mere laying of property in lots and the taking of various covenants from purchasers is not sufficient to imply a Building Scheme.

Mr. Daly with dexterity and skill made the following submissions:

1. The application was not bonafides and irrelevant to the issues joined between the objector and the applicant.

As I indicated supra, the applicant has a right to come to Court on Motion in respect of the determination of his right and therefore I cannot accept his submission that the matter should be stayed.

2. By reason of the operation of the Registration of Titles Act the transferees of any of these lots are bound for the benefit of their heirs and successors to observe these restrictive covenants. Any of them is entitled to resist its removal on breach.

3. The words on the transfer are adequate to annex the benefit of the covenant. Provided the instrument is under the Registration of Titles Act where there is a subdivision of land every covenant taken by the transferee enures for the benefit of part of the remaining land whether or not any appropriate words of annexation are used.

4. A Building Scheme is implied by law since one could not have these various lots laid out without having a Building Scheme approved. There is also evidence of an instrument relating to a building scheme despite unsuccessful efforts of the objector to find it.

There were no submissions on behalf of the Second Objector and Counsel in fact stated that there was no objection to the application.

I propose to deal with the submissions on behalf of the first objector.

I accept as relevant and apply the following eloquent statement from Cozens - Hardy MR. in the celebrated case of Reid v. Bickerstaff (1908 - 10) AER 298 at p.300:

"If on a sale of part of an estate the purchaser covenants with the vendor, his heirs and assigns, not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the covenant, as distinct from assignee of the land or (b) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. In the case of (a) of course the subsequent purchaser can sue. In the case of (b) the benefit of the covenant passes to the purchaser whether he knew of its existence or not. It is in the nature of an easement attached to his property as the dominant tenement. But unless either (a) or (b) can be established, it remains for the vendor to enforce or abstain from enforcing the restrictive covenant. For example, I sell a piece of land with a covenant that no public house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit. It is irrelevant to urge that the performance of the covenant would be greatly for the benefit of the adjoining land. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance." See Renals v. Cowlishaw. (1878) 9 Ch. D 125 and Rogers v. Hosegood (1900) 2 Ch. 288.

(emphasis mine)

There were in the Instrument of Transfer to Mary Christie no words stating that the restrictive covenants therein were intended for the benefit of any land retained by Frank Watson. As apparent from subsequent transfers on the Register of Title, land was retained by the vendor. It is not known whether lands remained in their hands thereafter. Furthermore, the Instrument of Transfer to Hubert and Ivy Lowe contains no express assignment by Frank Watson of any rights granted to them by Mary Christie's covenants and there is no evidence of any subsequent assignment of such rights to Keith Lamb.

As Lord Jauncey pointed out in Jamaica Mutual Life Assurance Society v. Hillsborough Ltd. et al Privy Council Appeal No.4 of 1983 at p.6 - "It is now well established that there are two prerequisites of a building scheme namely:-

- (1) the identification of the land to which the scheme relates, and
- (2) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will ~~enure~~ to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land. Reciprocity of obligations between purchasers of different plots is essential."

In White v. Bijou Mansions Limited (1938) 1 Ch. 351 Green

n.k. at page 362 said:-

"..... there are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable. The first thing that must be present in my view is this, there must be some common regulations intended to apply to the whole of the estate in development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject to relaxation. The material thing I think is that every purchaser in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgment to draw the necessary inference, whether you refer to it as an agreement or as a community of interests importing reciprocity of obligations."

Whether these matters exist may be determined as questions of fact from the relevant circumstances surrounding the sales by the common vendor to the various purchasers.

In my view it can hardly be said that the restrictive covenants in the transfers before the Court were intended to benefit only the lands therein mentioned and none other. More significantly there is nothing in either Instrument of Transfer to suggest that the vendors were selling off a number of lots as part of a scheme.

Furthermore, there is nothing in either Instrument to suggest that the purchaser had assumed an obligation to anyone other than the vendors or had acquired the benefit of obligations incurred by other persons. There is no evidence surrounding the circumstances of the sale in relation to advertisements and representations, if any, made to purchasers.

In the absence of any such evidence the terms of the Instrument of Transfer alone fall short of what is required to establish Community of interests or reciprocity of obligations between purchasers.

I accept as relevant to the instant case the statement of Goff J. in Re Wembley Park Estate Company Limited's Transfer (1968) Ch. 491 at p.503 and cited with approval in Jamaica Mutual Life Assurance Society v. Hillsborough (Supra) at p.8 "to imply a building scheme from no more than a common vendor and the existence of common covenants would be going much too far."

Finally Mr. Daly submitted that in light of Sec.6 of the Restrictive Covenants (Discharged & Modification) Act the order should be made in his favour despite his unsuccessful efforts to produce the relevant instrument. In response I must hasten to add that I am bound to deal with the case upon the evidence as it stands and avoid **conjecture** no matter how attractive this may be.

In applying the principles of law to the available evidence with the valuable help of the arguments of counsels on both sides I find myself forced to the conclusion that the arguments of the First Respondent Objector that a building scheme existed fail:

For the foregoing reasons I make the following declarations:

1. The Parcel of land now known as 10 Merrick Avenue, is not affected by the restrictions imposed by Instrument of Transfer numbered 70867.
2. Upon the true construction of the said Instrument of transfer the nature and extent of the restrictions thereby imposed are personal 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.
- (c) the original covenantee did not assign the benefit of the covenant, and
- (d) there was no building scheme in evidence at the time when the covenants were imposed.

I award Costs to the applicants against the First Respondent Objector to be agreed or taxed.